JUDGMENT OF THE COURT (Grand Chamber)

15 December 2009 *

In Case C-294/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 July 2005,

European Commission, represented by L. Ström van Lier, P. Dejmek and G. Wilms, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Sweden, represented by A. Kruse and A. Falk, acting as Agents,

defendant,

* Language of the case: Swedish.

supported by:

Federal Republic of Germany, represented by M. Lumma, acting as Agent,

Republic of Finland, represented by J. Heliskoski, acting as Agent,

Kingdom of Denmark, represented by M.J. Molde, acting as Agent,

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: C. Strömholm, 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 failing to declare and pay own resources which were not collected in the period from 1 January 1998 until 31 December 2002, in relation to imports of war material and goods for civil and military use, and by failing to pay default interest arsing from the failure to pay those own resources to the Commission, the Kingdom of Sweden has failed to fulfil its obligations under 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'), and 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 goods;

…

(c) the rates and other items of charge normally applicable to goods 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 goods;

(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) of the preamble to 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 EC 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 goods 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 6 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 importation 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 20 December 2001 the Commission advised the Kingdom of Sweden that the fact that the imports at issue had, since 1998, been exempted from customs duties had caused the Community to suffer a loss of own resources. The Commission called upon the Member State to calculate the amounts which had not been collected in respect of the budgetary years subsequent to the 1998 financial year and to make those amounts available to it by 31 March 2002. The Commission also advised the Swedish authorities that default interest was payable from that date, pursuant to Article 11 of Regulation No 1150/2000.

19 In its reply of 11 March 2002 the Kingdom of Sweden expressed the view that it was entitled, on the basis of Article 296(1)(b) EC, not to collect customs duties when military equipment and goods intended both for civil and military use were imported.

20 By letter of 31 March 2003 the Commission renewed its original request relating to imports of the products in question prior to 1 January 2003, the period subsequent to that date being covered by Regulation No 150/2003.

21 In its reply of 3 September 2003 the Kingdom of Sweden maintained its position and declared that it did not intend to comply with the Commission's request.

22 By letter of 17 October 2003 the Commission gave formal notice to the Kingdom of Sweden that it should make available to it the own resources which were payable to the Commission under Article 26 EC and Article 20 of the Community Customs Code, since the Kingdom of Sweden had, contrary to the terms of those articles, unilaterally exempted imports of dual-use goods for both civil and military use.

23 In its reply of 15 December 2003, the Kingdom of Sweden maintained its position.

24 On 9 July 2004, after consideration of the Kingdom of Sweden's reply, the Commission issued a reasoned opinion for each of the infringement proceedings, namely those relating to the fact that imports of material intended for specifically military use were exempted from duty and those relating to the fact that dual-use goods for both civil and military use were exempted from duty, and called 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 3 September 2004 the Kingdom of Sweden repeated and expanded upon the arguments previously submitted.

25 Taking into account what the Kingdom of Sweden had said, the Commission took the view that the Kingdom of Sweden had not complied with the reasoned opinion and brought this action.

26 By order dated 13 September 2007, the President of the Court allowed the applications for leave to intervene of the Federal Republic of Germany, the Republic of Finland and the Kingdom of Denmark in support of the forms of order sought by the Kingdom of Sweden.

The action

Arguments of the parties

27 The Commission claims that the Kingdom of Sweden 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.

28 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, should demonstrate that it can satisfy all the conditions laid down in Article 296 EC.

29 The Commission rejects as unfounded the Kingdom of Sweden's argument relating to the fear of disclosure of information supplied in the customs declaration and to the fear that monitoring procedures might lead the Community institutions to jeopardise military confidentiality.

30 The Commission adds that the Kingdom of Sweden was perfectly capable of organising the collection of the customs duties at issue in such a way as to safeguard the confidentiality of transmitted information, by, for example, making a military authority responsible for acting as the competent customs authority.

31 The Commission considers that the Kingdom of Sweden has not established in what respect the commitments it entered into under international agreements, on the one hand, and its obligations with regard to own resources, on the other, were incompatible. The same is true of the argument that the Kingdom of Sweden's international

cooperation projects and essential interests of its security and defence policy were seriously jeopardised by those obligations.

32 The Commission states that the Kingdom of Sweden's 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. Moreover, the fact that a Member State exempts imports of military material and dual-use goods for both civil and military use from customs duties in order to reduce their cost is evidence of a failure by that Member State to fulfil its obligations in respect of the joint co-financing of the Community budget.

33 The Commission claims that it is for the Kingdom of Sweden to provide specific and detailed evidence that the measures which it has taken, which deprive the Community budget of own resources, were indispensable for the protection of the essential interests of its security. The Kingdom of Sweden has not provided any such evidence. Furthermore, the fact that other Member States, whose situation is comparable to that of the Kingdom of Sweden, collect and pay customs duties on import duties of military material without thereby imperilling their security deprive the Kingdom of Sweden's arguments on that point of any weight.

34 The Commission also observes that while Regulation No 150/2003, based on Article 26 EC, establishes a means whereby the obligation to collect customs duties on imports of certain military equipment can be suspended, by introducing a system of certificates or customs declarations, there is, on the other hand, no general provision in that regulation which confers on Member States the right freely to determine which goods may be exempted.

35 The Kingdom of Sweden considers that Article 296 EC permits it to take measures for the protection of the essential interests of its security. Pursuant to that article, the Kingdom of Sweden was therefore justified in exempting imports of military material from customs duties. The purpose of that article is to ensure that Member States have freedom of action in certain areas affecting national defence and security. The fact that

Article 296 EC is among the general and final provisions of the EC Treaty confirms its general scope and its effect on all provisions of general scope within the Treaty and within secondary Community law.

36 In support of its claim that Article 296(1)(b) EC is applicable, the Kingdom of Sweden argues that the effect of levying customs duties when military equipment is imported is that the acquisition of such equipment becomes more expensive and consequently, the operational capacity of its armed forces is reduced. The additional direct costs imposed on the national defence budget, because of the customs duties at issue, impinge on the Kingdom of Sweden's freedom of action in the area of acquisition of defence material.

37 The Kingdom of Sweden considers that a consequence of its military neutrality is that national defence has a strategic role within its security policy. Accordingly, because of its surface area, the Kingdom of Sweden is dependent on cooperation at international level if it is to meet the national security and defence objectives. The Kingdom of Sweden argues in that regard that the obligation of confidentiality, by which it considers itself bound, precludes it sending information about the imported goods to the Commission and that any failure on its part to honour that obligation would be likely to jeopardise the pursuit of cooperation and trading relations in the military field with certain third countries.

38 The Kingdom of Sweden is of the opinion that the adoption of Regulation No 150/2003 upholds the need to respect the security interests of Member States and their right to rely on confidentiality where that is necessary.

39 The Kingdom of Sweden considers that, before the entry into force of Regulation No 150/2003, there was no provision of Community law which permitted a Member State, should the need arise for it to do so, to take measures necessary for the protection of the essential interests of its security when military material was imported. According to the Member State, those interests were covered by Article 296 EC and the Kingdom

of Sweden had no other choice but to establish, at national level and on the basis of Article 296 EC, an exemption from import duties when military material was imported.

Findings of the Court

40 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.

41 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.

42 The Kingdom of Sweden has not at any time denied the existence of the imports at issue during the period under consideration. The Kingdom of Sweden 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.

43 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).

44 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.

45 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.

46 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.

47 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.

48 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 and thereby seek 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.

49 As regards the argument that the Community customs procedures are not capable of safeguarding the security of the Kingdom of Sweden, 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.

50 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.

51 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.

52 In the light of the foregoing, the Kingdom of Sweden has not shown that the conditions necessary for the application of Article 296 EC are satisfied.

53 The foregoing arguments, to the effect that Article 296 EC is not applicable in relation to imports of material for specifically military purposes, hold good *a fortiori* in respect of imports of dual-use material for both civil and military use.

54 It follows from the foregoing that, by failing to make payment to the Commission of own resources which were not collected in the period from 1 January 1998 until 31 December 2002, in relation to imports of war material and goods for civil and military use, and by failing to pay default interest arising from the failure to pay those own resources to the Commission, the Kingdom of Sweden has failed to fulfil its obligations under, respectively, Article 2 and Articles 9 to 11 of Regulation No 1552/89 prior to 31 May 2000 and, after that date, the same articles of Regulation No 1150/2000.

Costs

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

56 In accordance with the first paragraph of Article 69(4) of the Rules of Procedure, the Federal Republic of Germany, the Republic of Finland and the Kingdom of Denmark which have intervened in the proceedings, must bear their own costs.

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

1. **Declares that, by failing to declare and pay to the European Commission own resources which were not collected in the period from 1 January 1998 until 31 December 2002, relating to imports of war material and goods for both civil and military use, and by failing to pay default interest arising from the failure to pay those own resources to the European Commission, the Kingdom of Sweden has failed to fulfil its obligations under 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 Kingdom of Sweden to pay the costs.**

3. **Orders the Federal Republic of Germany, the Republic of Finland and the Kingdom of Denmark to bear their own costs.**

[Signatures]