REPORT FOR THE HEARING
delivered in Case 54/87 *

I — Facts and procedure

1. The decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal, English Special Edition 1970 (I), p. 224), adopted by the Council under Article 201 of the EEC Treaty and Article 173 of the EAEC Treaty, attributes *inter alia* common customs tariff duties to the Communities as their own resources. Those own resources do not include customs duties on products falling under the ECSC Treaty.

By virtue of Article 1 of Council Regulation No 2891/77 of 19 December 1977 implementing the aforementioned decision (OJ 1977, L 336, p. 1) 'the Communities' own resources ... shall be established by Member States in accordance with their own provisions laid down by law, regulation or administrative action and shall be made available to the Commission and inspected as specified in this regulation ...'.

As regards establishing the duties, Article 2 provides as follows:

'For the purpose of applying this regulation, an entitlement shall be deemed to be established as soon as the corresponding claim has been duly determined by the appropriate department or agency of the Member State.

Where it becomes necessary to rectify an establishment recorded in accordance with the first paragraph, the competent department or agency of the Member State shall make a new establishment.'

Under Article 7 (1) and (2) accounts for own resources are required to be kept by the Treasury of each Member State or by the body appointed for that purpose and to enter the established entitlements in the accounts at the latest on the 20th day of the second month following the month during which the entitlements were established. Article 7 (3) requires each Member State to forward to the Commission a monthly statement of its accounts.

Where the established entitlement has been amended under the second paragraph of Article 2, Article 8 provides as follows:

'The new establishments recorded under the second paragraph of Article 2 shall be entered in the monthly return corresponding to the date of those establishments and shall be added to or substracted from the total amount of established entitlements.'

In accordance with Article 9 (1) of the regulation, own resources are made available to the Commission by each Member State which credits the amount thereof to the account opened for this purpose in the name

* Language of the case: Italian.

of the Commission with its Treasury or with the body it has appointed.

With regard to the time when the amounts of the entitlements established are made available to the Commission, Article 10 (1) provides as follows:

'The entry referred to in Article 9 (1) shall be made at the latest by the 20th day of the second month following the month during which the entitlement was established.'

With regard to delay in making available the entitlements to the Commission, Article 11 provides as follows:

'Any delay in making the entry in the account referred to in Article 9 (1) shall give rise to the payment of interest by the Member State concerned at a rate equal to the highest rate of discount ruling in the Member State on the due date. That rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

2. During the course of an inspection made by the Italian authorities in association with the Commission pursuant to Article 18 of Regulation No 2891/77 on 30 June and 4 July 1980 at the Ravenna Customs Office it was found that certain customs duties falling under the Common Customs Tariff had been wrongly accounted for as ECSC customs duties and therefore not as the Communities' own resources but as national resources.

The verification of the customs declarations for the first three months of 1980 which was carried out on the occasion of the inspection revealed that the error in classification related to an amount of LIT 11 858 060 for January, LIT 13 865 960 for February and LIT 32 120 470 for March, that is a total of LIT 57 845 390. The said amounts were rectified in the accounts of the customs office before the end of the inspection.

Subsequently, examination of the declarations for May and June 1980 led, following the same error in classification, to a rectification for an amount of LIT 25 912 010.

Since the monthly statements of own resources did not show the position, the Commission, in a letter dated 21 October 1980 to the Permanent Representation of Italy, requested the Italian authorities to inform it of the amount of duties which had been rectified as a result of the same error for the period from January to June 1980 and, if necessary, previous periods and the date on which the establishment of these entitlements ought to have taken place and the month in which the amounts were made available to the Commission.

By letter dated 19 January 1981 to the Permanent Representation of Italy the Commission reiterated its request since it could not calculate any interest pursuant to Article 11 of Regulation No 2891/77 on the amount of the rectification for May and June 1980 without knowing the allocation of the amount between the two months. Since the amount resulting from the rectification for January to March 1980 was not made available to the Commission until 20 September 1980 the Commission in the

same letter requested the Italian authorities to transfer to its account the sum of LIT 4 096 907 by way of default interest. Since the amounts for January, February and March ought to have been paid to the Commission's account on 20 March, 21 April and 20 May respectively, the sum pursuant to Article 11 of Regulation No 2891/77 was made up as follows:

January

LIT 11 858 060

$$\times (17\ \% + 1.50\ \%) \times \frac{184}{366} = \text{LIT } 1\,102\,948$$

February

LIT 13 865 960

$$\times (17\ \% + 1.25\ \%) \times \frac{152}{366} = \text{LIT } 1\,050\,934$$

March

LIT 2 120 470

$$\times (17\ \% + 1\ \%) \times \frac{123}{366} = \text{LIT } 1\,943\,025$$

LIT 4 096 907

By letter dated 4 March 1981 the Permanent Representation of Italy informed the Commission that the rectifications in issue both for January to March and for May to June 1980 had been entered in the accounts for own resources for July 1980. With regard to the payment of default interest the Italian authorities observed that such rectifications did not fall under Article 11 of Regulation No 2891/77 since they were rectifications in the establishment of entitlements. According to the said letter the establishment of entitlements is an accounting matter and a mistake in accounting such as that committed by the Ravenna customs office obviously falls under the second paragraph of Article 2 of the regulation as the period for making the amount available to the Commission could run only from the rectification.

Since it could not accept that interpretation of Regulation No 2891/77 the Commission, by letter dated 20 November 1984 to the Permanent Representation of Italy, requested the Italian authorities to make available to the Commission before 28 February 1985 the sum claimed by way of default interest and before then to inform it of the date on which the amounts resulting from the rectification for May and June 1980 were made available to the Commission.

Since it received no reply to that letter the Commission, by letter dated 20 September 1985, initiated the procedure provided for in Article 169 of the EEC Treaty and requested the Italian Government to pay it the sum claimed by way of default interest and to inform it within two months of the date on which the own resources for May and June 1980 and, if necessary, previous periods were made available to the Commission and to make any observations within the same period.

By letter dated 9 January 1986 from the Permanent Representation of Italy the Italian authorities challenged the justification of the claim for default interest on the basis of the provisions of Regulation No 2891/77 and stated that the procedure for

establishing entitlements was not harmonized at the Community level.

On 5 August 1986 the Commission sent the Italian authorities a reasoned opinion in which it took note of their refusal to pay default interest and of the failure to notify the months to which other rectified amounts made available to the Commission referred.

Since the Italian authorities did not respond to the opinion within the period laid down the Commission brought the present action.

3. The Commission's application was received at the Court Registry on 20 February 1987.

It is clear from the defence lodged by the Government of the Italian Republic that the rectification for the period from May to June 1980 related to an original establishment of 11 June 1980. It is claimed that the amount was entered in the own resources account in July 1980 and was thus made available to the Commission on 20 July 1980; thus even on the basis of the Commission's interpretation no default interest is payable on it.

In the rejoinder lodged by the Italian Government it is stated that rectifications were made for 1978 and 1979 in respect of LIT 54 976 430 and LIT 58 671 190 respectively. The rectifications were made in June 1981 and the amounts were immediately entered in the own resources account.

4. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any prepatory inquiry. It nevertheless put two questions to the Commission which replied to them in the time allowed.

II — Conclusions of the parties

1. The Commission claims that the Court should:

(a) declare that,

(i) by refusing to pay interest pursuant to Article 11 of Council Regulation No 2891/77 following a misclassification of a number of customs duties in January, February and March 1980,

(ii) by failing to notify the Commission as regards similar misclassifications occurring in May and June 1980 which of the amounts subsequently credited referred to May and which to June, and

(iii) by failing to notify the Commission whether and, if so, when similar misclassifications occurred and were rectified, if at all, before 1 January 1980,

the Italian Republic has failed to fulfil its obligations under the Treaty;

(b) order the defendant to pay the costs.

2. The Italian Republic contends that the Court should:

(a) dismiss the application as unfounded;

(b) order the applicant to pay the costs.

III — Submissions and arguments of the parties

The Commission claims that under Article 11 of Regulation No 2891/77 'any delay' in making an entry in its accounts gives rise to the payment of default interest. The period which Article 10(1) gives Member States for making the entry runs from the date on which the entitlement ought to have been established according to the rules. That principle was confirmed by the Court in its judgment of 20 March 1986 in Case 303/84 *Commission* v *Federal Republic of Germany* [1986] ECR 1171. In that judgment the Court held that there was an inseparable link between the obligations to establish an entitlement, enter it in the Commission's account within the requisite period and pay interest for any delay as laid down in Article 11 of the regulation. According to the same judgment, regardless of the reason for the delay in making the entry in the Commission's account, interest is payable without any distinction being called for according to whether the delay was caused by failure to determine the relevant amounts or by failure to comply with the time-limit laid down in Article 10(1). The principle was confirmed in a judgment of 18 December 1986 in Case 93/85 *Commission* v *United Kingdom* [1986] ECR 4011.

The period in which the entry in the account must be made cannot, in particular, run from a date fixed by the Member State itself. It is true that Article 1 provides that entitlements are to be established by the Member States 'in accordance with their own provisions laid down by law, regulation or administrative action', but that does not mean that the period runs from the date of actual establishment. If that were the case, Member States would be free to determine the date of establishment and, consequently, when the amount is made available to the Commission. Carried to the limit, that would mean that the Commission might never receive the amount in question and the view contended for by Italy would create a disparity in treatment between the Member States by giving advantage to the most lax of them. Article 1 of the regulation must be interpreted in the light of the above considerations and of the principle contained in the penultimate recital in the preamble to the regulation according to which the Commission should dispose of the own resources 'under the best possible conditions'.

The Commission further submits that Article 2 of the regulation, especially the second paragraph thereof, must be interpreted in the light of the same considerations. A mistake in classification, such as that in the present case, cannot fall under the provision referred to in the second paragraph of Article 2 and cannot be 'rectified' by a new establishment. The possibility of making such rectifications relates to technical errors from which establishment cannot be exempt. The mistake in the present case is of quite a different nature. Even if there were an establishment at the national level, it could not, since it does not concern own resources, be deemed to have been 'duly' determined within the meaning of the first paragraph of Article 2 of the regulation. Nor, since it is not an establishment at the Community level, can it be made the subject of a rectification giving

rise to a new establishment in accordance with the second paragraph of Article 2.

The Italian Government contends that the period laid down in Article 10(1) of Regulation No 2891/77 for crediting the account of the Commission runs from establishment of the entitlement.

By virtue of the first paragraph of Article 2 an entitlement is deemed to be established as soon as the corresponding claim has been duly determined by the national authorities. The concept of establishment has not been harmonized at the Community level. The only Community concept in that respect is of 'entry in the accounts' defined in Article 1(d) of Council Directive 79/623 of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (Official Journal 1979, L 179, p. 31) as 'the administrative act by which the amount of . . . duties to be levied by the competent authorities is duly determined'.

Establishment thus remains governed by national provisions. The relevant authority in Italy is the Testo Unico No 43 of the Customs Laws of 23 January 1973 (*GURI* of 28.3.1973, No 80). The fourth paragraph of Article 59 thereof distinguishes, in relation to the establishment of entitlements, between three separate stages: technical and legal establishment, calculation and entry in the accounts. It is only after the last stage that the establishment becomes definitive.

All the stages of the procedure for establishment may give rise to error and not only the first stage, as the Commission claims. The second paragraph of Article 2 of Regulation No 2891/77 contemplates the possibility of rectifying not only errors in the technical establishment but also in the calculation and in particular the entry in the account of the entitlements to be received. There is no reason for drawing different inferences from an error at the technical level and an accounting error. It must be possible to make a new establishment in respect of both pursuant to the second paragraph of Article 2 of the regulation.

That legal argument has already been set out by the Italian Ministry of Finance in Circular No 1974/IV/873 of 14 December 1974 to the peripheral and accounting institutions. The circular was brought to the attention of the Commission on its adoption. It relates to the identical provisions contained in the regulation which preceded Regulation No 2891/77 and, *inter alia*, gives instructions with regard to rectification due to an error in charging or clerical error discovered after the accounts are closed.

The Italian Government considers that the interpretation of the second paragraph of Article 2 of Regulation No 2891/77 advocated by the Commission is too restrictive. Similarly, the interpretation put forward by the Commission of Article 11 is too wide. The delays contemplated by the latter provision are exclusively delays in making available own resources which have been established, that is to say treasury delays.

Finally, the Italian Government observes that the judgments of the Court cited by the Commission do not support the Commission's argument. Case 303/84 *Commission* v *Germany* is a case where the period for collecting a levy was fixed by Community legislation and Case 93/85 *Commission* v *United Kingdom* is a case where the Commission, pursuant to Article 10 (2) of Regulation No 2891/77, had requested the entry of own resources to be brought forward.

IV — The Commission's answers to questions put by the Court

The *first question* asked the Commission to state whether in its opinion the second paragraph of Article 2 of Regulation No 2891/77 applies where the national customs authorities have wrongly treated an imported product as being covered by an exemption from customs duties under the Common Customs Tariff and if so, what is the practical difference between that situation and the one in the present case.

The Commission considers that the second paragraph of Article 2 of Regulation No 2891/77 applies in the case contemplated by the first question. In such a case it is necessary to rectify the original establishment of entitlements pursuant to the said provision.

In the present case on the other hand it is not possible to make a rectification because, in breach of the applicable rules, there has been no original establishment.

The *second question* asked the Commission to state whether in its opinion the second paragraph of Article 2 of Regulation No 2891/77 applies where the customs authorities have wrongly established an entitlement under the Common Customs Tariff in respect of goods which fall under the ECSC Treaty and, if not, to state which other provision enables the necessary rectification to be made.

The Commission considers that the second paragraph of Article 2 of Regulation No 2891/77 does not apply in the case contemplated by the question. The provision does not apply because there has not been (nor could there have been) an original establishment of entitlement since the goods do not fall under the Common Customs Tariff.

In the case contemplated by the question, once the error has been discovered the Member State concerned should enter the sums wrongly treated as Common Customs Tariff duties in the accounts as the national revenue and the Commission should credit it with the corresponding amount.

O. Due
Judge-Rapporteur