JUDGMENT OF THE COURT (Third Chamber)

18 October 2007 *

In Case C-19/05,

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

Commission of the European Communities, represented by N. Rasmussen, G. Wilms and H.-P. Hartvig, 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.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Klučka, P. Lindh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2007,

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 18 687 475 in own resources, together with default interest thereon as from 27 July 2000, 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 context

The system of own resources

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:

— '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;

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

— 'gross national product' 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.

3 Article 8 of Decision 94/728 provides:

'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.'

4 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), as amended by Council Regulation (Euratom, EC) No 1355/96 of 8 July 1996 (OJ 1996 L 175, p. 3) ('Regulation No 1552/89'), which entered into force on 14 July 1996.

5 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 ... 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'.

6 Article 2(1) and (1a) of that regulation 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 ... 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 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.'

8 Article 17(1) and (2) of that regulation provides:

'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. ...'

Regulation (EEC) No 2913/92

9 Pursuant to Article 204(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'):

'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.'

10 As to entries in the accounts and communication to the debtor of the amount of duty, Article 217 of the Customs 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.'

11 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.'

12 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.

...'

13 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.'

14 Article 239 of the Customs Code states as follows:

'1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.

However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases.'

15 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 1992 L 253, p. 1), as amended by Commission Regulation (EC) No 1677/98 of 29 July 1998 (OJ 1998 L 212, p. 18) ('Regulation No 2454/93'), 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] 50 000;

...'

16 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 [Customs] 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. ...'

The facts of the case and the pre-litigation procedure

17 During 1990, the Danish authorities authorised an undertaking ('the importing undertaking') to import under suspension of customs duties goods intended for the construction of containers, under the 'end-use' scheme, applicable to 'goods intended for incorporation in ... ships, boats or other vessels ... for the purposes of their construction, repair, maintenance or conversion, and [to] goods intended for fitting to or equipping such ships, boats or other vessels' pursuant to the provisions of Section II, A., point 1 of Annex I to Council Regulation (EEC) No 2658/87 of

23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EEC) No 2886/89 of 2 August 1989 (OJ 1989 L 282, p. 1).

18 After carrying out a check from 25 to 29 March 1996, the Commission informed the Danish authorities that the authorisation to import those goods free of customs duties was based on an incorrect interpretation of the provisions applicable, since the containers in question were not intended to be fixed on ships. The Commission requested those authorities to put an end to their practice and found that, because of their negligence, they were liable for the amount of own resources not recovered by the Community.

19 On 30 December 1997, the Danish customs authorities informed the importing undertaking of the Commission's position with regard to the authorisation to import goods for construction of containers under the end-use scheme, without, however, accepting it, and of the application of import duty to those goods from 1 January 1998. Those authorities agreed, however, that the authorisation should remain in force after that date provided that the importing undertaking agreed to bear the risk of customs duties being payable pursuant to Article 204 of the Customs Code. The Danish authorities decided, in application of Article 220(2)(b) of the Customs Code, not to make subsequent entry in the accounts of the import duties owed up to that date, without consulting the Commission in that regard.

20 With effect from 3 February 1998, the Danish authorities withdrew from the importing undertaking the benefit of the end-use scheme, for which they substituted an authorisation under the 'inward processing' scheme. The importing undertaking was therefore able to continue to import goods free of customs duty for the

construction of maritime containers to equip container ships which would subsequently be exported.

21 With regard to the period between 1 January and 3 February 1998 inclusive, the Commission, by letter of 22 July 2004, requested from the Kingdom of Denmark payment of the sum of DKK 1 479 016, corresponding to the amount of customs duty from which the importing undertaking had been exempted under the end-use scheme. By Decision REC 12/03 of 19 May 2004 ('Decision 12/03'), the Commission found that the customs duties should be the subject of a subsequent entry in the accounts, but the importing undertaking could be exempted from payment thereof under Article 239 of the Customs Code. By letter of 21 February 2005, the Commission informed the Kingdom of Denmark that it was no longer considered liable for the non-payment of own resources relating to that period, since the Commission had not found that the Danish authorities were at fault during that period.

22 With regard to the period between 1 January 1994 and 31 December 1997 inclusive, by letter of 9 November 1998 the Commission requested payment from the Danish authorities of the customs duties which they should have collected in respect of the importation by the importing undertaking of the goods required for the construction of containers, that is to say the sum of DKK 18 687 475, net of interest. After an exchange of correspondence, the Commission then instituted the procedure laid down in Article 226 EC for failure by a Member State to fulfil obligations. After requesting the Kingdom of Denmark to submit its observations in a letter of 31 January 2002, on 31 October 2002 to the Commission issued a reasoned opinion requesting the Member State to take all measures necessary to comply therewith within two months of its notification.

23 As it found the Kingdom of Denmark's response to the reasoned opinion to be unsatisfactory, the Commission brought the present action.

The action

Arguments of the parties

24 The Commission submits that the Kingdom of Denmark, by basing its decision to exempt the importing undertaking from import duty under the end-use scheme, during the period 1 January 1994 to 31 December 1997 inclusive, on an incorrect interpretation of the customs rules, has failed to fulfil its obligations to identify and make available to the Community own resources in the sum of DKK 18 867 475. In that regard it refers to Case C-392/02 *Commission* v *Denmark* [2005] ECR I-9811.

25 It points out that the Member States have the obligation to establish the Communities' own resources even where these are disputed (*Commission* v *Denmark*, paragraph 60). The Danish authorities acted at their own risk by maintaining their interpretation of the end-use scheme after the Commission had challenged it during 1996. They did not inform the importing undertaking until 30 December 1997 and failed to fulfil their obligation, laid down in Article 871 of Regulation No 2454/93, to seek a ruling from the Commission on the possible application of Article 220(2)(b) of the Customs Code.

26 The Commission reiterates that it no longer considers the Kingdom of Denmark liable for the non-payment of own resources relating to the period between 1 January and 3 February 1998 inclusive. Decision 12/03, which relates to that period, is therefore irrelevant to the present case.

27 With regard to the period from 1 January 1994 to 31 December 1997, the Commission takes the view that the facts of the present case do not differ from those which gave rise to the judgment in *Commission* v *Denmark*. In particular, it disputes the argument that the importing undertaking could have benefited, with effect from the start of that period, from the inward processing scheme, which would mean that the Community suffered no loss. It submits that that argument is based only on a purely hypothetical consideration and insists that the conditions for granting the inward processing scheme, laid down in Articles 114 to 129 of the Customs Code, differ profoundly from those of the end-use scheme. The Commission adds that, in any event, at the material time the grant of a retroactive licence under the inward processing scheme was not possible. It is therefore takes the view that the Kingdom of Denmark cannot merely assert, to avoid liability, that the importing undertaking could have benefited from the inward processing scheme from 1 January 1994.

28 The Kingdom of Denmark admits that the customs authorities based the decision on an incorrect interpretation of the relevant regulations when giving the benefit of the end-use scheme to the importing undertaking. Despite that error, the Member State takes the view that the present case is different on a fundamental point from that which gave rise to the judgment in *Commission* v *Denmark*. The Community did not lose any resources due to errors committed by the Danish authorities since the importing undertaking could, in any event, have benefited from an exemption of duty under the inward processing scheme.

29 The Kingdom of Denmark recalls that, in that judgment, the Court's analysis was based on the principle of budgetary balance, by which shortfalls in revenues of own resources must be offset either by another own resource or by an adjustment of expenditure (*Commission* v *Denmark*, paragraph 54). In the present case, that balance was not affected, which the Commission itself accepted. In particular, Decision 12/03 demonstrates that the Commission did not suffer a loss, whether in respect of the period between 1 January and 3 February 1998 inclusive or in respect of that between 1 January 1994 and 31 December 1997 inclusive.

30 The Kingdom of Denmark submits that, during 1990, the importing undertaking had requested the benefit of the inward processing scheme, for which it was eligible. The customs authorities then invited it to apply for the end-use scheme, on the basis of an incorrect interpretation of the relevant regulations. Although the end-use and inward processing schemes are different, according to that Member State the fact remains that the importing undertaking was exempt from duty.

31 In those circumstances, since the error committed by the customs authorities had no effect on the Community budget, the Kingdom of Denmark submits that it did not fail to fulfil its obligations.

Findings of the Court

32 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 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 any 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 (*Commission* v *Denmark*, paragraph 68).

33 In the present case, it is common ground that the Danish authorities failed to collect import duties due in respect of the period between 1 January 1994 and 31 December 1997 inclusive because of their own error. That error led them not to make a subsequent entry in the accounts and recovery of those duties in accordance with Article 220(2)(b) of the Customs Code.

34 Since it was thus established subsequently that a condition laid down for the grant of benefit under the end-use scheme was not fulfilled, Article 204(2) of the Customs Code fixes the point at which the importing undertaking's customs debt arose at the time when the goods were placed under that scheme. After the withdrawal, from 31 December 1997, of the licence granted to it during 1990 under that scheme, the importing undertaking could not retroactively obtain a licence under the inward processing scheme. Accordingly the question whether, in 1990, the undertaking could have met the conditions required to obtain a licence under the latter scheme and, if so, whether the Community would have had grounds to seek to have own resources made available in the absence of any harm to its financial interests is irrelevant.

35 In that regard, it is necessary, in any event, to recall that a failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute a breach, and the fact that such a failure had no adverse effects is irrelevant (Case 95/77 *Commission* v *Netherlands* [1978] ECR 863, paragraph 13; Case C-209/88 *Commission* v *Italy* [1990] ECR I-4313, paragraph 14; and Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 37).

36 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 in that article 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.

37 It must accordingly be held that, by failing to make available to the Commission an amount of DKK 18 687 475 in own resources, together with default interest thereon calculated as from 27 July 2000, 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

38 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 and the Kingdom of Denmark has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Declares that, by failing to make available to the Commission of the European Communities an amount of DKK 18 687 475 in own resources, together with default interest thereon calculated as from 27 July 2000, 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.**

[Signatures]