JUDGMENT OF THE COURT (Grand Chamber)

15 November 2005 *

In Case C-392/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 7 November 2002,

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

applicant,

v

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Danish.

supported by:

Kingdom of Belgium, represented by A. Snoecx, acting as Agent,

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by D. Sellner and U. Karpenstein, Rechtsanwälte,

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. de Bellis, avvocato dello Stato, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by H.G. Sevenster and J. van Bakel, acting as Agents,

Portuguese Republic, represented by L. Fernandes, Â. Seiça Neves and J.A. dos Anjos, acting as Agents, with an address for service in Luxembourg,

Kingdom of Sweden, represented by A. Kruse, K. Wistrand and A. Falk, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Makarczyk, Presidents of Chambers, C. Gulmann, A. La Pergola, J.-P. Puissochet, S. von Bahr (Rapporteur), P. Kūris, U. Lõhmus, E. Levits and A. Ó Caoimh, Judges,

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 11 January 2005,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration by the Court that, by failing to make available to the Commission an amount of DKK 140 409.60 in own resources, together with default interest thereon as from 20 December 1999, the Kingdom of Denmark has failed to fulfil its obligations under Community law and, in particular, under Article 10 EC and

Articles 2 and 8 of Council Decision 94/728/EC, Euratom of 31 October 1994 on the system of the European Communities' own resources (OJ 1994 L 293, p. 9).

Legal framework

2 It follows from Article 2(1) of Decision 94/728, which replaced Council Decision 88/376/EEC, Euratom of 24 June 1988 on the system of the Communities' own resources (OJ 1988 L 185, p. 24), that inter alia revenue from the following is to constitute own resources entered in the budget of the Communities:

— so-called 'traditional' resources (Article 2(1)(a) and (b)) accruing from:

  — levies, premiums, additional or compensatory amounts, additional amounts or factors and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries within the framework of the common agricultural policy;

  — Common Customs Tariff duties and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries;

— so-called 'VAT' resources (Article 2(1)(c)), accruing from the application of a uniform rate valid for all Member States to the VAT assessment base;

— so-called 'GNP' or 'additional' resources (Article 2(1)(d)), accruing from the application of a rate — to be determined pursuant to the budgetary procedure in the light of the total of all other revenue — to the sum of all the Member States' GNP (gross national product).

3 Article 2(3) of Decision 94/728 provides that 'Member States shall retain, by way of collection costs, 10% of the amounts paid under 1(a) and (b)'. Article 2(3) of Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42) raised that percentage to 25% for amounts established after 31 December 2000.

4 Article 8 of Decision 94/728 states:

'1. The Community own resources referred to in Article 2(1)(a) and (b) shall be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which shall, where appropriate, be adapted to meet the requirements of Community rules. The Commission shall examine at regular intervals the national provisions communicated to it by the Member States, transmit to the Member States the adjustments it deems necessary in order to ensure that they comply with Community rules and report to the budget authority. Member States shall make the resources provided for in Article 2(1)(a) to (d) available to the Commission.

2. ... the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt the provisions necessary to apply this Decision and to make possible the inspection of the collection, the making available to the Commission and payment of the revenue referred to in Articles 2 and 5.'

5 At the time of the facts giving rise to the present case, the provisions referred to by Article 8(2) of Decision 94/728 were to be found in 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) ('Regulation No 1552/89'), as amended by Council Regulation (Euratom, EC) No 1355/96 of 8 July 1996 (OJ 1996 L 175, p. 3), which entered into force on 14 July 1996.

6 The second recital in the preamble to Regulation No 1552/89 states that: '... the Community must have the own resources referred to in Article 2 of Decision 88/376/EEC, Euratom available in the best possible conditions and accordingly arrangements must be laid down for the States to provide the Commission with the own resources allocated to the Communities'.

7 According to Article 2(1) and (1a) of that regulation:

'1. For the purpose of applying this Regulation, the Community's entitlement to the own resources referred to in Article 2(1)(a) and (b) of Decision 88/376/EEC, Euratom shall be established as soon as the conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor.

1a. The date of the establishment referred to in paragraph 1 shall be the date of entry in the accounting ledgers provided for by the customs regulations.

... '.

8 The first subparagraph of Article 9(1) of Regulation No 1552/89 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.'

9 Under Article 11 of Regulation No 1552/89:

'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 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.'

10 According to Article 17(1) and (2) of that regulation:

'1. Member States shall take all requisite measures to ensure that the amounts corresponding to the entitlements established under Article 2 are made available to the Commission as specified in this Regulation.

2. Member States shall be free from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements solely if, for reasons of force majeure, these amounts have not been collected. In addition,

Member States may disregard this obligation to make such amounts available to the Commission in specific cases if, after thorough assessment of all the relevant circumstances of the individual case, it appears that recovery is impossible in the long term for reasons which cannot be attributed to them. ...'

11 In regard to the creation of a customs debt, Article 201(1) and (2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Customs Code') states:

'1. A customs debt on importation shall be incurred through:

(a) the release for free circulation of goods liable to import duties,

or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.'

12 Article 204(1) and (2) of the Customs Code provides that:

'1. A customs debt on importation shall be incurred through:

(a) non-fulfilment of one of the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed,

or

(b) non-compliance with a condition governing the placing of the goods under that procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods,

in cases other than those referred to in Article 203 unless it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question.

2. The customs debt shall be incurred either at the moment when the obligation whose non-fulfilment gives rise to the customs debt ceases to be met or at the moment when the goods are placed under the customs procedure concerned where it is established subsequently that a condition governing the placing of the goods under the said procedure or the granting of a reduced or zero rate of import duty by virtue of the end-use of the goods was not in fact fulfilled.'

13 As to entries in the accounts and communication to the debtor of the duties, Article 217 of the Code provides:

'1. Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

...

The customs authorities may discount amounts of duty which, under Article 221(3), could not be communicated to the debtor after the end of the time allowed.

2. The Member States shall determine the practical procedures for the entry in the accounts of the amounts of duty. Those procedures may differ according to whether or not, in view of the circumstances in which the customs debt was incurred, the customs authorities are satisfied that the said amounts will be paid.'

14 According to Article 218 of the Customs Code:

'1. Where a customs debt is incurred as a result of the acceptance of the declaration of goods for a customs procedure other than temporary importation with partial relief from import duties or any other act having the same legal effect as such acceptance the amount corresponding to such customs debt shall be entered in the

accounts as soon as it has been calculated and, at the latest, on the second day following that on which the goods were released.

...

3. Where a customs debt is incurred under conditions other than those referred to in paragraph 1, the relevant amount of duty shall be entered in the accounts within two days of the date on which the customs authorities are in a position to:

(a) calculate the amount of duty in question,

and

(b) determine the debtor.'

15 Article 220 of the Customs Code provides:

'1. Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation

and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time-limit may be extended in accordance with Article 219.

2. ... subsequent entry in the accounts shall not occur where:

...

(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

...'.

16 Article 221 of the Customs Code provides:

'1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

...

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period.'

17 Article 869 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1) provides:

'The customs authorities shall themselves decide not to enter uncollected duties in the accounts:

...

(b) in cases in which they consider that the conditions laid down in Article 220(2)(b) of the [Customs] Code are fulfilled, provided that the amount not collected from the operator concerned in respect of one or more import or export operations but in consequence of a single error is less than [EUR] 2 000;

... '.

18 Pursuant to Article 1(5) of Commission Regulation (EC) No 1677/98 of 29 July 1998 amending Regulation (EEC) No 2454/93 (OJ 1998 L 212, p. 18), the term '[EUR] 2 000' in Article 869(b) was replaced by the term '[EUR] 50 000'.

19 The first paragraph of Article 871 of Regulation No 2454/93 provides:

'In cases other than those referred to in Article 869, where the customs authorities either consider that the conditions laid down in Article 220(2)(b) of the Code are fulfilled or are in doubt as to the precise scope of the criteria of that provision with regard to a particular case, those authorities shall submit the case to the Commission, so that a decision may be taken in accordance with the procedure laid down in Articles 872 to 876. ...'

20 According to the first paragraph of Article 873 of that regulation:

'After consulting a group of experts composed of representatives of all Member States, meeting within the framework of the Committee to consider the case in question, the Commission shall decide whether the circumstances under consideration are or are not such that the duties in question need not be entered in the accounts.'

Facts underlying the dispute

21 A Danish undertaking ('the importer') imported into Denmark frozen mange-tout peas from China. Up to the end of 1995, the goods were sold before customs clearance to a Danish wholesaler, which handled the customs declaration. That

wholesaler had an end-use permit, which enabled it to have a zero rate of import duty by virtue of the particular end-use of the goods.

22 As from 1 January 1996, the importer handled the customs clearance procedures itself. The customs authorities in Ballerup (Denmark) accepted the importer's customs declarations without establishing whether it actually had an end-use permit for the goods in question and continued to apply a zero rate of import duty.

23 On 12 May 1997, the customs authorities in Vejle (Denmark) found that the importer did not have such a permit and proceeded to correct two customs declarations, applying a customs duty of 16.8%. The same day the importer appealed to the Ballerup customs authorities, which reversed the corrections and re-applied the zero rate of duty, without requiring production of the end-use permit.

24 During a subsequent check of 25 declarations filed between 9 February 1996 and 24 October 1997, the competent customs authorities established that the importer did not have the permit required for the end-use scheme. They ordered the importer to pay DKK 509 707.30 in unpaid import duties (approximately EUR 69 000).

25 Having found that the reversal of the corrections made on 12 May 1997 may have given rise to a legitimate expectation on the part of the importer that the correct procedures had been followed, the Danish customs authorities asked the Commission whether, under Article 220(2)(b) of the Customs Code, there was any justification for not making a subsequent entry in the accounts of customs

duties claimed from the importer for declarations filed after that date, involving a total amount of DKK 140 409.60 (approximately EUR 19 000). By decision of 19 July 1999, the Commission answered in the affirmative.

26 In its decision, the Commission found inter alia that the Ballerup customs authorities' reversal on 12 May 1997 of the corrections made by the Vejle customs authorities should be deemed to be an error of the competent Danish authorities, an error which the party concerned could not reasonably have detected.

27 By letter of 21 October 1999, the Commission requested the Danish authorities to make available to it DKK 140 409.60 of own resources before the first working day following the 19th day of the second month following the dispatch of the letter, namely 20 December 1999, failing which the default interest provided for by the applicable Community legislation would be applied. By letter of 15 December 1999, the Danish Government refused to make that amount available to the Commission.

28 The Commission then commenced infringement proceedings as provided for by Article 226 EC. After having put the Kingdom of Denmark on formal notice to present its observations, on 6 April 2001 it issued a reasoned opinion, requesting the Kingdom of Denmark to comply with that reasoned opinion within two months of its notification.

29 Not finding the response to its reasoned opinion to be satisfactory, the Commission then brought the present proceedings.

Admissibility

30 Noting that, under Article 92(2) of the Rules of Procedure, it is for the Court to examine of its own motion the admissibility of the present action, the German Government submits that the Court has no jurisdiction to hear the present case.

31 This action, it argues, is a claim for damages based on a breach of the Customs Code. There is no provision for such an action within the EC Treaty system and it is therefore the Danish courts which have jurisdiction to hear the case, pursuant to Article 240 EC.

32 The Court notes that, by its action, the Commission complains that the Kingdom of Denmark did not make available to it a certain amount of own resources and the associated default interest, contrary to Decision 94/728 and Regulation No 1552/89.

33 Accordingly, by the present action, the Commission seeks a declaration from the Court that the Kingdom of Denmark has failed to fulfil an obligation imposed on it by Community law, and not an order that it pay damages and interest.

34 It follows that the application is admissible.

Substance

Arguments of the parties

35 The Commission submits that traditional own resources as contemplated in Article 2 of Decision 94/728 exist as of the time the customs debt is incurred and that, therefore, the amount of DKK 140 409.60 should have been made available to the Commission pursuant to Article 8(1) of that decision. Accordingly, where the importer did not have the required end-use permit enabling it to benefit from the zero rate of import duties, it follows from Article 2 of Regulation No 1552/89 that the Danish authorities should have found that the Communities were entitled to those own resources and, at the same time, that they should have applied the customs provisions correctly by recovering the customs duties.

36 The Commission states that the fact that an undertaking is exempt from paying customs duties pursuant to Article 220(2)(b) of the Customs Code has no bearing on the issue of whether the Member State must itself pay the amount in question to the Community. The Customs Code governs only relations between traders and the national authorities responsible for collecting traditional own resources on behalf of the Community. Relations between the Community and the Member States are governed by provisions pertaining to the Community financing system, inter alia Decision 94/728, the provisions for implementing Regulation No 1552/89 and the general obligations under Article 10 EC.

37 Although a purely technical link may have been created between these two sets of rules inasmuch as Regulation No 1552/89 refers to steps which, pursuant to the Customs Code, must be followed when a customs debt is incurred and collected, those references have no bearing on the issue of the financial liability of national authorities towards the Community for errors they commit in the collection of traditional own resources. If a Member State does not collect those resources, it is

solely by virtue of Article 17 of Regulation No 1552/89 that it may be, subject to certain conditions, dispensed from having to make those resources available to the Commission.

38 The reference to the Customs Code, and more specifically to the phase designated 'entry ... in the accounts' of a customs debt in Article 2 of Regulation No 1552/89, should necessarily be understood as a reference to the objective conditions required by the Code for the entry in the accounts to take place and not to the matter of whether the national authorities did or did not in fact proceed with the entry in the accounts in the case in question.

39 The Danish Government acknowledges that it follows from the principle of loyalty enshrined in Article 10 EC that the Member States have an obligation to guarantee, through sound organisation of their administration, that own resources are recovered correctly and made available to the Community within the time periods fixed by the Community. If the Member States do not comply with their obligation of loyalty, the Commission may bring infringement proceedings against the Member States for poor management in the collection of own resources.

40 According to the Danish Government, the question which arises in the present case, however, is which party must suffer the loss of own resources caused by unavoidable administrative errors, regardless of the quality or efficiency with which the administrative machinery was organised.

41 It submits in this connection that it follows from the principle of equity that the loss of own resources due to administrative error must be borne by the Community.

42 The Danish Government maintains that it follows from Article 220(2)(b) of the Customs Code that there can be no entry in the accounts, and therefore no subsequent recovery of duty, when the conditions laid down in that article are not fulfilled. If there is no entry in the accounts, there is no amount to be entered in the accounts for the purposes of Article 2 of Regulation No 1552/89 and, therefore, no Community entitlement to own resources either.

43 The most striking indication of a link between the Customs Code and the provisions relating to own resources is the fact that it is the Commission which, under Articles 871 and 873 of Regulation No 2454/93, is competent to determine whether the Member States may waive import duties owed by undertakings pursuant to Article 220(2)(b) of the Customs Code. It is logical to suppose that, if the Commission has been left to decide whether Member States may waive import duties owed by an undertaking, it is because the non-collection of import duties entails a loss of own resources for the Commission.

44 The Belgian Government submits that, contrary to the Commission's assertions, Article 2(1) and (1a) of Regulation No 1552/89 must be read together with the Customs Code, as otherwise the substance of that article would be rendered nugatory.

45 The Belgian Government adds that it follows from Articles 869 and 871 of Regulation No 2454/93 that Member States which are in doubt as to the scope of the criteria of Article 220(2)(b) of the Customs Code have the option of referring the case to the Commission if the customs debt in question does not exceed EUR 50 000, and the obligation to refer the matter to the Commission if the debt exceeds that amount.

46 It would be contrary to the rules based on objectivity and impartiality if the authority which rules on the error committed by the authorities of a Member State also decides on the issue of financial liability of that State due to the same conduct, which that authority finds to be an error. Such a concentration of power would cast doubt on the objectivity of the decisions because the own resources would end up being made available to the Commission regardless of its decision.

47 The German Government states with respect to the Customs Code and the provisions relating to own resources that Articles 217 to 219 of that code make detailed provision for the accounting of import and export duties. This strictly internal administrative customs function serves essentially to expedite the collection of duties for the Commission. This is why Article 2 of Regulation No 1552/89 takes the accounting entry, or the entry in the accounts, as the starting point. For traders, by contrast, those provisions are of only indirect importance because they cannot claim that the amount of the debt incurred has been entered in the accounts.

48 The Italian Government submits that it is not possible to infer from such a broad and general text as Article 10 EC that there is such an obligation on Member States as maintained by the Commission.

49 As for Article 17 of Regulation No 1552/89, it presupposes that the amount in question has been entered in the accounts and, therefore, that the liability of the Member States is limited to possible shortfalls in the collection of previously-established duties. Accordingly, that provision does not cover the situation in question here, in which the duties were not entered in the accounts because of an error on the part of the national authorities, which in turn gave rise to a decision by the Commission to waive the duties on grounds of legitimate expectation within the meaning of Article 220(2) of the Customs Code.

50 The Netherlands Government argues that any liability of a Member State which would require it, in a situation such as the present one, to make available to the Commission amounts which it was unable to collect subsequently, is not provided for by Decision 94/728; nor can it result therefrom. Such liability would have to be provided for expressly in the applicable legislation.

51 The Customs Code scheme, read together with Regulation No 1552/89 and Decision 94/728, does not make provision for a situation where there has not been an entry in the accounts in the circumstances referred to in Article 220(2)(b) of that code.

52 The Portuguese Government submits that the Communities' entitlement to own resources does not arise when the customs debt is incurred, but at the time when the conditions laid down by the customs legislation pertaining to the entry of the amount of the duties and communication thereof to the debtor are fulfilled and when the duties may be considered to be established in accordance with Article 2 of Regulation No 1552/89. If the duties have not been established or the establishment has been annulled, payment to the Commission of amounts which were not collected due to errors attributable to the administrative authority in question cannot be made pursuant to Regulation No 1552/89, but only by way of damages and interest, in so far as provided for by Community law.

53 The Swedish Government submits that Article 2(1)(b) and (3) of Decision 94/728 states clearly that it is the Communities which may claim entitlement to customs duties. This is why a claim on customs duties arises between the Communities and each debtor of those duties. The Member State in question is not in any way a party to this creditor-debtor relationship. The role of the Member States is limited to ensuring recovery of the Communities' claims on their behalf. This is evidenced by the fact that the Commission, and not the Member State, has the power to decide not to establish a customs debt in a situation such as that at issue here.

Findings of the Court

54 As a preliminary point, the Court notes, as the Advocate General observed in point 7 of his Opinion, that it follows from the third paragraph of Article 268 EC, which provides that the revenue and expenditure shown in the budget must be in balance, that shortfalls in revenues of own resources must be offset either by another own resource or by an adjustment of expenditure.

55 The Court also notes that, pursuant to Article 8(1) of Decision 94/728, the Communities' own resources referred to in Article 2(1)(a) and (b) of that decision are to be collected by the Member States and that the latter are required to make the Communities' own resources available to the Commission. Pursuant to Article 2(3) of that decision, Member States are to retain, by way of collection costs, 10% of the amounts paid under Article 2(1)(a) and (b), a percentage which was, furthermore, raised to 25% for amounts established after 31 December 2000, in accordance with Article 2(3) of Decision 2000/597.

56 The Court further notes that, in the present case, neither the existence of a customs debt nor the amount involved is contested.

57 Article 2(1) of Regulation No 1552/89 provides that the Member States must establish the Communities' entitlement to own resources 'as soon as the conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor'.

58 It follows from the wording of that provision that the Member States' obligation to establish the Community's entitlement to own resources arises as soon as the conditions provided for by the customs regulations have been met and that, accordingly, it is not necessary that the entry in the accounts has actually been made.

59 As evidenced by Articles 217, 218 and 221 of the Customs Code, those conditions are met when the customs authorities have the necessary particulars and, therefore, are in a position to calculate the amount of duties and determine the debtor (see, to that effect, Case C-460/01 *Commission* v *Netherlands* [2005] ECR I-2613, paragraph 71, and Case C-104/02 *Commission* v *Germany* [2005] ECR I-2689, paragraph 80).

60 It should in this regard be borne in mind that the Member States have the obligation to establish the Communities' own resources (see Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 38, and *Commission* v *Germany*, cited above, paragraph 45). Article 2(1) of Regulation No 1552/89 must be interpreted as meaning that the Member States may not dispense with determining claims, even where these are disputed; otherwise, it would have to be accepted that the financial

equilibrium of the Communities may be disrupted by the conduct of a Member State (see, to that effect, Case C-96/89 *Commission* v *Netherlands*, cited above, paragraph 37, and Case C-348/97 *Commission* v *Germany* [2000] ECR I-4429, paragraph 64).

61 It follows that the Member States are required to establish the Communities' entitlement to own resources as soon as their customs authorities are in a position to calculate the amount of duties arising from a customs debt and determine the debtor.

62 This finding is not invalidated by Article 220(2)(b) of the Customs Code. That provision is intended to safeguard debtors' legitimate expectations as to the soundness of all of the particulars used in the decision to make or not to make a subsequent entry of customs duties in the accounts (see, with respect to Article 5(2) 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 (OJ 1979 L 197, p. 1), reproduced in Article 220(2)(b) of the Customs Code, Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 19, and Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 39). While it covers situations in which the Member States' customs authorities cannot make a subsequent entry in the accounts of the duties in question and, therefore, cannot effect a post-clearance recovery, either, it does not release Member States from their obligation to establish the Communities' entitlement to own resources.

63 This distinction between the rules governing the obligation to establish the Communities' entitlement to own resources and those pertaining to the possibility

for Member States to recover duties has already been upheld by the Court in Case C-61/98 *De Haan* [1999] ECR I-5003. Whilst failure by the national customs authorities to observe the time-limits imposed by the Community customs legislation may result in the Member State concerned paying default interest to the Communities, in the context of making available own resources, such failure does not have any bearing on the fact that the customs debt is payable or the authorities' right to proceed with post-clearance recovery within the three years provided for by Article 221(3) of the Customs Code, as evidenced by paragraph 34 of *De Haan*, cited above. Likewise, although an error committed by the customs authorities of a Member State results in the debtor not having to pay the duties in question, it does not affect that Member State's obligation to pay default interest and duties which should have been established, in the context of making available own resources.

64 As to the argument put forward by the Danish and Belgian Governments that, in the procedure provided for in Articles 871 and 873 of Regulation No 2454/93, the Commission consented to the application of Article 220(2)(b) of the Customs Code, the Court notes that that procedure does not pertain to the Member States' obligation to establish the Communities' entitlement to own resources. The purpose of Articles 871 and 873 of Regulation No 2454/93 is to ensure the uniform application of Community law (see, to that effect, *Mecanarte*, cited above, paragraph 33) and, together with Article 220(2)(b) of the Customs Code, to safeguard debtors' legitimate expectations (see paragraph 62 of this judgment).

65 Moreover, the fact that the Communities' financial interests are not at stake in the context of the procedure provided for in Articles 871 and 873 of Regulation No 2454/93, on the ground that, in any event, their entitlement to the own resources concerned must be established, ensures that the Commission can act without an interest in the outcome of the procedure and in an impartial manner.

66 Furthermore, under Article 17(1) and (2) of Regulation No 1552/89, Member States are required to take all requisite measures to ensure that the amounts corresponding to the duties established under Article 2 thereof are made available to the Commission. Member States are to be free from that obligation solely if, for reasons of force majeure, those amounts could not be collected or if it appears that recovery is impossible in the long term for reasons which cannot be attributed to them.

67 It is, moreover, clear from the Court's case-law that 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; in addition, default interest is payable regardless of the reason for the delay in making the entry in the Commission's account. It follows that it is unnecessary to distinguish between a situation in which a Member State has established the own resources without paying them and one in which it has wrongfully omitted to establish them, even in the absence of a mandatory time-limit (see, inter alia, Case C-96/89 *Commission* v *Netherlands*, cited above, paragraph 38).

68 Accordingly, Member States are required to establish the Communities' own resources as soon as their own customs authorities have the necessary particulars and, therefore, are in a position to calculate the amount of duties arising from a customs debt and determine the debtor, regardless of the issue of whether the criteria for the application of Article 220(2)(b) of the Customs Code are met and therefore whether or not it is possible to proceed with a subsequent entry in the accounts or post-clearance recovery of the customs duties in question. In those circumstances, a Member State which fails to establish the Communities' own resources and to make the corresponding amount available to the Commission, without one of the conditions laid down in Article 17(2) of Regulation No 1552/89 being met, falls short of its obligations under Community law, in particular Articles 2 and 8 of Decision 94/728.

69 As to Article 10 EC, also relied on by the Commission, there are no grounds for holding that there has been a failure to fulfil the general obligations contained therein which is separate from the established failure to fulfil the more specific Community obligations by which the Kingdom of Denmark was bound under, inter alia, Articles 2 and 8 of Decision 94/728.

70 It is accordingly necessary to hold that, by failing to make available to the Commission an amount of DKK 140 409.60 in own resources, together with default interest thereon calculated as from 20 December 1999, the Kingdom of Denmark has failed to fulfil its obligations under Community law and, in particular, under Articles 2 and 8 of Decision 94/728.

Costs

71 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Kingdom of Denmark and the latter has been essentially unsuccessful, the Kingdom of Denmark must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the Member States which intervened in the proceedings are to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, by failing to make available to the Commission of the European Communities an amount of DKK 140 409.60 in own resources, together with default interest thereon calculated as from 20 December 1999, the Kingdom of Denmark has failed to fulfil its obligations under Community law and, in particular, under Articles 2 and 8 of Council Decision 94/728/EC, Euratom of 31 October 1994 on the system of the European Communities' own resources;**

2. **Orders the Kingdom of Denmark to pay the costs;**

3. **Orders the Kingdom of Belgium, the Federal Republic of Germany, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic and the Kingdom of Sweden to bear their own costs.**

[Signatures]