JUDGMENT OF THE COURT (Grand Chamber)

15 December 2009 *

In Case C-409/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 November 2005,

European Commission, represented by C. Cattabriga, D. Triantafyllou, H. Støvlbæk and G. Wilms, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by A. Samoni-Rantou, E.-M. Mamouna and K. Boskovits, acting as Agents,

defendant,

* Language of the case: Greek.

supported by:

Kingdom of Denmark, represented by J. Bering Liisberg, acting as Agent,

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

Portuguese Republic, represented by C. Guerra Santos, L. Inez Fernandes and J. Gomes, acting as Agents,

Republic of Finland, represented by J. Heliskoski and A. Guimaraes-Purokoski, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, E. Levits and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Borg Barthet (Rapporteur), M. Ilešič, J. Malenovský and U. Lõhmus, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 November 2008,

after hearing the Opinion of the Advocate General at the sitting on 10 February 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by refusing to calculate and to make payment of own resources which were not collected in the period from 1 January 1998 until 31 December 2002, in relation to imports of military material which were exempted from customs duties, and by refusing to pay default interest arising from the failure to pay those own resources to the Commission, the Hellenic Republic has failed to fulfil its obligations under, respectively, Article 2 and Articles 9 to 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), as amended by Council Regulation (EC, Euratom) No 1355/96 of 8 July 1996 (OJ 1996 L 175, p. 3; 'Regulation No 1552/89'), until 31 May 2000, and, after that date, the same articles 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).

Legal context

Community legislation

2 Article 2(1) of Council Decision 88/376/EEC, Euratom, of 24 June 1988 on the system of the Communities' own resources (OJ 1988 L 185, p. 24) and 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), provides:

'Revenue from the following shall constitute own resources entered in the budget of the Communities:

…

(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 and customs duties on products coming under the Treaty establishing the European Coal and Steel Community;

…'

3 Article 20 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, the 'Community Customs Code'), provides:

'1. Duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities.

…

3. The Customs Tariff of the European Communities shall comprise:

(a) the combined nomenclature of products;

…

(c) the rates and other items of charge normally applicable to products covered by the combined nomenclature as regards:

— customs duties

…

(d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment;

(e) preferential tariff measures adopted unilaterally by the Community in respect of certain countries, groups of countries or territories;

(f) autonomous suspensive measures providing for a reduction in or relief from import duties chargeable on certain products;

(g) other tariff measures provided for by other Community legislation.

…'

4 Article 217(1) of the Community Customs Code states:

'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).

…'

5 In the context of making available to the Commission the Communities' own resources, the Council of the European Union adopted Regulation No 1552/89, applicable during the period at issue in this case until 30 May 2000. That regulation was replaced as from 31 May 2000 by Regulation No 1150/2000 which consolidates Regulation No 1552/89 but does not alter its content.

6 Article 2 of Regulation No 1552/89 provides:

'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.

…'

7 Article 9(1) of that regulation provides:

‘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.’

8 Under Article 10(1) of that regulation:

‘After deduction of 10% by way of collection costs in accordance with Article 2(3) of Decision 88/376/EEC, Euratom, entry of the own resources referred to in Article 2(1)(a) and (b) of that Decision shall be made at the latest on the first working day following the 19th day of the second month following the month during which the entitlement was established in accordance with Article 2 of this Regulation.

…’

9 Article 11 of Regulation No 1552/89 provides:

‘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 Under Article 22 of Regulation No 1150/2000:

'Regulation (EEC, Euratom) No 1552/89 shall be repealed.

References to the said Regulation shall be construed as references to this Regulation and should be read in accordance with the correlation table set out in Part A of the Annex.'

11 Thus, apart from the fact that Regulations Nos 1552/89 and 1150/2000 contain references to Decision 88/376 and Decision 94/728 respectively, Article 2 and Articles 9 to 11 of those two regulations are, in essence, identical.

12 The rate of 10% specified in Article 10(1) of Regulation No 1150/2000 was raised to 25% by 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).

13 Recital (1) in the preamble of that decision states:

'The European Council meeting in Berlin on 24 and 25 March 1999 concluded, inter alia, that the system of the Communities' own resources should be equitable, transparent, cost-effective, simple and based on criteria which best express each Member State's ability to contribute.'

14 Council Regulation No 150/2003 of 21 January 2003 suspending import duties on certain weapons and military equipment (OJ 2003 L 25, p. 1), adopted on the basis of Article 26 EC, states in recital (5) of the preamble:

'In order to take account of the protection of the military confidentiality of the Member States it is necessary to lay down specific administrative procedures for the granting of the benefit of the suspension of duties. A declaration by the competent authority of the Member State for whose forces the weapons or military equipment are destined, which could also be used as a customs declaration as required by the Customs Code, would constitute an appropriate guarantee that these conditions are fulfilled. The declaration should be given in the form of a certificate. It is appropriate to specify the form which such certificates must take and to allow also the use of means of data processing techniques for the declaration.'

15 Article 1 of that regulation provides:

'This Regulation lays down the conditions for the autonomous suspension of import duties on certain weapons and military equipment imported by or on behalf of the authorities in charge of the military defence of the Member States from third countries.'

16 Article 3(2) of that regulation states:

'Notwithstanding paragraph 1, for reasons of military confidentiality, the certificate and the imported products may be submitted to other authorities designated by the importing Member State for this purpose. In such cases the competent authority issuing the certificate shall send before 31 January and 31 July of each year a summary report to the customs authorities of its Member State on such imports. The report shall cover a period of six months immediately preceding the month on which the report has to be submitted. It shall contain the number and issuing date of the certificates, the date of imports and the total value and gross weight of the products imported with the certificates.'

17 Article 8 of Regulation No 150/2003 states that that regulation is to apply as from 1 January 2003.

Pre-litigation procedure

18 By letter of formal notice dated 17 October 2003 the Commission commenced infringement proceedings against the Hellenic Republic and asked that Member State to calculate and pay own resources related to the imports at issue which were not paid in the period from 1 January 1998 until 31 December 2002 and to pay the interest arising thereon.

19 In its reply of 18 August 2003 relating to infringement proceedings commenced on 21 December 2001 in respect of the same facts, a reply which was however sent on 24 October 2003, the Hellenic Republic contended that Article 296(1)(b) EC permitted it to exempt imports of military material from customs duties in order to protect the essential interests of its security.

20 On 18 October 2004, after consideration of the Hellenic Republic's reply, the Commission issued a reasoned opinion calling upon that Member State to take the measures necessary to achieve compliance within a period of two months from the date of receipt. In its reply of 18 February 2005 the Hellenic Republic repeated and expanded upon the arguments previously submitted.

21 Taking into account what the Hellenic Republic had said, the Commission decided to bring this action.

22 By order dated 13 September 2007 the President of the Court allowed the applications for leave to intervene of the Kingdom of Denmark, the Italian Republic, the Portuguese Republic and the Republic of Finland in support of the forms of order sought by the Hellenic Republic.

The action

Admissibility

23 First, the Hellenic Republic raises an objection of inadmissibility on the ground that the action is procedurally flawed, because the wrong legal remedy has been chosen. The Member State states that, given that it has relied on Article 296 EC in order to justify not paying the customs duties relating to the relevant imports of military material, the Commission was not entitled to bring this action on the basis of Article 226 EC, but was obliged to use the special procedure provided for in the second paragraph of Article 298 EC.

24 It is evident that, while the Hellenic Republic refers to that objection of inadmissibility in its defence, the appropriate form of order is however only presented in the rejoinder, and consequently, in accordance with Article 42 of the Court's Rules of Procedure, that objection must be declared to be inadmissible since the applicant has been denied the opportunity to rebut it.

25 Irrespective of considerations relating to the Rules of Procedure, it must be observed that the Commission's objective in the present action is to obtain a declaration of a failure to fulfil obligations under Articles 2 and 9 to 11 of Regulations Nos 1552/89 and 1150/2000. Article 298 EC is applicable only if the Commission alleges improper use of the powers provided for in Articles 296 EC and 297 EC.

26 Secondly, at the hearing, the representative of the Greek Government raised an objection of inadmissibility by arguing that it is not possible to obtain by means of an action for failure to fulfil obligations a decision of the Court requiring a Member State to adopt specific measures.

27 Suffice it to say in that regard that, as is clear from the very wording of the Commission's application, the latter restricted itself to seeking a declaration that the alleged failure to fulfil obligations had taken place, without asking the Court to impose specific measures on the Member State concerned.

28 Consequently, the Commission's action must be declared admissible.

Substance

Arguments of the parties

29 The Commission claims that the Hellenic Republic is wrong to rely on Article 296 EC to justify the refusal to pay customs duties, since the collection of such duties does not threaten the essential security interests of that Member State.

30 As a preliminary point, the Commission stated that it is not putting in issue the specific geographical position of the Hellenic Republic, but rather that Member State's need to exempt imports of military material from customs duties in order to protect its essential security interests.

31 The Commission considers that measures which establish derogations or exceptions, such as in particular Article 296 EC, must be interpreted strictly. Accordingly, the Member State concerned which claims that Article 296 EC applies and which proposes to derogate from Article 20 of the Community Customs Code, where the general principle of the levying of duties as fixed under Article 26 EC is stated, and consequently from the Common Customs Tariff applicable to the imports in question, should demonstrate that it can satisfy all the conditions laid down in Article 296 EC.

32 According to the Commission, it is for the Greek authorities to provide specific and detailed evidence that the collection of customs duties on the imports at issue in this case threatens essential interests of the security of the Hellenic Republic.

33 In that regard, an increase in the stock of military material or its modernisation and a significant reduction of resources allocated to the equipment programme do not constitute such proof. The same is true of the reliance on how much is spent on 'defence' expenditure when no reference is made to verified relevant data.

34 The Commission rejects as unfounded the Hellenic Republic's argument relating to the fear of disclosure of information affecting military confidentiality during the inspection procedure since, firstly, anyone can obtain access, via the internet, to detailed information on, for example, the type of weapons which have been exported to the Hellenic Republic and, secondly, the purpose of these infringement proceedings is restricted solely to the principle of payment of customs duties. The Commission also states that, in any event, implementation of the Community customs system requires the active involvement of Community and national officials, who are bound by an obligation of confidentiality when dealing with sensitive data.

35 The Commission rejects as untenable the argument that its inaction, after the commencement of the infringement proceedings against the Hellenic Republic in relation to imports of material intended for both civil and military use, is evidence of an implied decision to take no further action in relation to the infringement at issue in this case. The Hellenic Republic cannot claim that there has been a breach of the principle of protection of legitimate expectations on the view that that inaction signified the Commission's acceptance of the exemption at issue in this case, since the two proceedings, although in appearance very similar, are different and the Commission has, in relation to infringement proceedings, a wide discretion.

36 The Commission adds that the legal basis of Regulation No 150/2003 is directly to be found in Article 26 EC relating to the establishment of customs duties and not in

Article 296 EC, which, even under the new legislation, cannot justify the exemption at issue.

37 According to the Commission, the failure to collect the customs duties in question creates a disparity among the Member States in relation to their respective contributions to the Community budget. That failure is evidence of a disregard by that Member State of its obligations in respect of the joint co-financing of the Community budget.

38 Lastly, the Commission considers that the repayment of customs duties to Member States which have correctly applied the Common Customs Tariff cannot compensate for the budgetary disparity in treatment which they have suffered. The Commission, as guardian of the Treaties, cannot condone an infringement of this kind of the Community legislation, which is detrimental to the Community budget.

39 The Hellenic Republic considers that it is clear from the very wording of Article 296(1)(b) EC that the Treaty intended to confer on Member States a significant discretion in relation to measures which they may take for the protection of the essential interests of their security and which are connected with the products to which the provisions of Article 296(1)(b) EC apply. Accordingly, Article 296(1)(b) EC allows Member States to derogate from Article 26 EC and from the Community Customs Code in the case of imports of equipment exclusively intended for military purposes where the objective of those imports is the protection of the essential interests of the security of the Member State concerned, taking into account the specific situation of that Member State.

40 Accordingly, to justify the failure to collect customs duties on the imports of military material in the period concerned, the Hellenic Republic contends that the exceptions provided for in Article 296(1)(a) and (b) EC are applicable, since the implementation of the Community customs legislation to those imports would have jeopardised its essential security interests.

41 The Hellenic Republic considers that the question of whether or not there was an infringement of the customs legislation before the entry into force of Regulation No 150/2003 has not been definitively resolved. Moreover, whether a funding debt has been incurred is dependent, according to the Hellenic Republic, on whether the corresponding customs debt has been incurred.

42 The Hellenic Republic states that the payment of customs duties when military equipment is imported not only has a significant impact on the national armaments programme but also has direct effects on its defence capacity, thereby putting directly at risk the protection of essential interests of its security, within the meaning of Article 296 EC.

43 The Hellenic Republic considers that it has a wide discretion as to the choice of measures necessary for the protection of its essential security interests. In that regard, the fact that Regulation No 150/2003 takes account of the essential security interests of Member States by providing, from 1 January 2003, for a suspension of customs duties when military equipment is imported does not detract from the possibility of applying Article 296 EC where Member States satisfy the conditions laid down in that article.

44 In that regard, the Hellenic Republic is further of the opinion that, by the adoption of Regulation No 150/2003, the Community legislature upheld the need to respect the

security interests of Member States and their right to rely on confidentiality where that is required, and did so by means of specific administrative procedures as part of the rules relating to the suspension of customs duties.

45 The Hellenic Republic considers that it has supplied to the Commission as much information as it could supply, since additional information would harm its essential security interests, and that it is clear from the information which has been sent that the payment of customs duties would have affected its defence capacity, for example by causing reductions in the programme for air force supply and maintenance taking into account the particularly high cost of aircraft interceptions.

46 Further, the Hellenic Republic considers that it is impossible to calculate accurately the customs duties which are payable without also communicating information about the type of material imported, since that information is also the basis of calculation for the customs nomenclature.

Findings of the Court

47 The Community Customs Code provides for the charging of customs duties on imports of products for military use, such as those at issue, from third countries. There is no provision of the Community customs legislation which, in respect of the period of imports at issue, namely from 1 January 1998 to 31 December 2002, provided for any specific exemption from customs duties on imports of products of that type. Consequently, in respect of that period, nor was there any express exemption from the obligation to make payment to the competent authorities of the duties which were payable, accompanied, as appropriate, by payment of default interest.

48 It can moreover be inferred from the fact that Regulation No 150/2003 provided for the suspension of customs duties on certain weapons and military equipment from 1 January 2003 that the Community legislature started from the assumption that an obligation to pay those customs duties existed prior to that date.

49 The Hellenic Republic has not at any time denied the existence of the imports at issue during the period under consideration. The Hellenic Republic has confined itself to challenging the Community's entitlement to own resources while arguing that, pursuant to Article 296 EC, the obligation to pay customs duties on armaments imported from third countries would cause serious damage to its essential security interests.

50 According to the Court's settled case-law, although it is for Member States to take the appropriate measures to ensure their internal and external security, it does not follow that such measures are entirely outside the scope of Community law (see Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 15, and Case C-285/98 *Kreil* [2000] ECR I-69, paragraph 15). As the Court has already held, the only articles in which the Treaty expressly provides for derogations applicable in situations which may affect public safety are Articles 30 EC, 39 EC, 46 EC, 58 EC, 64 EC, 296 EC and 297 EC, which deal with exceptional and clearly defined cases. It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, would be liable to impair the binding nature of Community law and its uniform application (see Case C-186/01 *Dory* [2003] ECR I-2479, paragraph 31 and case-law there cited).

51 Furthermore, the derogations provided for in Articles 296 EC and 297 EC must, in accordance with settled case-law in respect of derogations from fundamental freedoms (see, inter alia, Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 45; Case C-490/04 *Commission* v *Germany* [2007] ECR I-6095, paragraph 86; and Case C-141/07 *Commission* v *Germany* [2008] ECR I-6935, paragraph 50) be interpreted strictly.

52 As regards, more particularly, Article 296 EC, it must be observed that, although that Article refers to measures which a Member State may consider necessary for the protection of the essential interests of its security or of information the disclosure of which it considers contrary to those interests, that Article cannot however be read in such a way as to confer on Member States a power to depart from the provisions of the Treaty based on no more than reliance on those interests.

53 Furthermore, in the area of value added tax, the Court declared in Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585 that there had been a failure to fulfil obligations on the ground that the Kingdom of Spain had not shown that the exemption from that tax on imports and acquisitions of arms, ammunition and equipment exclusively for military use, an exemption provided for by Spanish legislation, was justified, under Article 296(1)(b) EC, by the need to protect the essential interests of the security of that Member State.

54 Consequently it is for the Member State which seeks to take advantage of Article 296 EC to prove that it is necessary to have recourse to that derogation in order to protect its essential security interests.

55 In the light of those considerations, a Member State cannot be allowed to plead the increased cost of military material because of the application of customs duties on imports of such material from third countries in order to avoid, at the expense of other

Member States who collect and pay the customs duties on such imports, the obligations which the principle of joint financing of the Community budget imposes on it.

56 As regards the argument that the Community customs procedures are not capable of safeguarding the security of the Hellenic Republic of, in the light of the confidentiality requirements contained in agreements entered into with exporting States, it must be stated, as correctly observed by the Commission, that the implementation of the Community customs system requires the active involvement of Community and national officials, who are bound when necessary by an obligation of confidentiality, when dealing with sensitive data, which is capable of protecting the essential security interests of Member States.

57 Furthermore, the level of specificity to be attained in the declarations which Member States must periodically complete and send to the Commission is not such as to lead to damage to the interests of those States in respect of either security or confidentiality.

58 In those circumstances, and in accordance with Article 10 EC which obliges Member States to facilitate the achievement of the Commission's task of ensuring compliance with the Treaty, Member States are obliged to make available to the Commission the documents necessary to permit inspection to ensure that the transfer of the Community's own resources is correct. However, as the Advocate General stated in point 168 of his Opinion, such an obligation does not mean that Member States may

not, on a case-by-case basis and by way of exception, on the basis of Article 296 EC, either restrict the information sent to certain parts of a document or withhold it completely.

59 In the light of the foregoing, the Hellenic Republic has not shown that the conditions necessary for the application of Article 296 EC are satisfied.

60 Lastly, as regards the Hellenic Republic's arguments seeking to show that, because of the Commission's prolonged inaction and the adoption of Regulation No 150/2003, that Member State could legitimately consider that the Commission would not bring this action since the Commission had tacitly accepted the existence of an appropriate derogation, it must be observed that the Commission did not at any stage of the proceedings abandon its position in principle.

61 In the declaration which the Commission made during the negotiations relating to Regulation No 150/2003, it expressed its firm intention to maintain its claim to the collection of customs duties which should have been paid for periods prior to the entry into force of that regulation and reserved the right to take the appropriate action in that regard.

62 It follows from the foregoing that, by refusing to calculate and to pay to the Commission own resources which were not collected in the period from 1 January 1998 until 31 December 2002, in relation to imports of military material which were exempted from customs duties, and by refusing to pay default interest arising from the failure to pay those own resources to the Commission, the Hellenic Republic has failed to fulfil its obligations under, respectively, Article 2 and Articles 9 to 11 of Regulation No 1552/89, until 31 May 2000, and, after that date, the same articles of Regulation No 1150/2000.

Costs

63 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 Hellenic Republic and the latter has been unsuccessful, the Hellenic Republic must be ordered to pay the costs.

64 In accordance with the first paragraph of Article 69(4) of the Rules of Procedure the Kingdom of Denmark, the Italian Republic, the Portuguese Republic and the Republic of Finland, which have intervened in the proceedings, are to bear their own costs.

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

1. **Declares that, by refusing to calculate and to make payment to the European Commission of the own resources which were not collected in the period from 1 January 1998 until 31 December 2002, in relation to imports of military material which were exempted from customs duties, and by refusing to pay default interest arising from the failure to pay those own resources to the European Commission, the Hellenic Republic has failed to fulfil its obligations under, respectively, Article 2 and Articles 9 to 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, as amended by Council Regulation (EC, Euratom) No 1355/96 of 8 July 1996, until 31 May 2000, and, after that date, the same articles 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;**

2. Orders the Hellenic Republic to pay the costs;

3. Orders the Kingdom of Denmark, the Italian Republic, the Portuguese Republic and the Republic of Finland to bear their own costs.

[Signatures]