JUDGMENT OF THE COURT (Fifth Chamber)
7 March 2002 *

In Case C-10/00,

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

applicant,

v

Italian Republic, represented by U. Leanza, acting as Agent, assisted by I. Braguglia, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for a declaration that, by not making available to the Commission the sum of ITL 29 223 322 226 and by not paying default interest on that amount from 1 January 1996, the Italian Republic has failed to fulfil its obligations under the Community provisions relating to the Communities' own resources,

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, A. La Pergola and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 September 2001 at which the Commission was represented by E. Traversa and G. Wilms, acting as Agents, and the Italian Republic by I.M. Braguglia,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 13 January 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by not making available to the Commission ITL 29 223 322 226 and not paying default interest on that amount from 1 January 1996, the Italian Republic has failed to fulfil its obligations under the Community provisions relating to the Communities' own resources.

Legal context

2 The first paragraph of Article 2 of Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ, English Special Edition 1970 (I), p. 224), provides:

'[F]rom 1 January 1971 revenue from:

(a) 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...;

(b) 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...;

shall... constitute own resources to be entered in the budget of the Communities.'

3 In addition, Article 6(1) of Decision 70/243 provides:

'[T]he Community resources referred to in Articles 2, 3 and 4 shall be collected by the Member States in accordance with national provisions imposed by law, regulation or administrative action, which shall, where necessary, be amended for that purpose. Member States shall make these resources available to the Commission.'

4 As from 1 January 1986 Decision 70/243 was repealed and replaced by Council Decision 85/257/EEC, Euratom of 7 May 1985 on the Communities' system of own resources (OJ 1985 L 128, p. 15), which largely repeats the provisions of Decision 70/243, cited above.

5 Decision 85/257 was, in its turn, repealed and replaced by Council Decision 88/376/EEC, Euratom of 24 June 1988 on the system of the Communities' own resources (OJ 1988 L 185, p. 24), which also largely repeats the provisions of Decision 70/243, cited above.

6 Article 1 of Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing Decision 70/243 (OJ, English Special Edition 1970 (I), p. 224), which was applicable from 1978, provides:

'[T]he 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....'

7 Article 2 of Regulation No 2891/77 provides:

'[F]or 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.'

8 The first subparagraph of Article 9(1) of Regulation No 2891/77 provides:

'[T]he amount of own resources established shall be credited by each Member State to the account opened for this purpose in the name of the Commission with its Treasury or with the body it has appointed.'

9 Under Article 11 of Regulation No 2891/77,

'[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 a rate equal to the highest rate of discount ruling in the Member States on the due date. That rate shall be increased by 0.25 of a percentage point for each month of delay. The increase rate shall be applied to the entire period of delay.'

10 Article 18(1) and (2), first subparagraph, of Regulation No 2891/77 provides as follows:

'1. Member States shall carry out the verifications and inquiries concerning the establishment and the making available of own resources....

2. Accordingly, Member States shall:

— ...

— associate the Commission, at its request, with the inspection measures which they carry out.'

11 Regulation No 2891/77 was repealed and replaced by Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC (OJ 1989 L 155, p. 1) with effect from 1 January 1989, Articles 1, 2, 9(1), 11 and 18(1) and (2) of which essentially reproduce the provisions of Regulation No 2891/77, cited above.

12 By virtue of Article 24 of Regulation No 1552/89, that regulation became applicable with effect from 1 January 1989.

13 Under Regulation (EEC) No 1496/68 of the Council of 27 September 1968 on the definition of the customs territory of the Community (OJ, English Special Edition 1968 (II), p. 436),

'[T]he territories situated outside the territory of Member States and covered by the annex to this regulation shall, taking the conventions and treaties applicable to them into account, be considered to be part of the customs territory of the Community.'

14 Paragraph 3 of the Annex to Regulation No 1496/68 provides:

'ITALY:

The territory of the Republic of San Marino as defined in the convention of 31 March 1939 (Law of 6 June 1939, No 1220).'

15 Regulation No 1496/68 was replaced, as from 1 January 1985, by Council Regulation (EEC) No 2151/84 of 23 July 1984 on the customs territory of the Community (OJ 1984 L 197, p. 1). Article 2 of Regulation No 2151/84 and paragraph 3 of the Annex thereto are similar to the provisions of Regulation No 1496/68 cited above.

16 Moreover, Article 3 of Regulation No 2151/84 provides:

'[E]xcept where there are specific provisions to the contrary resulting either from conventions or from autonomous Community measures, the customs rules of the Community shall apply uniformly throughout the whole of the customs territory of the Community.'

17 Article 2 of Council Directive 68/312/EEC of 30 July 1968 on harmonisation of the provisions laid down by law, regulation or administrative action relating to: 1. customs treatment of goods entering the customs territory of the Community; 2. temporary storage of such goods (OJ, English Special Edition 1968 (II) p. 416), provides that all goods entering the customs territory of the Community are to be subject to customs control and are to be immediately conveyed to a customs office or other place designated by the competent national authorities and under the supervision of the customs authorities.

18 Directive 68/312 provides, in addition, in Article 3, that a summary declaration is to be lodged in respect of the goods to which Article 2 applies and, in Article 4, that that declaration is to be lodged immediately by the person responsible for the goods or by his agent.

19 Moreover, under Article 5 of Directive 68/312 all goods produced to customs are to remain under customs control until the customs authorities authorise their removal. Articles 6 and 7 of that directive state that the goods are to be placed under a customs procedure or redispatched out of the Community before the expiry of certain time-limits. Where the goods have not been the subject of a declaration for the purpose of placing them under a customs procedure or have been redispatched out of the Community, Article 9 of the same directive provides that the competent national authorities are to take the necessary measures to place them forthwith by official action under a customs procedure.

20 Directive 68/312 was replaced, as from 1 January 1992, by Council Regulation (EEC) No 4151/88 of 21 December 1988 laying down the provisions applicable to goods brought into the customs territory of the Community (OJ 1988 L 367, p. 1). That regulation largely reproduces the provisions of Directive 68/312 referred to above.

21 Under Article 2(a) of Council Directive 79/623/EEC of 25 June 1979 on the harmonisation of provisions laid down by law, regulation or administrative action relating to customs debt (OJ 1979 L 179, p. 31)

'[A] customs debt on importation shall be incurred by:

(a) The placing of goods liable to import duties in free circulation in the customs territory of the Community'.

22 Directive 79/623 was repealed, with effect from 1 January 1989, by Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt (OJ 1987 L 201, p. 15). That regulation largely reproduces the provision of Directive 79/623, cited above.

23 By virtue of the Agreement on friendship and good neighbourly relations between the Republic of San Marino and Italy of 31 March 1939 (the 'San Marino/Italy Agreement'), San Marino formed part of Italian customs territory. On the basis of that Agreement, San Marino entrusted Italy with collecting duties on imports of goods into Italy destined for consumption in the territory of San Marino. Those duties were accordingly paid to the Italian Exchequer and in return San Marino received an annual flat-rate compensatory amount paid by Italy.

24 That customs status of San Marino came to an end on 1 December 1992, the date of the entry into force of the interim agreement on trade and customs union between the European Economic Community and the Republic of San Marino, which was approved on behalf of the Community by Council Decision 92/561/EEC of 27 November 1992 (OJ 1992 L 359, p. 13, 'the Agreement' or 'the EEC/San Marino Agreement').

25 The Agreement established a customs union between the European Economic Community and the Republic of San Marino. Thus, it provides, first, that trade between the Community and the Republic of San Marino is to be exempt from all import and export duties and charges having equivalent effect. It then provides that products coming from third countries are to be considered to be in free circulation in the Community if the import formalities have been complied with and the customs duties payable have been levied, and there has been no total or partial drawback of such duties or charges in respect of those products. It further provides that the Republic of San Marino is to apply the Community customs tariff in respect of countries not members of the Community. Lastly, it requires the Republic of San Marino to authorise the European Economic Community,

acting in the name and on behalf of the Republic of San Marino, to carry out customs clearance formalities, in particular release for free circulation of products sent from third countries to San Marino.

Facts and pre-litigation procedure

26 The documents before the Court show that the present dispute concerns imports from third countries, between 1979 and 1992, of goods destined for San Marino, in respect of which the Italian authorities collected customs duties on the basis of the San Marino/Italy Agreement. It is common ground that, since the EEC/San Marino Agreement entered into force on 1 December 1992, it is not applicable to the present case.

27 Considering that from 1979 to 1984 they had mistakenly accounted for those duties, totalling ITL 9 410 311 986, as Communities' own resources and had on that basis, and therefore in error, paid them to the Commission, the Italian authorities asked the Commission by fax of 3 June 1985 to agree to corrections of the amounts of own resources by way of a deduction. Moreover, they asked the Commission to agree that the Italian Republic should in the future, when making payments of Community own resources, leave the duties concerned, that is customs duties on products destined for consumption in the territory of San Marino, out of account.

28 By telex of 7 June 1985 and by letter of 18 July 1985, the Commission expressed a reservation with respect to the envisaged deduction, informing the Italian authorities that such a deduction could be made only where the results of the relevant checks carried out pursuant to Regulation No 2891/77 showed that it was justified.

29 Subsequently, in 1985 and 1987, two meetings between the Commission and the Italian authorities took place with a view to reaching agreement. Later, by letter of 11 June 1987, the Commission accepted, subject to checks carried out by its officers, the request by those authorities to make a deduction on the basis of actual amounts resulting from the application of secondary Community law to imports of products destined for San Marino in respect of the financial years after 1982. However, in its letter the Commission emphasised the following:

'(i) For the future, the Italian authorities can make monthly deductions of the duty on imports from third countries of goods destined for San Marino from the amount of duty made available to the Community. Deductions must be expressly indicated in the monthly statements of account, with a break-down of the amount between customs duties and agricultural levies.

...

(v) All those amounts — past and future — are accepted only subject to inspection measures in association with the Commission pursuant to Regulation No 2891/77 (now Regulation [No] 1552/89). More generally, the Commission expects the Italian authorities to do everything necessary to ensure that imports destined for San Marino are not subsequently re-imported into Italy. The Commission considers that the present agreement may be in question if there is an unexplained increase in imports from third countries destined for San Marino.

The Italian authorities may effect the proposed deductions as soon as the Commission has received their agreement to the above.'

30 In October 1988 the Italian authorities deducted the amounts overpaid for 1982 to 1984, totalling ITL 5 269 620 911, even though they did not indicate their agreement to the terms of the Commission's letter of 11 June 1987 until 3 March 1990.

31 Between 23 and 27 April 1990 and between 28 January and 1 February 1991, officials of the Commission carried out two joint inspections in Italy pursuant to Article 18(2) of Regulation No 1552/89.

32 By letter of 31 May 1991, the Commission sent the Italian authorities a report on the two inspections ('the inspection report'). It is apparent from the report that the Commission no longer accepted the deductions at issue.

33 According to the inspection report, the conditions subject to which the Commission had agreed to the principle of the deductions at issue did not appear to have been entirely satisfied. The report concluded that, as there was no monitoring of the Italy-San Marino border and there were inadequate controls, it could not be excluded that there was trade between third countries and the Community via San Marino and that, accordingly, in order to prevent any loss of Community own resources, the Italian Republic should:

— totally revise the amounts it was seeking to deduct with regard to the years 1979 to 1989 and verify the authenticity of the duties imputed to chapter headings in the national accounts from 1 January 1990 in order to ensure that the amounts concerned actually correspond to goods destined for San Marino. Those checks should be carried out either on the basis of declarations of release into free circulation or on the basis of A.28 documents;

— analyse exports from San Marino as from 1 January 1979 in order to identify possible trade deflections which might entail a loss of own resources.

34 In addition, in the inspection report the Commission indicated that it considered that the Italian Republic had to improve certain aspects of its system of controls.

35 Nevertheless, in September 1991, the Italian authorities deducted the amount of ITL 4 140 691 075 for the years 1979 to 1981. Similarly, they withheld a sum of ITL 19 813 010 240 for the years 1990 to 1992. Taking into account the deductions already made in 1988 for the years 1982 to 1984, the total amount deducted was ITL 29 223 322 226.

36 In their reply of 20 January 1992, the Italian authorities disputed the conclusions in the Commission's inspection report, stating that the Italian rules and controls provided appropriate guarantees and that it was for the Commission to prove the contrary.

37 In a letter of 3 June 1992, the Commission reminded the Italian authorities that the inspection report had disclosed inadequate monitoring. In addition, it drew their attention to the fact that from January 1986 to December 1992 the amounts collected by the Italian Republic on behalf of the Republic of San Marino had almost tripled and had therefore increased disproportionately and had to be considered excessively high having regard to domestic consumption in San Marino.

38 By letter of 26 April 1993, which made particular reference to a Commission inspection visit on 22 January 1993, the Italian authorities sent a table to the Commission setting out, for the period 1986 to 1989, the amount of the duties on imports destined for San Marino actually collected by the Italian customs authorities, that amount being split between three revenue chapter headings.

39 As promised in their letter of 26 April 1993, the Italian authorities forwarded to the Commission, by letter of 30 July 1993, data on the gross domestic product of San Marino for the period 1985 to 1991 and on tourist trade between 1979 and 1992.

40 By letter of 23 February 1994, the Commission proposed a method of 'flat-rate calculation', referring to the similar solution devised for Monaco. That method was based on a division of the total amounts of duty established for the Italian Republic and the Republic of San Marino by reference to the number of inhabitants of the two States, corrected by a coefficient to reflect their respective levels of wealth.

41 In the same letter, the Commission estimated, on the basis of the flat-rate calculation method, that of the total amount of ITL 51 648 921 166 claimed by the Italian authorities a sum of ITL 10 183 686 281 could be regarded as corresponding to the duties relating to imports destined for San Marino. In its letter the Commission accordingly requested the Italian authorities to make available to it before 1 May 1994 a sum of ITL 19 039 635 945, representing the difference between the amount of ITL 29 223 322 226 already deducted by them in respect of imports destined for San Marino and the sum of ITL 10 183 686 281 accepted by the Commission.

42 On 22 June 1994, responding to the negative reaction of the Italian authorities of 27 April 1994, the Commission indicated its willingness to contemplate a

revision of the flat-rate calculation method to take into account the Italian Republic's arguments as to the effect of tourist trade and to the macro-economic indicator to be adopted.

43 By letter of 8 August 1994, the Italian Republic confirmed its reservations regarding a flat-rate calculation, disputing its lawfulness and referring to certain factors which in its view could not be evaluated by a statistical method. According to the Italian authorities, the only reliable basis for determining the deductible amount was the amount established in the supporting documents held by the Italian customs authorities, namely ITL 51 648 921 166. By letter of 10 October 1994, the Commission requested the Italian authorities to justify all the amounts claimed in an appropriate statement containing, *inter alia*, the references of the customs documents. Moreover, the Commission indicated that it could only consider amounts to be deducted where the authorities could provide evidence that the goods which were the subject of the declarations of imports destined for San Marino were indeed destined for that country and that those goods had been 'definitively integrated into the economy of that State'.

44 In its reply of 2 December 1994, the Italian Republic again maintained that it was for the Commission to prove the existence of abnormal transactions or that goods were deflected from San Marino to Italy or other countries. In its view, the Commission could not call in question the totality of the sums to be deducted in respect of the financial years which were yet to be monitored, that is, 1985 and the following years. By reason of the substantial amount of preparatory work that was necessary, it was not possible to comply with the Commission's requests in the period laid down by it. In conclusion, the Italian authorities requested the Commission to carry out a joint inspection on the spot to make the appropriate checks.

45 By letter of 28 July 1995, amended by letter of 8 November 1995, the Commission requested the Italian Government to make available to it before the end of December 1995 the sum of ITL 29 223 322 226, representing the

deductions made during the period from 1 February 1979 to 30 November 1992, failing which default interest would be payable pursuant to Article 11 of Regulation No 1552/89. The Italian authorities replied by letters dated 26 October and 16 December 1995.

46 The Commission sent a letter of formal notice to the Italian Republic on 26 June 1996. In that letter it claimed that:

— by failing to take appropriate action in the light of the Commission's observations following the inspections carried out by it, and

— by continuing to deduct unilaterally amounts from its payments of own resources without the Commission's agreement and without complying with the Commission's request to justify those deductions, thereby creating a risk of unjustified diminution of Community own resources,

the Italian Republic had infringed its obligations under the Treaty.

47 In consequence, the Commission requested the Italian Government:

— to make available to it the sum of ITL 29 223 322 226, and

— to pay default interest to the Commission from 1 January 1996 until the aforesaid amount is made available.

48 The Commission also requested the Italian Government to submits its observations on the question within two months of receiving the letter of formal notice.

49 The Italian authorities replied by letter of 22 October 1996, reiterating the arguments they had advanced in previous correspondence.

50 On 20 March 1998 the Commission sent a reasoned opinion to the Italian Republic requesting that Member State to comply, within two months from notification of the opinion, with the request for payment of the sum of ITL 29 223 322 226 together with default interest from 1 January 1996.

51 On 19 May 1998 the Italian authorities replied to the reasoned opinion, confirming and elaborating on their objections in relation to the Commission's complaints.

52 In those circumstances, the Commission brought the present action.

Substance

Arguments of the parties

53 The Commission maintains that, since the Italian Republic has sought to reduce the amount of its indebtedness to the Community in respect of own resources by amounts allegedly corresponding to duties relating to imports destined for San Marino, it is for the Italian Republic to prove that those imports are in fact destined for San Marino and that the duties relating to them do not therefore constitute Community own resources.

54 In that connection, the Commission submits that that apportionment of the burden of proof arises from a general principle of tax law according to which it is for the taxable person, if he avails himself of a right to reduce his liability to tax, to prove that the conditions laid down for that purpose are in fact satisfied.

55 That principle has been applied in Community tax legislation, notably in Article 18(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), which, according to the Court's case-law (Case C-85/95 *Reisdorf* [1996] ECR I-6257, paragraphs 29 and 31), authorises Member States to require a taxable person to produce irrefutable evidence that the transaction in respect of which the deduction is claimed actually took place.

56 The Commission maintains that it refused to approve the deductions at issue for serious and compelling reasons relating to the lack of reliability, as recorded in the inspection report, of the monitoring and accounting procedures for duties relating to imports destined for San Marino. It submits that the Italian Republic was therefore not justified in unilaterally deducting the amounts in question.

57 The Commission further contends that it follows from the Community legislation on own resources, in particular Article 2 of Decisions 70/243, 85/257 and 88/376, that the assignment of import duties to Community own resources constitutes the general rule and that where a Member State invokes an exception to that general rule, in this case by means of a deduction of duties relating to imports destined for San Marino, it is for that Member State to prove that it is justified.

58 Moreover, the Commission submits that that apportionment of the burden of proof finds support in the case-law of the Court relating to the legislation on own resources, in particular Article 2 of Regulations Nos 2891/77 and 1552/89, according to which it cannot be inferred from those provisions that Member States may dispense with determining the claims for Community own resources, even where these are disputed (see, in particular, Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 37). That apportionment could also be based on Article 18(1) of the above regulations which provides that Member States are obliged to carry out checks and investigations relating to the establishing and making available of own resources (see, in particular, Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 29 and 33).

59 In the Commission's submission, that apportionment of the burden of proof follows, moreover, from a principle, established in the case-law of the Court,

according to which, where the Commission shows that it is entitled to entertain substantial and reasonable doubts as to the reliability of the controls carried out by the national authorities, it is for the Member State concerned to establish that those controls do not lead to an unjustified reduction in the amounts collected by the Communities as own resources (see, in particular, with regard to discriminatory levies, Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141 and Case C-153/89 *Commission* v *Belgium* [1991] ECR I-3171 and also, with regard to the 'guarantee section' of the clearance of accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF), Case C-247/98 *Greece* v *Commission* [2001] ECR I-1, paragraphs 8 and 9, and Case C-278/98 *Netherlands* v *Commission* [2001] ECR I-1501, paragraphs 40 and 41).

60 The Italian Government maintains that, since the Commission accepts that the duties relating to imports destined for San Marino do not constitute Community own resources, it is for the Commission to prove that the goods which are the subject of such imports and in respect of which the prescribed duties have been collected did not in fact arrive or remain in San Marino and therefore constitute Community own resources.

61 In that regard, the Italian Government submits that what is in point here is not a unilateral deduction by the Italian Republic of sums owed as Community own resources but merely a determination that the amounts in question relate to duties collected on imports of goods destined for San Marino, which do not constitute Community own resources but revenue owing to the Italian Republic. The reference made by the Commission to the case-law of the Court on own resources is therefore irrelevant. As a result, it cannot be concluded that it is for the Italian Republic to justify the deductions it has allegedly made.

62 The Italian Government maintains that the findings in the inspection report do not constitute sufficient evidence that the Italian Republic's controls relating to the possible fraudulent reintroduction into the Community of imported goods destined for San Marino were non-existent or ineffective, especially since they refer to isolated cases or cases of limited importance.

63 In the Italian Government's view the adequacy of the controls is also demonstrated by the fact that there is a substantive similarity between the controls carried out before the EEC/San Marino Agreement entered into force and those introduced afterwards, in particular those prescribed by Decision No 1/93 of the Community-San Marino Cooperation Committee of 27 July 1993 adopting the procedures for making available to the San Marino Exchequer the import duties collected by the Community on behalf of the Republic of San Marino (OJ 1993 L 208, p. 38).

64 The Commission replies that the EEC/San Marino Agreement can provide no basis for argument, since that agreement is not applicable to the present case, which is concerned with the period from 1979 to 1992, and radically altered the legal context in which customs duties on goods destined for San Marino are collected.

65 The Italian Government goes on to repeat that, as regards the period from 1985 to 1989, the Italian Republic mistakenly accounted for ITL 22 425 598 940 as own resources. As those sums have still not been deducted by the Italian Republic, the Italian Government asks the Court to find that they do not constitute own resources but national revenue.

66 The Commission doubts whether that request is in conformity with the Rules of Procedure, in particular Article 40 read in conjunction with Article 38(1)(c), but contends that in any case it serves no purpose, given that the decision to be given in the present case will inevitably have consequences for the destination of the above amounts.

Findings of the Court

67 In its application the Commission is asking the Court to declare that the total amount deducted by the Italian Republic as duties relating to imports destined for San Marino during the periods from 1979 to 1984 and from 1990 to 1992, namely ITL 29 223 322 226, represents Community own resources and must therefore be made available to the Commission by the Italian Republic.

68 As the Advocate General observes at point 45 of his Opinion, it is, in particular, apparent from the Commission's letter dated 23 February 1994 that the Commission does not dispute that at least a part of that amount concerns duties relating to imports which were in fact destined for San Marino and which cannot therefore be assigned to Community own resources. In that letter, the Commission considered on the basis of a flat-rate calculation that that amount included only ITL 10 183 686 281 as own resources for the entire period from 1979 to 1992.

69 In those circumstances, the question arises as to the basis in Community law of the Commission's request that the amount of duties collected and deducted by the Italian Republic in relation to imports destined for San Marino constitute Community own resources.

70 In that connection, the Commission maintains that its request finds a basis in the principle that as a general rule all customs duties and levies collected on the importation of goods into the Community constitute Community own resources. It also follows from that principle that, where a Member State intends not to assign amounts representing import duties to own resources, it is for it to prove that, as an exception to the general rule, those duties do not constitute own resources.

71 At the hearing the Commission stated that support for that principle can be found in Article 201(1)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1). Under that provision the release of goods for free circulation gives rise to a customs debt on importation.

72 The Commission submitted, in particular, that, by virtue of that provision, the customs debt, and therefore the obligation to pay customs duties, arises at the moment when goods are physically introduced in the territory of the Community. The Community legislation on own resources establishes a close link between the customs debt and the establishment of own resources. Under Article 2 of Regulations Nos 2891/77 and 1552/89 a Community entitlement in respect of own resources, in this case customs duties, is established as soon as the amount owed has been communicated by the competent department of the Member State to the taxable person.

73 As a preliminary point, it should be observed that Article 201(1)(a) of Regulation No 2913/92 is not applicable to the present case, which concerns imports carried out between 1979 and 1992. That regulation, by virtue of Article 253 thereof, only entered into force as from 1 January 1994.

74 It is common ground that, by virtue of Article 2 of Regulations Nos 1496/68 and 2151/84, the territory of the Republic of San Marino formed part of the customs territory of the Community. It follows from those provisions, in conjunction with the Community customs legislation applicable to the present case, that, in principle, the relevant Community customs provisions applied to movements of goods destined for or coming from San Marino at the time of the imports in question.

75 In accordance with Directive 68/312 and Regulation No 4151/88, which are applicable to the present case, the introduction of goods into the customs territory of the Community meant that those goods were subject to customs control until they were assigned a customs-approved treatment in conformity with Community law.

76 Imports from third countries of goods destined for San Marino — at issue in the present case — were the subject of a specific customs-approved treatment recognised by Community law, namely the customs procedure under the San Marino/Italy Agreement. This is confirmed, in particular, by Article 2 of Regulations Nos 1496/68 and 2151/84 read in conjunction with paragraph 3 of the Annex thereto.

77 It is clearly the case that the introduction into the customs territory of the Community of goods destined for San Marino and their subjection to the customs

formalities prescribed for that destination do not in themselves give rise to a customs debt within the meaning of the Community customs provisions to which the Commission refers.

78 It follows from Article 2(a) of Directive 79/623 and Article 2(1)(a) of Regulation No 2144/87, which are applicable to the present case, that, in order for a customs debt to arise within the meaning of those provisions, goods liable to import duties must be placed in free circulation within the customs territory of the Community.

79 That was precisely not the situation with regard to imported goods destined for San Marino. The specific nature of the import procedures applicable to goods destined for San Marino precluded the application of the abovementioned Community provisions relating to the creation of a customs debt.

80 It follows that the introduction into the customs territory of the Community of goods destined for San Marino and the completion of the customs formalities prescribed for that destination do not in themselves constitute events giving rise to Communities' own resources by way of common customs tariff duties or other duties established or to be established by the institutions of the Communities within the meaning of Article 2 of Decisions 70/243, 85/257 and 88/376.

81 The Commission's argument based on Community law on own resources, that is to say, Article 2 of Regulations Nos 2891/77 and 1552/89 and the case-law of the Court relating thereto, therefore cannot be accepted. The same is true as regards

the conclusions drawn by the Commission from the applicability of those provisions in regard to the apportionment of the burden of proof.

82 Contrary to what the Commission maintains, the specific nature of the customs procedure which applies to imports destined for San Marino also precludes the transposition to the circumstances of this case of principles governing the burden of proof under Community law in the field of value added tax.

83 As regards the Commission's argument that it is necessary to apply by analogy in this case the case-law of the Court mitigating the burden of proof in connection with the clearance of EAGFF accounts, it should be observed that that case-law, inasmuch as it relates to the shortcomings in the controls carried out by a Member State, concerns Commission decisions based on Article 5(2)(c) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy, as amended by Council Regulation (EC) No 1287/95 of 22 May 1995 (OJ 1995 L 125, p. 1), and imposing flat-rate corrections expressed, in principle and barring exceptional circumstances, in the form of a percentage of the costs which Member States ask the Community to bear (see, in particular, the judgment of 6 December 2001 in Case C-373/99 *Greece* v *Commission* [2001] ECR I-9619, paragraphs 5 to 7 and 10 to 13).

84 In that regard, it must be found that, in contrast to the criteria applied by the Commission to determine the level of a flat-rate correction in connection with clearance of EAGGF accounts, in the present case the Commission has not established that its request relating to the totality of the amounts mentioned above was proportionate to the extent of the shortcomings found in the system of controls and to the ensuing risk of wholesale losses, as a result of those shortcomings, for the Communities' own resources.

85 That argument of the Commission cannot therefore be accepted.

86 Equally, however, the Italian Republic's argument that in the present case the burden of proof as to the assignment of the duties collected on imports destined for San Marino to Community own resources falls entirely upon the Commission cannot be accepted.

87 It should be observed that, as the inspection report shows, the Commission established that the shortcomings in the controls carried out by the Italian authorities on imports destined for San Marino created a serious risk of loss of own resources for the Community. However, in the present case, the Commission does not possess either figures or documents which would enable it to identify, or at least make a global estimate of, which of the imports in question were not in fact destined for San Marino. Consequently, the Commission is not in a position to quantify the amount of duty owing to the Communities by way of own resources.

88 In that connection, it should be borne in mind that it is clear from the case-law of the Court that the Member States are required, under Article 5 of the EC Treaty (now Article 10 EC), to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 155 of the EC Treaty (now Article 211 EC), in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied (see, in particular, Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraph 16).

89 In the light of that case-law, it should be observed that, in the circumstances of the present case, the implementation of the arrangements relating to imports

destined for San Marino creates an obligation on the part of the Italian Republic to take, in sincere cooperation with the Commission, the measures needed to ensure the application of the Community provisions relating to establishment of possible own resources.

90 That obligation was given more specific expression, with regard to verifications, in Article 18 of Regulations Nos 2891/77 and 1552/89. That provision aims, in particular, to ensure that own resources are not lost by reason of unjustified determinations of duties as accruing to Member States.

91 In particular, it follows from that obligation that where, as here, the Commission is largely dependent on the information provided by the Member State concerned, that Member State is required to make supporting documents and other relevant documentation available to the Commission under reasonable conditions, to enable it to verify whether, and, as the case may be, to what extent the amounts concerned relate to Communities' own resources.

92 It is apparent from the documents before the Court that, following the joint inspections and the sending of the inspection report which established the existence of serious problems as regards monitoring by the Italian authorities of imports destined for San Marino, the parties engaged, albeit at times with difficulty, in a dialogue regarding the existence within the total amount of the deductions in question of a component corresponding to own resources and, where appropriate, regarding the exact determination of that component.

93 It must be observed, however, that, in the present case, the parties have not exhausted the possibilities that dialogue and sincere cooperation offer in this respect.

94 Having regard to all the foregoing considerations, the Commission's application for a declaration that, by not making a sum of ITL 29 223 322 226 available to the Commission and by not paying default interest on that amount from 1 January 1996, the Italian Republic has failed to fulfil its obligations under the Community provisions on Communities' own resources must be dismissed.

95 Nor, for that matter, can the Court grant the request, formulated by the Italian Republic in its defence, for a finding by the Court that the revenue collected by way of customs duties on goods destined for San Marino from 1985 to 1989 does not constitute own resources but rather national revenue. Such a request falls outside the limits of the jurisdiction which the Treaty confers on the Court in proceedings under Article 226 EC.

Costs

96 Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared where each party succeeds on some and fails on other heads.

97 Since the Commission has been unsuccessful in obtaining a declaration by the Court that the sum of ITL 29 223 322 226 relating to customs duty on imports destined for San Marino for the periods from 1979 to 1984 and from 1990 to 1992 had to be made available to it as own resources, and since the Italian Republic, for its part, has been unsuccessful in obtaining a finding by the Court that such duties for the period from 1985 to 1989 constituted national revenue owing to it, it is appropriate that the Commission should bear two thirds and the Italian Republic one third of the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Commission of the European Communities to bear two thirds of the costs and the Italian Republic to bear one third of the costs.**

Jann La Pergola Timmermans

Delivered in open court in Luxembourg on 7 March 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber