JUDGMENT OF THE COURT (Second Chamber)

14 April 2005 *

In Case C-460/01,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 28 November 2001,

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

applicant,

v

Kingdom of the Netherlands, represented by H.G. Sevenster, acting as Agent,

defendant,

* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 May 2004,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2004,

gives the following

Judgment

1 By its application the Commission of the European Communities has brought an action for a declaration that, between 1 January 1991 and 31 December 1995:

— by failing to proceed with the entry in the accounts and recovery of the customs debt and other relevant duties within three days of the fixed time-limit, or at a

later date pursuant to Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits (OJ, English Special Edition 1971(II), p. 354), when the principal of an external Community transit operation has not, within three months of being notified by the office of departure that the consignment has not been presented on time at the office of destination, provided proof of the regularity of the transit operation in question,

— by failing to make available in due time to the Commission the relevant Community own resources, and

— by refusing to pay the relevant default interest,

the Kingdom of the Netherlands has failed to fulfil its obligations under the second sentence of the second subparagraph of Article 11a(2) of Commission Regulation (EEC) No 1062/87 of 27 March 1987 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1987 L 107, p. 1), the third sentence of Article 49(2) of Commission Regulation (EEC) No 1214/92 of 21 April 1992 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure (OJ 1992 L 132, p. 1), and the third sentence of Article 379(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1) ('the implementing regulation'), and under Articles 2, 9, 10 and 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).

Legal framework

Community customs law

2 Various sets of substantively identical legislative rules applied in succession during the period from 1 January 1991 to 31 December 1995, the period to which the present action pertains.

3 As regards Community transit procedures, in 1991 and 1992 the applicable provisions were Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (OJ 1977 L 38, p. 1), as amended most recently by Regulation (EEC) No 474/90 of 22 February 1990 (OJ 1990 L 51, p. 1) ('Regulation No 222/77') and Regulation No 1062/87, as amended most recently by Commission Regulation (EEC) No 2560/92 of 2 September 1992 (OJ 1992 L 257, p. 5) ('Regulation No 1062/87'). In 1993 the applicable provisions were Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community transit (OJ 1990 L 262, p. 1) and Regulation No 1214/92, as amended by Commission Regulation (EEC) No 3712/92 of 21 December 1992 (OJ 1992 L 378, p. 15) ('Regulation No 1214/92').

4 As regards customs debts, the applicable provisions from the beginning of 1991 to the end of 1993 were Council Regulation (EEC) No 2144/87 of 13 July 1987 on customs debt (OJ 1987 L 201, p. 15), as amended by Council Regulation (EEC) No 4108/88 of 21 December 1988 (OJ 1988 L 361, p. 2) ('Regulation No 2144/87') and

Commission Regulation (EEC) No 597/89 of 8 March 1989 laying down provisions for the implementation of Regulation No 2144/87 (OJ 1989 L 65, p. 11).

5 As regards accounting and recovery of customs debts, the applicable provisions until 1 January 1994 were Council Regulation (EEC) No 1854/89 of 14 June 1989 on the entry in the accounts and terms of payment of the amounts of the import duties or export duties resulting from a customs debt (OJ 1989 L 186, p. 1).

6 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Customs Code') codified the legislation applicable under Community customs law. That code was the subject of provisions in the implementing regulation. Those provisions have been in force since 1 January 1994.

7 Given that the different customs law schemes which applied successively during the period covered by the present action are substantively identical, the parties refer in their arguments only to the provisions which applied as from 1 January 1994, that is, the Customs Code and the implementing regulation. For that reason, the table below simply lists the provisions which applied successively during the periods to which the dispute pertains. The text of the provisions of the Customs Code and the implementing regulation are reproduced after the table.

Calendar years 1991 and 1992	Calendar year 1993	Calendar years 1994 and 1995
Article 1(2) of Regulation No 222/77	Articles 1 and 3(2)(a) of Regulation No 2726/90	Article 91(1)(a) and (2)(a) of the Customs Code
Article 13 of Regulation No 222/77	Article 11(1)(a) and (b) of Regulation No 2726/90	Article 96(1)(a) of the Customs Code
Article 2(1)(c) of Regulation No 2144/87		Article 203 of the Customs Code
Article 2(1)(d) of Regulation No 2144/87		Article 204 of the Customs Code
Article 2(1) of Regulation No 1854/89		Article 217(1) of the Customs Code
Article 3(3) of Regulation No 1854/89		Article 218(3) of the Customs Code
Article 4 of Regulation No 1854/89		Article 219 of the Customs Code
Articles 6(1) and Article 7 of Regulation No 1854/89		Article 221(1) and (3) of the Customs Code
Article 26(1) and (3) of Regulation No 222/77	Article 22(1) and (4) of Regulation No 2726/90	Article 356(1) and (5) of the implementing regulation
Article 36(3) of Regulation No 222/77	Article 34(3) of Regulation No 2726/90	Article 378 of the implementing regulation
Article 11a of Regulation No 1062/87	Article 49 of Regulation No 1214/92	Article 379 of the implementing regulation
Article 11b of Regulation No 1062/87	Article 50 of Regulation No 1214/92	Article 380 of the implementing regulation

The Customs Code

8 Article 91(1)(a) and (2)(a) of the Customs Code provides:

'1. The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:

(a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures;

...

2. Movement as referred to in paragraph 1 shall take place:

... under the external Community transit procedure,

...'.

9 According to Article 96(1)(a) and (b) of the Customs Code:

'The principal shall be the holder of the external Community transit procedure. He shall be responsible for:

(a) production of the goods intact at the customs office of destination by the prescribed time-limit and with due observance of the measures adopted by the customs authorities to ensure identification;

(b) observance of the provisions relating to the Community transit procedure.'

10 According to Article 203 of the Customs Code:

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

— the unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

3. The debtors shall be:

— the person who removed the goods from customs supervision,

— any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,

— any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision,

and

— where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.'

11 According to Article 204 of 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.

3. The debtor shall be the person who is required, according to the circumstances, either to fulfil 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 have been placed, or to comply with the conditions governing the placing of the goods under that procedure.'

12 Article 215 of the Customs Code provides:

'1. A customs debt shall be incurred at the place where the events from which it arises occur.

2. Where it is not possible to determine the place referred to in paragraph 1, the customs debt shall be deemed to have been incurred at the place where the customs authorities conclude that the goods are in a situation in which a customs debt is incurred.

3. Where a customs procedure is not discharged for goods, the customs debt shall be deemed to have been incurred at the place where the goods:

— were placed under that procedure

or

— enter the Community under that procedure.

4. Where the information available to the customs authorities enables them to establish that the customs debt was already incurred when the goods were in another place at an earlier date, the customs debt shall be deemed to have been incurred at the place which may be established as the location of the goods at the earliest time when existence of the customs debt may be established.'

13 Article 217(1) of the Customs Code provides:

'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).'

14 Under Article 218(3) of the Customs Code:

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

(a) calculate the amount of duty in question,

and

(b) determine the debtor.'

15 According to Article 219 of the Customs Code:

'1. The time-limits for entry in the accounts laid down in Article 218 may be extended:

(a) for reasons relating to the administrative organisation of the Member States, and in particular where accounts are centralised,

or

(b) where special circumstances prevent the customs authorities from complying with the said time-limits.

Such extended time-limit shall not exceed 14 days.

2. The time-limits laid down in paragraph 1 shall not apply in unforeseeable circumstances or in cases of force majeure.'

16 According to Article 221(1) and (3) of the Customs Code:

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

...

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

17 Article 236(1) of the Customs Code provides:

'Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220 (2).

No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.'

The implementing regulation

18 According to Article 356(1) and (5) of the implementing regulation:

'1. The goods and the T1 document shall be presented at the office of destination.

...

5. Where the goods are presented at the office of destination after expiry of the time-limit prescribed by the office of departure and the failure to comply with the time-limit is due to circumstances which are explained to the satisfaction of the office of destination and are not attributable to the carrier or the principal, the latter shall be deemed to have complied with the time-limit prescribed.'

19 Article 378 of the implementing regulation provides:

'1. Without prejudice to Article 215 of the [Customs] Code, where the consignment has not been presented at the office of destination and the place of the offence or irregularity cannot be established, such offence or irregularity shall be deemed to have been committed:

— in the Member State to which the office of departure belongs,

or

— in the Member State to which the office of transit at the point of entry into the Community belongs, to which a transit advice note has been given,

unless within the period laid down in Article 379(2), to be determined, proof of the regularity of the transit operation or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the customs authorities.

2. Where no such proof is furnished and the said offence or irregularity is thus deemed to have been committed in the Member State of departure or in the Member State of entry as referred to in the first paragraph, second indent, the duties and other charges relating to the goods concerned shall be levied by that Member State in accordance with Community or national provisions.

3. If the Member State where the said offence or irregularity was actually committed is determined before expiry of a period of three years from the date of registration of the T1 declaration, that Member State shall, in accordance with Community or national provisions, recover the duties and other charges (apart from those levied, pursuant to the second subparagraph, as own resources of the Community) relating to the goods concerned. In this case, once proof of such recovery is provided, the duties and other charges initially levied (apart from those levied as own resources of the Community) shall be repaid.

4. The guarantee covering the transit operation shall not be released until the end of the aforementioned three-year period or until the duties and other charges applicable in the Member State where the said offence or irregularity was actually committed have been paid.

Member States shall take the necessary measures to deal with any offence or irregularity and to impose effective penalties.'

20 According to Article 379 of the implementing regulation:

'1. Where a consignment has not been presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure shall notify the principal of this fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.

2. The notification referred to in paragraph 1 shall indicate, in particular, the time-limit by which proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed must be furnished to the office of departure to the satisfaction of the customs authorities. That time-limit shall be three months from the date of the notification referred to in paragraph 1. If the said proof has not been produced by the end of that period, the competent Member State shall take steps to recover the duties and other charges involved. In cases where that Member State is not the one in which the office of departure is located, the latter shall immediately inform the said Member State.'

21 According to Article 380 of the implementing regulation:

'Proof of the regularity of a transit operation within the meaning of Article 378(1) shall be furnished to the satisfaction of the customs authorities inter alia:

(a) by the production of a document certified by the customs authorities establishing that the goods in question were presented at the office of destination or, where Article 406 applies, to the authorised consignee. That document shall contain enough information to enable the said goods to be identified,

or

(b) by the production of a customs document issued in a third country showing release for home use or by a copy or photocopy thereof; such copy or photocopy must be certified as being a true copy by the organisation which certified the original document, by the authorities of the third country concerned or by the authorities of one of the Member States. The document shall contain enough information to enable the goods in question to be identified.'

22 Article 859 of the implementing regulation provides:

'The following failures shall be considered to have no significant effect on the correct operation of the temporary storage or customs procedure in question within the meaning of Article 204(1) of the [Customs] Code, provided:

— they do not constitute an attempt to remove the goods unlawfully from customs supervision,

— they do not imply obvious negligence on the part of the person concerned, and

— all the formalities necessary to regularise the situation of the goods are subsequently carried out:

(1) exceeding the time-limit allowed for assignment of the goods to one of the customs-approved treatments or uses provided for under the temporary storage or customs procedure in question, where the time-limit would have been extended had an extension been applied for in time;

(2) in the case of goods placed under a transit procedure, exceeding the time-limit for presentation of the goods to the office of destination, where such presentation takes place later;

(3) in the case of goods placed in temporary storage or under the customs warehousing procedure, handling not authorised in advance by the customs authorities, provided such handling would have been authorised if applied for;

(4) in the case of goods placed under the temporary importation procedure, use of the goods otherwise than as provided for in the authorisation, provided such use would have been authorised under that procedure if applied for;

(5) in the case of goods in temporary storage or placed under a customs procedure, unauthorised movement of the goods, provided the goods can be presented to the customs authorities at their request;

(6) in the case of goods in temporary storage or placed under a customs procedure, removal of the goods from the customs territory of the Community or their entry into a free zone or free warehouse without completion of the necessary formalities;

(7) in the case of goods having received favourable tariff treatment by reason of their end-use, transfer of the goods without notification to the customs authorities, before they have been put to the intended use, provided that:

(a) the transfer is recorded in the transferor's stock records;

and

(b) the transferee is the holder of an authorisation for the goods in question.'

Community own resources

23 According to 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):

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

(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, and also contributions and other duties provided for within the framework of the common organisation of the markets in sugar;

(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.

...'.

24 According to Article 2 of Regulation No 1552/89:

'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 amount due has been notified by the competent department of the Member State to the debtor. Notification shall be given as soon as the debtor is known and the amount of entitlement can be calculated by the competent administrative authorities, in compliance with all the relevant Community provisions.

2. Paragraph 1 shall apply when a notification must be corrected.'

25 According to Article 6 of that regulation:

'1. Accounts for own resources shall be kept by the Treasury of each Member State or by the body appointed by each Member State and broken down by type of resources.

2. (a) Entitlements established in accordance with Article 2 shall, subject to point (b) of this paragraph, be entered in the accounts [currently referred to as "A accounting"] at the latest on the first working day after the 19th day of the second month following the month during which the entitlement was established.

(b) Established entitlements not entered in the accounts referred to in point (a) because they have not yet been recovered and no security has been provided shall be shown in separate accounts [currently referred to as "B accounting"] within the period laid down in point (a). Member States may adopt this

procedure where established entitlements for which security has been provided have been challenged and might upon settlement of the disputes which have arisen be subject to change.

...'.

26 According to Article 9(1) of the same regulation:

'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.'

27 Under Article 10(1) of Regulation No 1552/89:

'After deduction of 10% by way of collection costs in accordance with Article 2(3) of Decision 88/376 ..., 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.

However, for entitlements shown in separate accounts under Article 6(2)(b), the entry must be made at the latest on the first working day following the 19th day of the second month following the month in which the entitlements were recovered.'

28 Article 11 of the same regulation 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.'

Legislation applicable to the calculation of periods, dates and time-limits

29 Regulation No 1182/71 lays down the general rules applicable, unless provided for otherwise, to the periods, dates and time-limits fixed by acts of the Council and the Commission. Where not otherwise provided for by the Customs Code and the implementing regulation, the provisions of Regulation No 1182/71 are applicable in the present case.

Pre-litigation procedure

30 From 10 to 14 January 1994 the Commission conducted investigations in the Netherlands concerning the procedures applied in the customs district of Rotterdam to Community transit operations.

31 By letter of 6 June 1994, the Commission sent to the Netherlands authorities the report drawn up following those investigations and drew their attention to the fact that, in the application of Article 379(2) of the implementing regulation and equivalent provisions previously in force, delays had been found in the registration

and, accordingly, in the making available of Community own resources coming from imports.

32 The Commission states that Article 379(1) of the implementing regulation lays down a maximum time-limit of 11 months between the drawing-up of the T1 document by the customs authorities and the notification to the principal of the failure to discharge that document. By adding to that time-limit the three months provided for in Article 379(2) of the same regulation, the Commission's auditors took the maximum time-limit to be 14 months between the drawing-up of a T1 document and the mandatory recovery of the duties in question by the Rotterdam customs authorities when that document was not discharged. However, according to the aforementioned investigation report the Rotterdam customs district did not comply with that time-limit, as the investigation showed that many of the undischarged documents dated back to over 14 months.

33 By letter of 24 February 1995, the authorities contested the Commission's interpretation of the relevant provisions. By letter of 28 April 1995, the Commission informed the authorities that it was upholding its complaints.

34 In the same letter, the Commission stated that the applicable Community legislation did not leave any margin of discretion to the Member States for extending the 14-month time-limit referred to above, and reiterated its earlier request for communication of information relating to T1 documents discharged late during the period between 1 January 1991 and 31 December 1995.

35 In their response of 30 August 1995, the Netherlands authorities provided the Commission with the information requested. On the basis of that information, the

Commission calculated the interest owing under Article 11 of Regulation No 1552/89. To that end, it assumed that the notification provided for in Article 379(2) of the implementing regulation had been sent on the last day of the 11th month after registration of the T1 document in question, so that the relevant customs debt should have been entered in the accounts at the latest at the end of the 14th month following that registration.

36 By letter of 17 December 1996, which contained the details of those calculations, the Commission asked the Netherlands authorities to pay it default interest in the amount of NLG 5 323 395.06 before the last working day of the second month following the notification of that request, that is, before 23 February 1997.

37 By letter of 1 October 1997, the Netherlands authorities informed the Commission that they refused to comply with that request. They referred to the arguments they had put forward previously and criticised the Commission for not having replied to the arguments put forward by them in their letter of 30 August 1995.

38 By letter of 18 February 1999, the Commission issued a letter of formal notice to the Netherlands authorities, to which they replied by letter of 22 April 1999.

39 On 2 February 2000, the Commission issued a reasoned opinion to which the Netherlands authorities replied by letter of 28 March 2000.

40 Taking the view that this last response was not satisfactory, the Commission decided to bring the present action.

The action

41 The Commission's first plea relates to infringement of Article 379(2) of the implementing regulation, in force since 1 January 1994, and of equivalent provisions applicable between 1 January 1991 and 31 December 1993, that is, the second sentence of the second subparagraph of Article 11a(2) of Regulation No 1062/87 and the third sentence of Article 49(2) of Regulation No 1214/92 on the grounds that, between 1 January 1991 and 31 December 1995, the Kingdom of the Netherlands did not proceed with entry in the accounts and recovery of the customs debt in due time in cases of late discharge of external Community transit operations.

42 By its second plea, the Commission alleges that the Netherlands authorities infringed Articles 2, 9 and 10 of Regulation No 1552/89, on the ground that they had not, by the prescribed time-limit, made available to the Commission the own resources relating to the customs debt.

43 The third plea relates to infringement of Article 11 of Regulation No 1552/89 on the grounds of non-payment of the relevant default interest.

Plea of infringement of the second sentence of the second subparagraph of Article 11a (2) of Regulation No 1062/87, the third sentence of Article 49(2) of Regulation No 1214/92 and the third sentence of Article 379(2) of the implementing regulation

Arguments of the parties

44 The Commission submits that Article 96 of the Customs Code and Articles 356 and 379 of the implementing regulation lay down a mandatory schedule which must be

complied with by the principal, the office of departure and the office of destination in dealing with external Community transit operations, particularly when a consignment transported under the auspices of the scheme is not presented at the office of destination by the time-limit fixed when the transit declaration is registered.

45 The Commission states that, pursuant to that schedule:

— the principal must present the consignment in question intact and by the time-limit mentioned in the T1 document at the office of destination (Article 96(1)(a) of the Customs Code and Article 356(1) and (5) of the implementing regulation);

— if the consignment is not presented by that time-limit, the office of departure must, in accordance with Article 379(1) of the implementing regulation, give notice of that failure to present to the principal at the latest before the end of the 11th month following the date of registration of the transit declaration,

and

— as of the day of that notification, a period of three months starts to run during which the principal is given a final opportunity to provide proof of the regularity of the transit operation to the office of departure, to the satisfaction of the customs authorities.

46 According to Article 380 of the implementing regulation, that proof must be provided using certified copies establishing that the consignment was presented at the office of destination or that it was released for home use in a third country. In practice, this is generally done using a copy of a T1 document endorsed by the office of destination and provided to the principal.

47 If that proof has not been furnished by that time-limit, the competent Member State is to take steps to recover the duties and other charges involved pursuant to Article 379(2) of the implementing regulation. The Commission submits that that three-month time-limit is binding not only for the principal but also for the Member State to which the office of departure belongs.

48 Regarding the moment of the entry in the accounts of the customs debt, the Commission states that, pursuant to Article 217(1) of the Customs Code, the Member States are to calculate and enter in the accounts the amount of duty resulting from a customs debt as soon as they have the necessary particulars. In order to determine the time when the mandatory period for entry in the accounts starts running for the Member States, Article 218 of that code has opted for the time when the Member State concerned is 'in a position to' determine the debtor and calculate the amount of the debt. The entry in the accounts should then take place by the time-limit laid down in Articles 218 and 219 of the Customs Code, that is, within two days, with the possibility of extension up to a maximum of 14 days.

49 The Commission observes that, at the latest the first working day of the 15th month following the date of registry of the T1 document, or before, when the office of departure has sent the notification of non-discharge earlier, that office has all the necessary particulars to calculate the amount of duty resulting from the customs debt (Article 217(1) and Article 218(3)(a) of the Customs Code) and to determine the debtor, in this case the principal (Article 218(3)(b) of the Customs Code).

50 According to Articles 218 and 219 of the Customs Code, the debt must be entered in the accounts within two days, which may be extended in certain circumstances to a maximum of 14 days. Therefore, the Member State concerned should take steps to enter the customs debt in the accounts at the latest on the third or 15th day, as the case may be, of the fourth month following the sending of the notification referred to in Article 379(1) of the implementing regulation.

51 Consequently, apart from a possible extension of the time-limit under Article 219 of the Customs Code, the Member State does not have any margin of discretion which might put it in a position to determine when to take steps to enter the customs debt in the accounts. Moreover, Article 221(1) of the Customs Code states that the Member State is to take steps for recovery immediately after the entry in the accounts, by communicating the amount of the debt to the debtor. Logically, recovery must follow that entry in the accounts immediately, even though Article 379(2) of the implementing regulation does not specify whether or not that action should take place rapidly.

52 The Kingdom of the Netherlands contests the argument that a combined reading of Article 379(2) of the implementing regulation and Article 218(3) of the Customs Code shows that a Member State is required to enter duties owing in the accounts immediately within two days after the expiry of the three-month time-limit as from the sending of the notification of non-discharge. In its view, the three-month time-limit referred to in Article 379(2) is a procedural time-limit and not a mandatory time-limit. The opposite argument advocated by the Commission is contrary to the very wording of the provisions in question, does not respect the rights of individuals and raises insuperable practical dif' ·ılties.

53 First, regarding the wording of the provisions in question, the Kingdom of the Netherlands observes that, according to Article 218(3) of the Customs Code, the two-day time-limit starts to run only when the customs authorities 'are in a position to calculate the amount of duty in question, and determine the debtor', which

implies more than merely being in possession of the information in question. In its view, although in practice the entry in the accounts can normally take place immediately after the end of the three-month time-limit, it cannot be inferred therefrom that the expiry of that time-limit must be considered as the starting point of the two-day time-limit referred to in that provision.

54 The third sentence of Article 379(2) of the implementing regulation also merely states that 'the competent Member State shall take steps to recover' the amount of duties owing. Those words do not have the same meaning as the expression 'entered in the accounts' by the 'customs authorities' referred to in Article 218(3) of the Customs Code. The two provisions in question have two different addressees and the time-limit referred to in the latter provision cannot therefore be transposed to Article 379(2) of the implementing regulation.

55 Second, regarding the requirements relating to respect of individual rights, the Netherlands Government states that it follows from Article 379 of the implementing regulation that it is only on the expiry of the three-month time-limit or earlier if the relevant proof is furnished, as the case may be, that the customs authorities may assess whether the Community transit scheme has ended properly, at which place a possible irregularity has occurred, whether or not a customs debt has been incurred and which Member State is competent to take steps to recover that debt. In other words, it is only after examining the evidence provided by the principal that the customs authorities have 'the necessary particulars' within the meaning of Article 217 of the Customs Code to proceed with the calculation and entry in the accounts of the customs debt. The proposition that that assessment must take place within two days, including the calculation of the amount of duty, does not allow for a proper and thorough examination and is, accordingly, detrimental to the rights of individuals.

56 The Netherlands Government adds that a system where the customs authority must take steps for immediate entry of the amount of duties only then to reimburse that

amount if it turns out that the proof of regular discharge of the transit was nevertheless provided by the principal places an unacceptable burden on the principal. That burden is made all the more unacceptable by the fact that in the vast majority of cases it is not the principals who are responsible for presumed irregularities in transit, but rather the customs authorities at the office of destination or the recipients of the shipment.

57 Third, regarding the impossibility of complying with the time-limits in question, the Netherlands Government states that discharge is a cumbersome process and that it is not possible to examine within two days all of the evidence relating to all of the documents and then to designate the party liable for the duties and determine 'the amount of duty'. In practice, various types of documents are presented. It is thus not possible in two days to determine whether a customs debt has been incurred, forward the file if necessary to the competent Member State, determine who is the debtor, calculate the 'amount of duty resulting from the customs debt' and, lastly, send a request for payment.

Findings of the Court

58 The Court notes at the outset that the Netherlands Government does not contest the Commission's findings of fact relating to the customs debts incurred following irregularities committed in the external Community transit system, debts which, during the period which is the subject of the present action, that is, from 1 January 1991 to 31 December 1995, were not the subject of a recovery procedure by the Netherlands customs authorities within the two-day time-limit referred to in Article 218 of the Customs Code following the expiry of the three-month time-limit referred to in the third sentence of Article 379(2) of the implementing regulation and the equivalent provisions which applied previously. However, unlike the Commission, the Netherlands Government considers that, by instigating the recovery procedure several months after the expiry of that three-month time-limit, it did not disregard its obligations under Community customs law.

59 The Court notes that under Article 379(1) of the implementing regulation, when a consignment has not been presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure is to notify the principal of that fact as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration.

60 Although in Case C-112/01 *SPKR* [2002] ECR I-10655, paragraph 40, the Court held that non-compliance with the 11-month time-limit does not by itself prevent recovery of the customs debt from the principal, it also stated, at paragraph 34 of the same judgment, that that time-limit is directed at administrative authorities and has as its objective to ensure diligent uniform application, by those authorities, of the provisions relating to the recovery of customs debts in order to secure rapid availability of the Community's own resources. Accordingly, as acknowledged moreover by the Netherlands Government, compliance with the 11-month time-limit, although it does not have any effect on whether the customs debt is owed, is nevertheless mandatory for the Member States in respect of their Community obligations relating to the making available of Community own resources.

61 Moreover, pursuant to Article 379(2) of the implementing regulation, the notification referred to in Article 379(1) must state, in particular, the time-limit by which proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed may be furnished to the office of departure to the satisfaction of the customs authorities. That time-limit is three months as from the date of notification referred to in Article 379(1). If that proof has not been provided by the expiry of that time-limit, the competent Member State 'shall take steps to recover' the duties and other charges involved.

62 In paragraphs 24 and 25 of Case C-300/03 *Honeywell Aerospace* [2005] ECR I-689, the Court held that it follows from the very wording of Articles 378(1) and 379(2) of the implementing regulation that notification by the office of departure to the principal of the time-limit by which the proof requested must be furnished is

mandatory and must precede recovery of the customs debt. The time-limit is intended to protect the interests of the principal by allowing him three months in which to furnish, where appropriate, proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed. In those circumstances, the Member State to which the office of departure belongs may recover import duties only if, in particular, it has indicated to the principal that he has three months in which to furnish the proof requested and such proof has not been provided within that period.

63 Consequently, where, as in the present case, disputed consignments were not presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure must, with a view to making Community own resources available rapidly, notify that fact to the principal as soon as possible and in any case before the end of the 11th month following the date of registration of the Community transit declaration. That notification must inform the addressee that he has three months during which proof of the regularity of the transit operation or of the place where the offence was actually committed may be provided to the office of departure to the satisfaction of the customs authorities. If that proof has not been provided at the end of that time-limit, the competent Member State 'shall take steps to recover' the customs debt.

64 In this context Article 217(1) of the Customs Code provides that any amount of import duties or export duties resulting from a customs debt must be 'calculated' by the customs authorities as soon as they 'have the necessary particulars' and be 'entered by those authorities in the accounting records'.

65 According to Article 218(3) of the Customs Code, the 'relevant amount of duty shall be entered in the account' within two days of the date on which the customs authorities are 'in a position to calculate the amount of duty in question, and determine the debtor' of the customs debt. Article 219 of the Customs Code allows

for that time-limit to be extended to a maximum of 14 days either for reasons relating to the administrative organisation of the Member States or where special circumstances prevent the customs authorities from complying with the said time-limit. Under Article 221(1) of the Customs Code, the amount of duties must 'as soon as it has been entered in the accounts, ... be communicated to the debtor'.

66 In the present action, the Commission essentially criticises the Netherlands customs authorities for not having taken steps to recover the customs debt within two days of the expiry of the three-month time-limit provided for in Article 379(2) of the implementing regulation. More specifically, it criticises them for not having entered in the accounts the relevant amount of duties, in accordance with Article 218(3) of the Customs Code, and for not having communicated the amount to the debtor pursuant to Article 221(1) of the Customs Code.

67 The Netherlands Government, for its part, states that the Member States are not required to take steps to recover the customs debt immediately upon expiry of the three-month time-limit occurring after the expiry of the 11-month time-limit referred to in Article 379(1) of the implementing regulation. In its view, the latter time-limit cannot be interpreted as being a mandatory time-limit.

68 That argument cannot be accepted.

69 As rightly pointed out by the Commission, it is clear from the very wording of the third sentence of Article 379(2) of the implementing regulation that the Member States are obliged to instigate the recovery procedure upon expiry of the three-month time-limit referred to therein. That interpretation is also necessary in order to guarantee diligent and uniform application by the competent authorities of the provisions governing recovery of customs debts, with a view to making Community own resources available efficiently and speedily.

70 Nor is that interpretation incompatible with Article 221(3) of the Customs Code, which authorises communication of the amount of duties to be paid during a period of three years as from the time when the customs debt is incurred. That provision seeks primarily to ensure legal certainty by prescribing a maximum time-limit for communicating the amount of the customs debt to the debtor. It does not affect the obligations for customs authorities vis-à-vis the Community under the provisions of the Customs Code and the implementing regulation for the purpose of securing diligent and uniform application of the provisions governing recovery of customs debts with a view to ensuring that Community own resources are made available efficiently and speedily.

71 Under Articles 217(1), 218(3), and 219 of the Customs Code, the entry in the accounts of the amount relating to customs debts such as those contemplated in the present action must take place within two days, which may be extended to but not exceed 14 days in all. In addition, the debtor must be informed of the amount of those debts as soon as it has been entered in the accounts, pursuant to Article 221(1) of the Customs Code. That time-limit starts to run from the date when the customs authorities have the necessary particulars and, therefore, are in a position to calculate the amount of duties and determine the debtor. Moreover, contrary to the position advocated by the Netherlands Government, this is precisely the case at the latest upon the expiry of the three-month time-limit referred to in Article 379(2) of the implementing regulation.

72 First, with respect to the finding that a customs debt was incurred, the Court notes that when, as in the cases contemplated in the present action, the consignments placed in the external Community transit procedure were not presented at the office of destination by the time-limit prescribed by the office of departure, the customs debt is presumed to have been incurred and the principal is presumed to be the debtor thereof. In such a case, and when the place of the offence or irregularity cannot be established, the office of departure must, pursuant to Article 379(1) of the implementing regulation, give notice of that fact to the principal before the end of the 11th month following the date of registration of the Community transit declaration.

73 Under the first and second sentences of Article 379(2), that notification must indicate the three-month time-limit which the addressee has in which to prove the regularity of the transit operation. As stated in paragraph 62 of this judgment, the competent customs authorities can take steps to recover the debt only when they have informed the principal that he has a three-month period in which to provide proof of the regularity of the transit operation and that proof has not been produced at the end of that period.

74 Moreover, as the Advocate General stated in paragraph 50 of her Opinion, nothing warrants the conclusion that the examination of the proof presented in order to establish the regularity of the operation, such as that enumerated in a non-exhaustive manner in Article 380 of the implementing regulation, even if that evidence was produced on the last day of the three-month time-limit referred to earlier, justifies a derogation from the provisions of Articles 218 and 219 of the Customs Code for the purposes of the entry in the accounts of the amounts of duties and communication thereof to the debtor pursuant to Article 221(1) of the Customs Code.

75 Turning next to the determination of the debtor of the customs debt, the Court notes that, pursuant to Article 379(1) and (2) of the implementing regulation, at the end of that three-month time-limit, the principal is considered to be the debtor of the customs debt, regardless of whether the liability of other parties might be established, a process which, according to the Netherlands Government, would require supplementary time-limits. Consequently, at the latest upon expiry of the three-month time-limit, the customs authorities are manifestly in a position to identify the principal as debtor of the customs debt.

76 With respect to the determination of the amount of duties, the Court notes that, as explained by the Advocate General in paragraphs 57 to 62 of her Opinion, although the office of departure cannot be required to calculate systematically the amount of duties relating to the customs debt upon import for each transit operation undertaken when the transit declaration is filed, which is when that office, in principle, has the necessary particulars for calculating the duties in question, there is

in any event nothing preventing such a calculation from being made as soon as the principal has been informed of the three-month period which he has to produce proof of the regularity of the operation, that is, at the latest at the end of the 11-month time-limit provided for in Article 379(1) of the implementing regulation.

77 Lastly, with respect to the decision by the competent customs authorities to take steps to recover the customs debt, Article 378(1) and (2) of the implementing regulation establishes a presumption of competence in favour of the Member State to which the office of departure belongs. In the three months provided for in Article 379(2) of that same regulation, proof that the offence was committed in another State may be produced by the principal. As rightly pointed out by the Commission, there is nothing to show that the assessment of the documents produced for that purpose, even assuming that they were provided on the last day of the three-month period, cannot be carried out within the two-day time-limit following the end of the three-month time-limit, increased in duly justified special cases by 12 supplementary days, giving a maximum time-limit of 14 days.

78 It follows from all of the foregoing that the Court must reject the Netherlands Government's argument that the three-month time-limit is merely indicative and that it is not mandatory to instigate the recovery procedure upon expiry of that time-limit because at the end of it the competent customs authorities are physically not able to instigate immediately the procedure to recover the customs debt.

79 Lastly, contrary to the contentions of the Netherlands Government, the communication of the amount of the debt to the principal immediately after the end of the three-month time-limit does not represent a disproportionate burden for him. If it should subsequently emerge that the Community transit operation took place in a lawful manner and within the time-limits allowed or that it ended late without any other irregularities, the principal may obtain reimbursement of the amounts paid,

which, since the adoption of the Customs Code, is expressly provided for in Article 236(1) thereof, once it is established that, in accordance with Article 204(1) of the Customs Code, read together with Article 859 of the implementing regulation, the breach did not have any real impact on the proper functioning of the customs scheme in question.

80 Consequently, the Court finds that the first plea is founded as regards both the provisions of the Customs Code and of the implementing regulation and those of the regulations, in substance identical, which were applicable previously during the period covered by the present action.

Plea alleging infringement of Articles 2, 9 and 10 of Regulation No 1552/89

Arguments of the parties

81 According to the Commission, this plea is an inevitable consequence of the offence described as part of the first plea. Articles 9 and 10 of Regulation No 1552/89 fix time-limits by which the own resources determined pursuant to Article 2 of that regulation are made available to the Commission by crediting those resources to the account opened by the Member States in the name of the Commission.

82 The Commission submits that under Article 2 of Regulation No 1552/89, the Community's entitlement to own resources is established as soon as the debtor in question is informed by the Member State concerned of the amount due, which notification is, in principle, given as soon as the debtor is known and the amount of entitlement can be calculated by the competent administrative authorities. Those conditions are identical to those laid down by Article 217 of the Customs Code for

the entry in the account of a customs debt, although that provision does not speak of 'entitlement', but rather of 'entry in the accounts'. The entry in the accounts proves the existence of a customs debt which, because it partially concerns own resources, triggers the application of Regulation No 1552/89.

83 The entry in the accounts of the customs debt thus also implies automatically entitlement to the relevant own resources. A late entry in the accounts thus automatically leads to late entitlement, which in turn inevitably leads to a late making available of resources. By establishing entitlement to the own resources in question both late and erroneously, the Kingdom of the Netherlands thus also caused undue delay in making those own resources available to the Commission.

84 The Kingdom of the Netherlands observes that, when there is no late entry in the accounts of a customs debt, it is also not possible to speak of a late making available of own resources to the Commission. Not all information is known at the end of the three-month time-limit, which means also that there cannot be an obligation to make an entry in the accounts pursuant to Article 218 of the Customs Code and, consequently, there cannot be an obligation to send notification to the debtor. Likewise, there can be no establishing of entitlement to own resources within the meaning of Article 2 of Regulation No 1552/89, so that it is wrong to say that resources should be made available to the Commission within two days following the end of the three-month time-limit within the meaning of Article 10 of Regulation No 1552/89.

Findings of the Court

85 The late communication, in breach of Articles 221(1) and 218(3) of the Customs Code, of the amount of the relevant duties, as established in the course of the

examination of the first plea, necessarily implies a delay in the establishment of the Communities' entitlement to own resources within the meaning of Article 2 of Regulation No 1552/89. Under that provision, the entitlement in question is established 'as soon as' the competent authorities notify the debtor of the amount due, which must be done as soon as the debtor is known and the amount of entitlement can be calculated by the competent administrative authorities, in compliance with the relevant applicable Community provisions, in this case the Customs Code and the implementing regulation.

86 Under Article 9(1) of Regulation No 1552/89, each Member State, in accordance with the procedure laid down in Article 10 of the same regulation, is to credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed. According to the first subparagraph of Article 10(1), the entry of the own resources is to 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 Regulation No 1552/89.

87 The Court notes that the Kingdom of the Netherlands does not contest the amount of the relevant own resources which, as maintained by the Commission, have, because of the delay in instigating the procedure to recover the customs debt, been credited late to the account opened for that purpose in the name of the Commission with its Treasury or the body it has appointed.

88 In those circumstances, the second plea is also well founded.

Plea relating to infringement of Article 11 of Regulation No 1552/89

Arguments of the parties

89 The Commission maintains that Article 11 of Regulation No 1552/89, under which entries made late by the Member States in favour of the Commission give rise to the payment of default interest, was also breached because the Kingdom of the Netherlands, during the period in question, failed to make available to the Commission the default interest relating to the principal amount due.

90 The Kingdom of the Netherlands maintains that, since there was no late making available of own resources following from a late entry in the accounts of the customs debt within the meaning of the Customs Code or the implementing regulation, interest is not due pursuant to Article 11 of Regulation No 1552/89.

Findings of the Court

91 Under Article 11 of Regulation No 1552/89, any delay in making the entry in the account referred to in Article 9(1) of that regulation gives rise to the payment of default interest by the Member State concerned at the interest rate applicable to the entire period of delay. That interest is payable in respect of any delay, regardless of the reason for the delay in making the entry in the Commission's account (see, inter alia, Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 38, and Case C-363/00 *Commission* v *Italy* [2003] ECR I-5767, paragraph 44).

92 Consequently, pursuant to Article 11 of Regulation No 1552/89, the delays in making the entries of own resources in the Commission's account found under the second plea give rise to entitlement to default interest, the amount and non-payment of which are not contested by the Kingdom of the Netherlands.

93 Accordingly, the third plea is also well founded.

94 In the light of all the foregoing, the Court finds that, between 1 January 1991 and 31 December 1995:

— by failing to proceed with the entry in the accounts of the customs debt and other relevant duties and communicate the amount thereof to the debtor within three days of the time-limit laid down in Article 3(3) and Article 6(1) of Regulation No 1854/89 and in Articles 218(3) and 221(1) of the Customs Code, or at a later date pursuant to Regulation No 1182/71, when the principal of a Community transit operation has not, within three months of being notified by the office of departure that the consignment has not been presented on time at the office of destination, provided proof of the regularity of the transit operation in question,

— by failing to make available in due time to the Commission the relevant Community own resources, and

— by refusing to pay the relevant default interest,

the Kingdom of the Netherlands has failed to fulfil its obligations under the second sentence of the second subparagraph of Article 11a(2) of Regulation No 1062/87, the third sentence of Article 49(2) of Regulation No 1214/92, and the third sentence of Article 379(2) of Regulation No 2454/93, and under Articles 2, 9, 10 and 11 of Regulation No 1552/89.

Costs

95 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Kingdom of the Netherlands and the latter has been unsuccessful, it must be ordered to pay the costs.

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

1. Declares that between 1 January 1991 and 31 December 1995:

— **by failing to proceed with the entry in the accounts of the customs debt and other relevant duties and communicate the amount thereof to the debtor within three days of the time-limit laid down in Articles 3(3) and 6(1) of Council Regulation (EEC) No 1854/89 of 14 June 1989 on the entry in the accounts and terms of payment of the amounts of the import duties or export duties resulting from a customs debt, and in Articles 218(3) and 221(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, or at a later date pursuant to Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits, when the principal of an external Community transit operation has not, within three months of being notified by the**

office of departure that the consignment has not been presented on time at the office of destination, provided proof of the regularity of the transit operation in question,

— by failing to make available in due time to the Commission the relevant Community own resources, and

— by refusing to pay the relevant default interest,

the Kingdom of the Netherlands has failed to fulfil its obligations under the second sentence of the second subparagraph of Article 11a(2) of Commission Regulation (EEC) No 1062/87 of 27 March 1987 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure, as amended by Commission Regulation (EEC) No 2560/92 of 2 September 1992, the third sentence of Article 49(2) of Commission Regulation (EEC) No 1214/92 of 21 April 1992 on provisions for the implementation of the Community transit procedure and for certain simplifications of that procedure, as amended by Commission Regulation (EEC) No 3712/92 of 21 December 1992, and the third sentence of Article 379(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, and under Articles 2, 9, 10 and 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;

2. Orders the Kingdom of the Netherlands to pay the costs.

[Signatures]