ORDER OF THE COURT (Eighth Chamber)

21 June 2007 *

In Case C-163/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 23 March 2006,

Republic of Finland, represented by E. Bygglin, acting as Agent, with an address for service in Luxembourg,

applicant,

the other party to the proceedings being:

Commission of the European Communities, represented by G. Wilms and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: Finnish.

THE COURT (Eighth Chamber),

composed of E. Juhász, President of the Chamber, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 In this appeal, the Republic of Finland asks the Court of Justice to set aside the order of the Court of First Instance of the European Communities of 9 January 2006 in Case T-177/05 *Finland* v *Commission*, not published in the ECR ('the order under appeal'), by which that Court dismissed as inadmissible its action for annulment of the decision of the Commission of the European Communities (Directorate-General for Budget), contained in the letter of 28 February 2005 and in the confirmatory letter of 25 April 2005, whereby the Commission refused to enter into negotiations with the Republic of Finland regarding the conditional payment of customs duties demanded retroactively, plus default interest up to the date of payment, which the Commission claimed from the Republic of Finland in the context of infringement proceeding No 2003/2180, brought under Article 226 EC.

Legal context

2 Article 6 of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources (OJ 2000 L 130, p. 1), appearing under Title II thereof under the heading 'Accounts for own resources', requires accounts for those resources to be kept at the Treasury of each Member State or at the body appointed by each Member State and broken down by type of resources. That article lays down the procedure relating to that accounting and to the information to be sent to the Commission.

3 Article 9(1) of Regulation No 1150/2000, appearing under Title III under the heading 'Making available own resources', provides that:

'In accordance with the procedure laid down in Article 10, each Member State shall credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed.

This account shall be kept free of charge.'

4 According to Article 11 of that Regulation, '[a]ny 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 the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by two percentage points. This 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'.

Facts of the case

5 The factual background to the dispute was summarised by the Court of First Instance in paragraphs 1 to 9 of the order under appeal as follows:

'1. On 17 October 2003, the Commission initiated infringement procedure No 2003/2180 against the Republic of Finland and subsequently adopted a reasoned opinion pursuant to Article 226 EC, considering that the Member State had failed to fulfil its obligations under Community law in failing to calculate and make available to the Commission unlevied own resources relating to imports of military equipment from 1998 to 2002 and in refusing to pay the default interest accrued thereon.

2. The Republic of Finland challenged the Commission's legal assessment, asserting that Article 296 EC entitled it, in order to protect the essential interests of its security, not to communicate confidential information concerning the import of military equipment and, moreover, during the period which is the subject of the infringement proceedings, not to levy customs duties on the imports at issue.

3. On 25 January 2005, in order to suspend the accrual of default interest applicable in the circumstances pursuant to Article 11 of Regulation No 1150/2000 (EC, Euratom) [...], the Republic of Finland called on the Commission to negotiate with it the conditional payment of the customs duties demanded retroactively and the default interest accrued thereon up to the date of payment. The Member State referred to the case-law of the Court of Justice regarding the possibility of making such a conditional payment. It stated that it hoped to conclude with the Commission an agreement concerning the conditional payment at issue.

4. The Commission, by letter of 8 February 2005 from the European Commissioner responsible for the budget, stated to the Republic of Finland that it was possible for it to make, in accordance with the case-law of the Court of Justice, a conditional payment protecting the rights of the Member State pending the decision of the Court. It called on the Finnish authorities to contact the Directorate-General (DG) for Budget of the Commission as regards the practical aspects of making the payment.

5. Following a telephone call, the Commission, by letter of the Director General for Budget of 28 February 2005 (first contested letter), informed the Republic of Finland that it did not legally have the right to enter into an agreement of the kind sought by the Finnish authorities, having regard to the obligations of the Member States concerning the Communities' own resources and the fact that they could not negotiate specific conditions regarding a given payment, save in the case of particular difficulties of calculation, not relied on in the present case.

6. The Director General for Budget [...] confirmed to the Finnish authorities the possibility of making a conditional payment as provided for in the case-law of the Court of Justice. He explained the practical procedure for making such a payment and the consequences thereof for the legal proceedings.

7. By letter of 18 March 2005, the Republic of Finland stated to the Commission that the issue in dispute in the infringement proceedings concerned the question of whether Article 296 EC entitled a Member State to withhold confidential information relating to the import of military equipment and to suspend the associated customs duties and that the express purpose of a conditional payment was to suspend the accrual of default interest provided for by Regulation No 1150/2000.

8. The Finnish authorities moreover stated that their conditional payment was subject to two conditions: (i) that the Commission undertake to bring the case before the Court and (ii) that the Republic of Finland receive a guarantee that they may make the payment with the benefit of a derogation from the normal procedure, in other words, without their being required to communicate information which would jeopardise the essential interests of security of the Member State.

9. The Commission, by letter of the Director General for Budget of 25 April 2005 (second contested letter), again stated to the Finnish authorities that it was unable to negotiate the agreement requested. Furthermore, it confirmed the terms of its letter of the 28 February 2005.'

The action before the Court of First Instance and the order under appeal

6 By application lodged on 11 May 2005, the Finnish Government brought the action which gave rise to the order under appeal.

7 The Commission, having entered a plea of inadmissibility, contended that the Court of First Instance should dismiss the action as inadmissible and, in the alternative, dismiss it as to substance.

8 The Republic of Finland claimed that the Court of First Instance should declare the action admissible and annul the decision of the Commission contained in the letter of 28 February 2005 and in that of 25 April 2005 confirming the earlier letter (together 'the letters at issue'), by which the Commission refused to enter into

negotiations with the Republic of Finland on the conditional payment of customs duties demanded retroactively, plus default interest up to the date of payment, which were claimed from the Republic of Finland in the context of infringement proceeding No 2003/2180 brought under Article 226 EC.

9 By the order under appeal, issued pursuant to Article 114 of its Rules of Procedure, the Court of First Instance, without opening the oral procedure, dismissed the action as inadmissible.

10 The Court of First Instance held that the letters at issue addressed to the Republic of Finland during the pre-litigation stage of the proceedings for failure to fulfil obligations do not contain any decision capable of producing obligatory legal effects affecting the interests of that Member State.

11 It states, at paragraph 32 of the order under appeal, that the refusal to open negotiations does not constitute a decision aversely affecting the Member State. The opening of negotiations such as those at issue in the present dispute, even if the Commission were to have the power so to consent, would not in itself affect the legal position of the Republic of Finland, since only the conclusion of an agreement at the end of that negotiation, were it to prove successful, could possibly have such an effect.

12 At paragraph 33 of the order under appeal, the Court of First Instance held that, in respect of the Communities' own resources, neither the provisions of Regulation No 1150/2000 nor the case-law of the Court of Justice confers the power on the Commission to enter into any negotiations with the Member States.

13 With regard to the conditional payment, the Court of First Instance points out, at paragraph 34 of the order under appeal, that, in accordance with the case-law of the Court of Justice, any 'conditional' nature of the payment lies in the confirmation, notwithstanding the payment, that a disagreement exists between the Member State and the Commission as to the justification for the debt claimed by that institution.

14 It goes on to hold, at paragraphs 35 and 36 of that order, that, far from refusing to allow the Republic of Finland to make a conditional payment of the customs duties which are the subject of the infringement proceedings, the Commission had, on the contrary, pointed out the possibility that the Finnish authorities had of making a conditional payment in accordance with the case-law of the Court of Justice. The Commission stated that it was sufficient for the Finnish authorities to calculate the unpaid customs duties and credit the corresponding amounts, equivalent to payment of the principal, to it on its own-resources account; in the light of that transaction, the Commission would calculate the default interest included from the moment when the customs duties in question should have been credited to it (information communicated by the Member State) and the date of actual payment. Finally, if the Republic of Finland were vindicated in the action for failure to fulfil obligations which is before the Court of Justice, the Commission would repay the amounts which were paid on a conditional basis.

15 At paragraphs 37 to 40 of the order under appeal, the Court of First Instance rejected the two 'conditions' advanced by the Finnish Government in connection with the conditional payment, namely, an undertaking by the Commission to bring an action for failure of a Member State to fulfil its obligations and a dispensation for confidential information. First, the discretion which the Commission enjoyed as to whether to bring such an action before the Court of Justice precluded the right of anyone to require that it adopt a particular position. Second, the Commission had never required the communication, upon the conditional payment, of confidential information which would jeopardise the essential security interests of the Member State.

16 The Court of First Instance therefore held that, in those circumstances, the letters at issue did not display the attributes of decisions within the meaning of Article 230 EC and as such could not be the subject of an application for their annulment. Consequently, the action for annulment had to be dismissed as inadmissible.

Forms of order sought

17 The Republic of Finland claims that the Court should:

— set aside the order under appeal,

— declare the action brought by the Republic of Finland to be admissible pursuant to Article 230 EC, and

— refer the case back to the Court of First Instance for a judgment on its substance and order the Commission also to pay the Republic of Finland the costs incurred in the appeal proceedings.

18 The Commission contends that the Court should:

— dismiss the appeal as unfounded, and

— order the Republic of Finland to pay the costs.

The appeal

19 Pursuant to Article 119 of its Rules of Procedure, where the appeal is clearly inadmissible in whole or in part or clearly unfounded, the Court of Justice may at any time, acting on a report from the Judge-Rapporteur and after hearing the Advocate General, dismiss it in whole or in part by reasoned order without initiating the oral procedure.

20 In support of the claim for the setting aside of the order under appeal, the Finnish Government relies on a single plea in law, divided into four parts. That plea alleges that the Court of First Instance erred in law when it refused to acknowledge that the letters at issue constituted a decision capable of being the subject of an action under Article 230 EC.

21 The Commission states that since the letters at issue were simply letters of notification, setting out the approach being followed by the Commission in the present case, none of them affect the interests of the Finnish Government nor do they change its legal position from that which existed before they were received. It is, consequently, of the view that the Court of First Instance correctly applied Community law, since the Republic of Finland has failed to demonstrate that the Court of First Instance erred in law.

The second and third parts, alleging errors of assessment in holding that the Commission lacks competence and that the letters at issue are of no binding legal effect

Arguments of the Finnish Government

22 The Finnish Government challenges the findings of the Court of First Instance at paragraphs 28 to 36 of the order under appeal, first, that the Commission has no power to enter into negotiations with the Member States and, second, that those negotiations were not necessary.

23 It submits that the possibility of making a conditional payment in the context of infringement proceedings cannot be assessed on the basis of Regulation No 1150/2000, since it does not provide for procedures relating to payments other than those connected with the Community's own resources.

24 Community law has not established a system whereby a conditional payment can be made in a way which secures the rights of the Member State. In that respect, the Finnish Government states that it is not clear by what means a Member State can satisfy itself that the Commission will bring the case before the Court of Justice once it has paid the funds plus default interest up to the date of payment, nor in what way it should proceed if the Commission refuses to bring an action, since Community law does not provide for a guarantee that that State will obtain repayment of its conditional payment.

25 In particular, in the third part of its plea in law, the Finnish Government submits that the Court of First Instance erred in its findings at paragraphs 35 and 36 of the order under appeal and in its finding at paragraph 42 thereof that the letters at issue are of no binding legal effect since the Commission did not refuse the conditional payment.

26 In those circumstances, the Finnish Government submits that the Member States should be able to agree with the Commission the procedure for a conditional payment. It also considers it necessary, if that payment is to be made, for negotiations to be opened with the purpose of concluding an agreement in that respect. That follows both from the principle of loyal cooperation enshrined in Article 10 EC and from the principle of legal certainty.

Findings of the Court

27 As a preliminary point the Court finds that the second and third parts of the plea in law should be dealt with together. In order to show that the refusal to open negotiations concerning a conditional payment is a reviewable act pursuant to Article 230 EC, those two parts essentially refer to the Commission's power to open such negotiations and the need for those negotiations.

28 It should be noted, first, that the complaint alleging the irrelevance of Regulation No 1150/2000 is inoperative. While the Regulation is relevant inasmuch as it seeks to govern the system of the Communities' own resources, it does not lay down any provisions concerning negotiations such as those sought by the Finnish Government. It follows from the second sentence of the 20th recital in the preamble to Regulation No 1150/2000, that the Commission 'should exercise its powers in accordance with this Regulation'.

29 Thus, the Court of First Instance was justified in holding that the Regulation does not confer on the Commission the power to enter into any negotiations with the Member States.

30 It is necessary to state, second, that according to the settled case law to which the Court of First Instance referred at paragraph 33 of the order under appeal, there is an inseparable link between the obligation to establish the Communities' own resources, the obligation to credit them to the Commission's account within the prescribed time-limit and the obligation to pay default interest (see, also, Case C-392/02 *Commission* v *Denmark* [2005] ECR I-9811, paragraph 67). The inseparable nature of that link does not permit the Commission to open separate negotiations concerning one of those factors.

31 It is in the same line of reasoning that the Court of Justice found that the default interest under Article 11 of Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155, p. 1), a provision repeated by Regulation No 1150/2000 (see Case C-363/00 *Commission* v *Italy* [2003] ECR I-5767, paragraph 23), is payable in respect of any delay, regardless of the reason for the delay in crediting them to the Commission's account (see, inter alia, Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 38; *Commission* v *Italy*, paragraph 44, and Case C-460/01 *Commission* v *Netherlands* [2005] ECR I-2613, paragraph 91).

32 Thus, the Commission had no choice but to inform the Finnish Government of the fact that according to Community legislation and the case-law of the Court of Justice it does not have the power to negotiate the conditions and procedures for payment of own resources. It follows that, as acts of a purely informative nature, limited to explaining the state of the law regarding a conditional payment, the letters at issue could neither affect the interests of the Republic of Finland nor change its legal position from that which existed before those letters were received.

33 It is necessary to point out that for the purpose of the action for failure to fulfil obligations following the infringement proceedings, referred to at paragraph 8 of the present order and in the context of which the question of the opening of the negotiations on the conditional payment arises, the Commission had to apply the legal rules in force at the time when the two letters at issue were communicated (see, to that effect, Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, paragraph 19, and Case C-293/04 *Beemsterboer Coldstore Services* [2006] ECR I-2263, paragraph 19). Therefore, that assessment cannot be affected by a judgment of the Court of Justice bringing that action to a close, and in consequence delivered after the communication of the two letters.

34 The Finnish Government maintains that, read together, the principles of loyal cooperation and legal certainty require the Commission to enter into negotiations. According to the Finnish Government it follows that the refusal in the letters at issue to enter into the negotiations, affects the interests of the Republic of Finland within the meaning of the case-law of the Court of Justice (see, Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraph 25 and the case-law cited, and Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 44). That argument however cannot be upheld.

35 Although it is clear from the case-law that the Commission cannot refuse a Member State the right to make a conditional payment (see, to that effect, Case C-96/89 *Commission* v *Netherlands*, paragraph 17, and Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 31), the recognition of such a right is subject to the Community rules surrounding the conditional payment. However, Community law does not require the Commission to conclude an agreement with the Member State concerned confirming the pre-existing Community obligations in favour of that Member State. The possibility of negotiating the conditions and procedures of payment runs counter to the system of own resources. In this respect, the Court of Justice has, in particular, emphasised the importance of securing efficient and rapid availability of the Community's own resources (Case C-378/03 *Commission* v *Belgium* [2006] ECR I-9805, paragraph 48 and the case-law cited).

36 It follows that the principles of loyal cooperation and legal certainty do not confer on the Republic of Finland the right to require that negotiations be entered into for this purpose.

37 It follows from all of the foregoing that the second and third parts of the plea in law are inoperative and must be dismissed as manifestly unfounded.

The first part, alleging an error of assessment of the refusal to negotiate

Arguments of the Finnish Government

38 The Finnish Government claims that the Court of First Instance erred in finding, at paragraph 32 of the order under appeal, that the refusal to grant the request to enter into the negotiations does not constitute a decision adversely affecting the Member State. Only the conclusion of an agreement at the end of the negotiations could constitute a measure having an adverse affect.

39 According to the Finnish Government, no agreement could have been concluded at the end of negotiations, if they had never been started. In refusing to enter into the negotiations, disregarding thereby Article 10 EC, the Commission in fact deprived the Republic of Finland of the chance of making a conditional payment within the

meaning of the case-law of the Court of Justice (Case C-96/89 *Commission* v *Netherlands*, paragraph 17, and *Commission* v *United Kingdom*, paragraph 31). The decision at issue therefore adversely affected the Republic of Finland.

Findings of the Court

40 As a preliminary point, it is necessary to point out, as the Court of First Instance did at paragraph 30 of the order under appeal, that, according to settled case-law, the only decisions which may be the subject of an action for annulment within the meaning of Article 230 EC are measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position (see *Netherlands* v *Commission*, paragraph 25, and *Commission* v *Greencore*, paragraph 44).

41 The Court of First Instance did not err in finding that the refusal to enter into negotiations contained in the letters at issue does not constitute a decision adversely affecting the Member State. As the Finnish Government maintains, entry into negotiations is indeed an essential pre-condition in order to reach any agreement. However, given that such an entry does not guarantee that the negotiations will lead to a result, only the result itself is capable of affecting the interests of the Finnish Government. The question of a result cannot however arise, since the Commission has no power to conclude an agreement leading to such a result or to enter into negotiations for that purpose.

42 Therefore, it must be held that, by the first part of its plea in law, the Republic of Finland is also not able to establish that the two letters at issue constitute decisions within the meaning of the case-law of the Court of Justice. Therefore, that part is inoperative and must accordingly be dismissed as manifestly unfounded.

The fourth part, alleging errors of assessment of the two conditions for a conditional payment

Arguments of the Finnish Government

43 The Finnish Government criticises the Court of First Instance's assessment, at paragraphs 37 and 41 of the order under appeal, of the two conditions advanced by the Republic of Finland in connection with a conditional payment, namely, an undertaking by the Commission to bring an action for failure of Finland to fulfil its obligations and a dispensation granted to that Member State exempting it from the requirement to provide confidential information which would jeopardise the essential interests of its security — conditions which, according to the Court of First Instance, are not appropriate for the conclusion of an agreement.

Findings of the Court

44 The findings made by the Court of First Instance at paragraphs 39 and 40 of the order under appeal correctly show that the Finnish Government cannot require that the payment at issue be made subject to the condition that the Commission undertakes to bring the matter before the Court of Justice and that the payment takes place without the Commission requiring the information provided for by Article 6 of Regulation No 1150/2000.

45 Neither an obligation on the part of the Commission to bring an action for failure to fulfil obligations before the Court of Justice nor an obligation to refrain from requesting the allegedly confidential information provided for by Regulation No 1150/2000 can imply that an obligation exists to negotiate a payment subject to such conditions. Even if the Commission were to be required to abide by those conditions, they would not require it, as pointed out at paragraph 35 of the present order, to enter into the negotiations sought.

46 Consequently, the letters at issue are not capable of affecting, either by the Commission's refusal to negotiate a payment subject to a condition that it bring the matter before the Court of Justice or by its refusal to accept the non-communication of the information provided for by Regulation No 1150/2000, the interests of the Republic of Finland since they do not significantly change the Republic of Finland's legal position. They cannot therefore be considered to be decisions capable of being the subject of an action for annulment. The Court of First Instance was therefore justified in holding, at paragraph 37 of the order under appeal, that neither of the 'conditions' were appropriate for the conclusion of an agreement.

47 Therefore, the fourth part of the plea in law is also inoperative and, as such, must be dismissed as manifestly unfounded.

48 It follows from all of the foregoing that the plea in law is unfounded in all of its parts.

Costs

49 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against the Republic of Finland, which has been unsuccessful, the Republic of Finland must be ordered to pay the costs.

On those grounds, the Court (Eighth Chamber) hereby orders:

1. The appeal is dismissed.

2. The Republic of Finland is ordered to pay the costs.

[Signatures]