# JUDGMENT OF THE COURT (First Chamber)

5 October 2006 *

In Case C-105/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 21 March 2002,

**Commission of the European Communities,** represented by G. Wilms, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Federal Republic of Germany,** represented by W.-D. Plessing and R. Stüwe, acting as Agents, assisted by D. Sellner, Rechtsanwalt,

defendant,

* Language of the case: German.

supported by

**Kingdom of Belgium,** represented by M. Wimmer and A. Snoecx, acting as Agents, assisted by B. van de Walle de Ghelcke, avocat,

intervener,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric, J.N. Cunha Rodrigues (Rapporteur), M. Ilešič and E. Levits, Judges,

Advocate General: C. Stix-Hackl,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2005,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2005,

gives the following

## Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that:

— by failing properly to process certain transit documents (TIR carnets), with the result that the own resources arising therefrom were not correctly entered in the accounts or made available to the Commission within the prescribed periods;

— by failing to inform the Commission of all the other uncontested customs duties treated in the same way (entry in the B accounts instead of entry in the A accounts) in respect of the non-discharge of TIR carnets by the German customs authorities from 1994 until the amendment of the 1996 decree of the Federal Minister for Finance (III B 1 — Z 0912 — 31/96) ('the 1996 Federal Decree');

the Federal Republic of Germany has failed to fulfil its obligations under 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), which was replaced, with effect from 31 May 2000, by 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).

The Commission also requests the Court to declare that:

— the Federal Republic of Germany is obliged to credit immediately to the Commission's account the own resources which remain unpaid due to the failures to fulfil obligations referred to in the first and second paragraphs;

— the Federal Republic of Germany is obliged to indicate, in respect of any amounts which may already have been transferred to the account, the due date of the claim, the amount owing and, as the case may be, the date of the transfer;

— pursuant to Article 11 of Regulation No 1552/89, for the period up to 31 May 2000, and Article 11 of Regulation No 1150/2000, for the period subsequent to 31 May 2000, the Federal Republic of Germany is required to pay into the Community budget the interest owing in the event of late entry in the accounts.

## Legal framework

### *The TIR Convention*

2 The Customs Convention on the International Transport of Goods under Cover of TIR Carnets ('the TIR Convention') was signed in Geneva (Switzerland) on 14 November 1975. The Federal Republic of Germany is a party to the Convention, as is the European Community, which approved it by Council Regulation (EEC) No 2112/78 of 25 July 1978 (OJ 1978 L 252, p. 1). That convention entered into force for the Community on 20 June 1983 (OJ 1983 L 31, p. 13).

3 The TIR Convention provides, in particular, that goods carried under the TIR procedure which it establishes are not to be subject to the payment or deposit of import or export duties and taxes at customs offices en route.

4 For those facilities to be applied, the TIR Convention requires that the goods be accompanied throughout the transport operation by a standard document, the TIR carnet, which serves to check the regularity of the operation. It also requires that the transport operations be guaranteed by associations approved by the contracting parties, in accordance with the provisions of Article 6 of the Convention.

5 Article 6(1) of the TIR Convention thus provides:

'Subject to such conditions and guarantees as it shall determine, each Contracting Party may authorise associations to issue TIR carnets, either directly or through corresponding associations, and to act as guarantors.'

6 A TIR carnet consists of a set of sheets each comprising vouchers No 1 and No 2 with the corresponding counterfoils, on which appears all the necessary information. One pair of vouchers is used for each territory crossed. At the start of the transport operation, counterfoil No 1 is left with the customs office of departure; discharge takes place once counterfoil No 2 is returned from the customs office of exit in the same customs territory. The procedure is repeated for each territory crossed, using the pairs of vouchers in the one carnet.

7 TIR carnets are printed and distributed by the International Road Transport Union ('IRU'), established in Geneva. The issuance to users is done by the national guaranteeing associations authorised to do so by the administrations of the contracting parties. The TIR carnet is issued by the guaranteeing association of the country of departure, the guarantee provided being covered by the IRU and a pool of insurers established in Switzerland ('the pool of insurers').

8 Article 8 of the TIR Convention provides:

'1. The guaranteeing association shall undertake to pay the import or export duties and taxes, together with any default interest, due under the customs laws and regulations of the country in which an irregularity has been noted in connection with a TIR operation. It shall be liable, jointly and severally with the persons from whom the sums mentioned above are due, for payment of such sums.

2. In cases where the laws and regulations of a Contracting Party do not provide for payment of import or export duties and taxes as provided for in paragraph 1 above, the guaranteeing association shall undertake to pay, under the same conditions, a sum equal to the amount of the import or export duties and taxes and any default interest.

3. Each Contracting Party shall determine the maximum sum per TIR carnet which may be claimed from the guaranteeing association on the basis of the provisions of paragraphs 1 and 2 above.

4. The liability of the guaranteeing association to the authorities of the country where the customs office of departure is situated shall commence at the time when the TIR carnet is accepted by the customs office. In the succeeding countries through which goods are transported under the TIR procedure, this liability shall commence at the time when the goods are imported ... .

5. The liability of the guaranteeing association shall cover not only the goods which are enumerated in the TIR carnet but also any goods which, though not enumerated therein, may be contained in the sealed section of the road vehicle or in the sealed container. It shall not extend to any other goods.

6. For the purpose of determining the duties and taxes mentioned in paragraphs 1 and 2 of this Article, the particulars of the goods as entered in the TIR Carnet shall, in the absence of evidence to the contrary, be assumed to be correct.

7. When payment of sums mentioned in paragraphs 1 and 2 of this Article becomes due, the competent authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the guaranteeing association.'

*The system of the Communities' own resources*

9 Article 2 of Regulation No 1552/89, which features under Title I, entitled 'General Provisions', states:

'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.

...'

10 That provision was amended with effect from 14 July 1996 by Council Regulation (Euratom, EC) No 1355/96 of 8 July 1996 (OJ 1996 L 175, p. 3), the content of which was replicated in Article 2 of Regulation No 1150/2000, which 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 94/728/EC, 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.

2. 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.

...'

11 Article 6(1) and (2)(a) and (b) of Regulation No 1552/89, set out under Title II, entitled 'Accounts for own resources' (now Article 6(1) and (3)(a) and (b) of Regulation No 1150/2000), provides:

'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 accounts"] 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 accounts"] 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.'

12 Article 9 of Regulations No 1552/89 and No 1150/200, set out under Title III, entitled 'Making available own resources', reads as follows:

'1. 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.

2. The amounts credited shall be converted by the Commission and entered in its accounts ...'.

13 According to Article 10(1) of Regulations No 1552/89 and No 1150/2000, included in the same Title III:

'After deduction of 10% by way of collection costs in accordance with Article 2(3) of [Decisions 88/376 and 94/728], entry of the own resources referred to in Article 2(1)(a) and (b) of [those decisions] 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 [the B] accounts under [Article 6(2)(b) and Article 6(3)(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.'

14 Under Article 11 of Regulations No 1552/89 and No 1150/2000, also set out in Title III:

'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.'

15 Article 17(1) and (2) of those regulations, under Title VII, entitled 'Provisions concerning inspection measures', provides:

'1. Member States shall take all requisite measures to ensure that the amount corresponding to the entitlements established under Article 2 are made available to the Commission as specified in this Regulation.

2. Member States shall be free from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements solely if, for reasons of force majeure, these amounts have not been collected. In addition, Member States may disregard this obligation to make such amounts available to the Commission in specific cases if, after thorough assessment of all the relevant circumstances of the individual case, it appears that recovery is impossible in the long term for reasons which cannot be attributed to them. ...'

16 Article 18 of Regulation No 1552/89, now Article 18 of Regulation No 1150/2000, provides:

'1. Member States shall conduct the checks and enquiries concerning the establishment and the making available of the own resources referred to in Article 2(1)(a) and (b) of [Decisions 88/376 and 94/728]. The Commission shall exercise its powers as specified in this Article.

2. In pursuance of paragraph 1, Member States shall:

(a) carry out additional inspection measures at the Commission's request. In its request the Commission shall state the reasons for the additional inspection,

(b) associate the Commission, at its request, with the inspection measures which they carry out.

Member States [shall] take all steps required to facilitate these inspection measures. Where the Commission is associated with these measures, Member States shall place at its disposal the supporting documents referred to in Article 3.

...'

*National provisions*

17 The 1996 Federal Decree provides:

'Claims for payment of import duties under the Community transit procedure or the common transit procedure shall be deemed to be secured only if separate security has been provided for each transit operation and that security has not yet been released.

All other claims arising from the Community transit procedure, the common transit procedure or the TIR procedure shall be deemed to be unsecured ...'

## Pre-litigation procedure

18 During an inspection of traditional own resources carried out by the Commission in Germany from 24 to 28 November 1997, failures and delays had been found, in connection with the customs transit system, in the payment of own resources to the Commission through non-compliance with the accounting rules laid down in Article 6(2)(a) of Regulation No 1552/89. According to the Commission, the German authorities had not properly discharged certain transit documents in connection with the customs transit system, on the basis of the 1996 Federal Decree. In issue were 509 TIR carnets relating to the years 1993 to 1995, and the duties in question totalled approximately DEM 20 million. The customs offices had sent a request in due time for payment of the duties, prescribing a period for payment for the guaranteeing association, but no payment had been made and the German authorities had not claimed the amounts owing through legal proceedings, as they could have done. According to the Commission, the recovery of the duties in question was suspended, or was not even undertaken, as the German Government had concluded agreements with the guaranteeing associations by which it agreed, provisionally, to waive its rights.

19 According to the German authorities, the amounts at issue fell to be considered as unsecured within the meaning of the 1996 Federal Decree. Consequently, they entered those amounts in the B accounts, although an amount of USD 50 000 had been provided by way of contractual security for a TIR carnet under the TIR Convention.

20 That action was criticised by the Commission, which maintains that the contractual security is to be considered as separate or lump-sum security, with the result that the claims in question ought to have been entered in the A accounts, as they were uncontested.

21 By letter of 19 December 1997, the Commission therefore called on the German authorities to provide it with the content of the agreements referred to in paragraph 18 of this judgment and that of other similar agreements which might have been concluded with other guaranteeing associations, and also to inform it as to when and in what form the established, unrecovered own resources arising from the undischarged TIR carnets had been made available to the Commission.

22 By letter of 22 January 1998, the German authorities stated that an increase in fraud marring transit operations under cover of TIR carnets had led to the cancellation of the reinsurance contract by the pool of insurers on 5 December 1994 and the suspension of payments by that pool to the German guaranteeing associations, which were reinsured through the IRU. In those circumstances, the provisional waiver by the German authorities of their legal rights was necessary in order to avoid the bankruptcy of those associations and the consequent collapse of the TIR system throughout the European Union. Moreover, arbitration proceedings were under way between the IRU and the pool of insurers. According to the German authorities, the claims arising from non-discharge of transit operations could be regarded as being secured within the meaning of Regulation No 1552/89 only if the security provided related to individual operations and offered protection on a par with the actual risk, which was not the case here.

23 By letter of 30 March 1998, the Commission reiterated its request that the own resources in question be made available to it, taking the view that the claims arising from the non-discharge of transit operations, established at the time of the inspection of the own resources in November 1997, were secured.

24 By letter of 22 May 1998, the German authorities replied that they could not comply with that request without unduly burdening the German budget, as the securities in question covered only part of the amount of the entitlements at issue. Prior to the adoption of the 1996 Federal Decree, the Federal Republic of Germany made an overall entry of the secured claims in the A accounts and made the own resources available to the Commission, irrespective of the payment or non-payment of the entitlements, even though other Member States were competent to recover the entitlements because of offences or irregularities committed in their territory. That excessive burden on the German budget would no longer have been bearable.

25 By letter of 8 June 1998, the Commission requested the German authorities, inter alia, to provide it with the information requested previously for the purpose of calculating the default interest owing pursuant to Article 11 of Regulation No 1552/89. In their response of 18 September 1998, the German authorities reiterated their position as set out in the letters of 22 January and 22 May 1998.

26 By letter of 30 October 1998, the Commission requested the German Government to pay a certain amount by way of payment on account for the entitlements owing before the last day of the second month following the sending of that letter and also to indicate to it any other uncontested customs amounts which had been entered in the B accounts, instead of in the A accounts, and which related to TIR carnets which had not been discharged by the German customs offices in the years 1994 to 1998.

27 By letter of 4 March 1999, the German authorities reiterated their position and indicated to the Commission that they would not be complying with its requests.

28 In a letter of 24 March 1999, and subsequently in its letter of formal notice of 15 November 1999, the Commission disagreed with the German Government's interpretation of Regulation No 1552/89. It stated therein that, contrary to the German authorities' assertions, what is at issue is not the overall security provided for a number of claims, but the security for each TIR carnet which, in most cases, fully or largely covers the claims.

29 The persistent refusal to provide the Commission with the content of the agreements concluded with the guaranteeing associations was, the Commission agreed, contrary to Article 10 EC. Moreover, the TIR carnets at issue relating to the years 1993 and 1994 in particular were not affected by the cancellation of the reinsurance contract at the end of 1994. As to the TIR carnets relating to the year 1995, the Federal Republic of Germany had provisionally waived its right to enforce its claims against the guaranteeing association, on the condition that the association remained liable 'with an appropriate own share' and that it assigned its claims against the reinsurer by way of security. Consequently, the claims for 1995 and the subsequent years were also covered by security and should have been entered — at least in part — in the A accounts and made available to the Commission, as they had not been challenged within the prescribed periods. Regarding the provisional waiver of recovery of the amounts entered in the B accounts, the Commission observed that, under Article 17 of Regulation No 1552/89, the German authorities were bound to take all requisite measures to ensure that the own resources established were collected.

30 In their correspondence of 1 February 2000, the German authorities maintained and elaborated on their point of view, forwarding to the Commission the agreements concluded with the guaranteeing associations concerning the postponement of payment.

31 On 8 November 2000, the Commission issued a reasoned opinion to the Federal Republic of Germany. According to the Commission, the claims could not be regarded as being challenged on account of the arbitration proceedings between the IRU and the pool of insurers. The principal claims had not been contested by the debtors and the refusal by the pool of insurers to assume the debtor's liability could not be viewed as being a challenge to the principal claims. Finally, the German authorities' provisional waiver of their claims concerned only the liability of the insurers behind the guaranteeing associations. Thus the obligation of the debtors, and therefore the obligation of the Federal Republic of Germany, was not affected as regards the Community budget. Contrary to that Member State's contentions, Article 17(2) of Regulation No 1552/89 was not applicable to the present circumstances; that provision was applicable only when the amounts of the own resources could not be collected due to force majeure (first sentence of that provision) or when recovery was definitively impossible for reasons which could not be attributed to the Member States (second sentence of that provision).

32 The Commission again requested the German authorities to make available immediately to the Commission, by way of payment on account, the amount of DEM 10 552 875 corresponding to the amount in respect of the non-discharge of the TIR carnets relating to the years 1996 and 1997, in order to avoid payment of additional default interest, to provide it with all the other unchallenged customs amounts which had been treated similarly in relation to the non-discharge of TIR carnets by the German customs offices beginning in 1994 until the amendment of the 1996 Federal Decree, and to make available immediately to the Commission the relevant own resources in order to avoid having to pay additional default interest. The Federal Republic of Germany was called on to take the measures necessary to comply with the reasoned opinion within two months of receipt thereof.

33 The German Government replied to the reasoned opinion by letter of 10 January 2001, in which it reiterated the point of view set out above, namely that only the

amounts covered by security which were 'directly and immediately realisable' had to be made available to the Community. This was not the case, however, for the security at issue under the TIR Convention, because the national associations could no longer rely on the IRU's counter-security and the IRU could no longer rely on the pool of insurers' pay-outs, because of the much higher amount of the damages not provided for in the insurance contracts and due to the more serious frauds committed by organised criminal groups. The amount of the security, EUR 60 024, did not cover claims for goods. Moreover, it followed from Article 8(7) of the TIR Convention that, in the event of non-discharge of a TIR operation, payment ought first to be sought from the person directly liable. The guaranteeing associations could be held liable only if this first avenue of recourse were to fail.

34 The claims, moreover, had to be regarded as having been challenged within the meaning of Article 6(2) of Regulation No 1552/89, because they were the subject-matter of disputes between the guaranteeing associations and the administration. Administrative actions and legal proceedings before the German courts were also under way, which justified the amounts' being entered in the B accounts. Lastly, the agreement with those associations was not a waiver of enforcement of rights against those associations, but rather merely a provisional non-enforcement of those rights which was vital for the purpose of avoiding almost certain insolvency.

35 It was in those circumstances that the Commission decided to bring the present action.

36 By order of 9 September 2002 of the President of the Court, the Kingdom of Belgium was granted leave to intervene in support of the forms of order sought by the Federal Republic of Germany.

## The action

*The plea in law alleging partial inadmissibility of the action*

Arguments of the parties

37 The Federal Republic of Germany, supported by the Kingdom of Belgium, submits that the action is partly inadmissible because the Commission, in its third, fourth and fifth heads of claim, seeks to have the defendant ordered to 'credit immediately to the Commission's account the own resources which remain unpaid due to the failures to fulfil obligations' referred to in the present proceedings, to 'indicate, in respect of any amounts which may already have been transferred to the account, the due date of the claim, the amount owing and, as the case may be, the date of the transfer' and to 'pay into the Community budget the interest owing in the event of late entry in the accounts'.

38 It follows clearly from Article 228(1) EC that the role of the Court is limited to finding that a Member State has failed to fulfil obligations and that it cannot force the defendant to act, whereas it is for the national bodies to determine the consequences to be drawn from the failure to fulfil obligations, it being understood that the infringement must cease without delay. Obligations relating to putting an end to an infringement may of course be found in the Court's reasoning in a judgment, but not in the operative part thereof (see, inter alia, Case 303/84 *Commission* v *Germany* [1986] ECR 1171, paragraph 19).

39 Accordingly, the third and fifth heads of claim must be rejected because through those claims the Commission is, in reality, seeking to enforce its claims for payment.

The same is true of the fourth head of claim, by which the Commission puts forward an imprecise request for investigations, whereas the Court can only find, where applicable, that there has been an infringement of the obligation of sincere cooperation and the obligation to provide information (Case C-10/00 *Commission* v *Italy* [2002] ECR I-2357). Moreover, not only was this fourth head of claim not put forward during the pre-litigation procedure, but it reverses the burden of proof, which rests on the Commission and not the defendant Member State.

40 According to the Commission, the wording of Article 228 EC does not prevent the Court from making appropriate declarations with a view to putting an end to an infringement. The Commission observes, in relation to the fourth head of claim, that it is largely dependent on the information provided by the Member States in order to check whether they are paying correctly the amounts of own resources owing. The Member States are bound by a particular obligation of cooperation (Case C-10/00 *Commission* v *Italy*, cited above, paragraph 88 et seq.), explicitly laid down in Article 18(2) and (3) of Regulation No 1552/89, with the result that the Commission could, without breaching the principle of proportionality, require the defendant, as it did from the time of the administrative procedure, to provide it with the information necessary to ascertain the existence and scope of the failure to fulfil obligations, which it described conclusively. That was precisely the point of the second and fourth heads of claim.

41 Regarding the fifth head of claim, the Commission observes that Article 11 of Regulation No 1552/89 sets out a specific and unconditional obligation to pay default interest and that the Court has previously referred to such an obligation in other infringement actions (see, inter alia, Case 303/84 *Commission* v *Germany*, cited above, paragraph 19). In the case of a failure to fulfil an obligation to make a payment, the Member State has no margin of discretion as to how to end the infringement.

42 At the hearing, the Commission reformulated the fifth head of claim so that it is henceforth asking the Court to find that 'the Federal Republic of Germany has infringed Article 11 of Regulation No 1552/89 by failing to credit the Community budget with the interest owing'.

Findings of the Court

43 By the third and fourth heads of claim in its application, and also by the fifth head of claim in the initial version thereof, the Commission asks the Court to order the Federal Republic of Germany to 'credit immediately to the Commission's account the own resources which remain unpaid due to the failures to fulfil obligations referred to in the first and second paragraphs', to 'indicate, in respect of any amounts which may already have been transferred to the account, the amount owing and, as the case may be, the date of the transfer' and to 'pay into the Community budget the interest owing in the event of late entry in the accounts' pursuant to Article 11 of Regulation No 1552/89, for the period up to 31 May 2000, and Article 11 of Regulation No 1150/2000, for the period after 31 May 2000.

44 It is well established that the purpose of an action under Article 226 EC is to obtain a declaration that a Member State has failed to fulfil its Community obligations. When there is a finding of infringement, Article 228 EC expressly requires the Member State in question to take the measures necessary to comply with the judgment of the Court of Justice. The Court cannot, however, order the Member State to take specific measures (see, inter alia, Case C-104/02 *Commission* v *Germany* [2005] ECR I-2689, paragraph 49).

45 Consequently, the Court cannot, in the context of infringement proceedings, rule on pleas such as those in the present case, which seek an order that the Member State enter determined amounts in accounts, provide information concerning certain amounts and transfers and pay default interest.

46 As to the reformulation of the fifth head of claim, the Court notes that in principle it is not permissible for a party to alter the very subject-matter of the case during the proceedings, and the merits of the action must be examined solely in the light of the claims contained in the application initiating the proceedings (see, to that effect, Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3; Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraph 31; and Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 61).

47 The Court has also consistently held (see, inter alia, Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 23, and Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 59) that the letter of formal notice sent by the Commission to a Member State, and the reasoned opinion issued by the Commission, delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the EC Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations.

48 The Court has also held that there can be no requirement that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly

the same, where the subject-matter of the proceedings as defined in the reasoned opinion has not been extended or altered but simply limited (Case C-441/02 *Commission* v *Germany*, cited above, paragraph 61 and case-law cited).

49 In the light of that case-law, the German Government was entitled to consider, both at the stage of the pre-litigation procedure and at the stage of the written pleadings before this Court, that it was not required to submit its observations on the fifth head of claim because it basically was to be construed as being a request for an order to be made against it. The Commission's request for reformulation, put forward for the first time at the hearing and seeking to modify that request for an order, reiterated by the Commission in its reply to the objection of inadmissibility raised by the Federal Republic of Germany in its defence, into a request for a declaration of failure to fulfil obligations, must accordingly be rejected as inadmissible.

50 In the light of the foregoing considerations, the forms of order sought in the present action, which seek to have the Federal Republic of Germany ordered to credit untransferred own resources to the Commission's account, to pay default interest pursuant to Article 11 of Regulations No 1552/89 and No 1150/2000 and to provide information on other, undischarged amounts, must be declared inadmissible.

51 The examination of the present action will thus be restricted to assessing the pleas in law put forward under the first and second heads of claim, namely, first, the failure to discharge properly 509 TIR carnets relating to the years 1993 to 1995 and the failure to make correct accounting entries and make the corresponding own resources available to the Commission and, second, the refusal to indicate to the Commission the other uncontested duties relating to the failure to discharge properly TIR carnets from 1994 up to September 1996, which were also entered in the B accounts.

*Substance*

The first plea: irregularities affecting the treatment of certain TIR carnets, the incorrect accounting entries and the failure to make the corresponding own resources available to the Commission

— Arguments of the parties

52 The Commission submits that, since the claims covered by the present proceedings were covered by security, they should have been entered in the A accounts pursuant to Article 6(2)(a) of Regulation No 1552/89. Under the TIR procedure the payment of customs duties is covered by security, namely the carnets issued by the guaranteeing associations, which are jointly and severally liable for the payment of duties and taxes with the principal debtor in the event of irregularities or fraud committed in the context of a TIR operation.

53 The Commission states that the B accounts are not intended to protect Member States from having excessive charges weighing on their budget, but to allow the Commission better to monitor Member States' action in recovering own resources, particularly in cases of fraud or irregularities. That objective would be rendered meaningless if each Member State was free to assess the quality of the security as it saw fit and to decide alone, without consulting the Commission, when a secured claim was to be entered in either of the accounts.

54 It follows from Article 6 of Regulation No 1552/89, read as a whole, that an entry of entitlements in the A accounts does not presuppose that the security must be

'directly and immediately realisable'. It need only be realisable if, when the security is enforced, the insolvent debtor is ultimately unable to pay the customs debt.

55 According to the Commission, the German authorities, whilst contesting overall the assertion that security for an amount of EUR 60 024 per TIR carnet suffices in most cases to cover customs duties claims for high-tax goods, do not specifically challenge the assertion that the security in this case was sufficient to cover the claims. Nor do they disagree with the contention that the security in question was sufficient at the very least to cover part of the claims in all cases, so that they should have at least to that extent been entered in the A accounts, unless another assessment is not necessary due to the cancellation of the reinsurance contract by the pool of insurers at the end of 1994.

56 Since it is the date at which the TIR operation commenced and the date at which the security was provided which are decisive, claims prior to 1995 should, in any event, have been entered in the A accounts and made available to the Commission. Regarding claims from 1995 and later, the German authorities' contention that at that time the claims should have been considered as unsecured due to the cancellation of the reinsurance contract by the pool of insurers should have led them not to authorise the TIR procedure, given the lack of security. If they nevertheless accepted it and entered the claims in the B accounts on that ground, they should also accept the risk associated with recovery of those claims. It can be assumed that at the very least partial security was provided. The Federal Republic of Germany waived provisionally its right to enforce the claims due from the guaranteeing association on the condition that the association remained liable with an appropriate own share and that it assigned its claims against the reinsurer by way of security. Accordingly, the claims relating to 1995 and subsequent years were covered by security and should — at least in part — have been entered in the A accounts and made available to the Commission, in so far as they had not been challenged within the prescribed periods.

57 The fact that the guaranteeing associations have only subsidiary liability is of no relevance when the claims cannot be recovered from the principal debtor. Subsidiary liability is additional security put back in time which authorises the creditor to have recourse to the assets of the guarantor when the debtor's assets are insufficient. Under Article 8(1) of the TIR Convention, Member States may opt to exercise their rights against the guaranteeing associations.

58 The Commission states that in the present proceedings it refers only to claims established legally. The second sentence of Article 6(2)(b) of Regulation No 1552/89, in so far as it refers to entitlements which 'have been challenged', does not apply when the security provided for a claim is at issue not because the guarantor challenges the principal claim but because the only uncertainty is his ability to honour the security.

59 The Commission adds that the views put forward by the Kingdom of Belgium on the possibility for the guaranteeing association to challenge entitlements are hypothetical, as the existence of the claims in dispute has not been challenged. There was simply cancellation of a security contract, following which the Member State arbitrarily granted a postponement of payment and did not make available to the Community budget the secured amounts as it is bound to do under Regulation No 1552/89. Such conduct cannot be allowed to impact on that budget.

60 Lastly, the German authorities have not adduced any evidence tending to support the assertion that, by their provisional waiver of their right to recover the claims in

question, they acted in the interest of the Community in order to avoid the collapse of the TIR system. In that event, the German authorities should have collaborated, in the interest of the Community, with the Commission and the other Member States before deciding on such a waiver. The unilateral approach of the German authorities illustrates precisely a failure to comply with the obligation of cooperation referred to in Article 10 EC, as does the delay in complying with the Commission's request, reiterated numerous times, to provide it with the details of the agreement concluded between the German Federal Government and the guaranteeing association and those of any other agreements concluded with other guarantors.

61 Regarding the provisional waiver of the right to recover the amounts entered in the B accounts, the Commission submits that the German authorities are required to exercise due care in taking all necessary measures to collect established own resources (Article 17(1) of Regulation No 1552/89). The present case does not come within the scope of the first and second sentences of Article 17(2) of Regulation No 1552/89; the Federal Republic of Germany cannot claim that all of the conditions laid down in that provision are met because it did not comply with the procedure laid down therein and the relevant criteria for application (unforeseeability, exceptional circumstances) of that provision are not satisfied. Hypothetical events, such as a collapse of the reinsurance system, do not justify the conduct of the German authorities.

62 The Federal Republic of Germany, for its part, states that, since as from 1993 the guaranteeing associations were no longer providing sufficient security for the claims arising from TIR carnets which had not been discharged due to the spectacular rise in claims submitted to the pool of insurers, who were increasingly refusing to honour the security under the initial terms, the customs authorities were quite right, initially, to enter the claims in question in the B accounts.

63 According to the very wording of Article 6(2) of, and the recitals in the preamble to, Regulation No 1552/89, only those secured claims for which it is certain that the security will in fact be able to be realised should be entered in the A accounts; this is not the case for insolvent guaranteeing associations whose assets are, as is well known, insufficient, or cancelled or defective international guarantee chains (Article 6 of the TIR Convention). Claims which have not been recovered, but are secured, are, in principle, among the '[establishments which] have not yet been recovered' (Article 6(2)(b) of Regulation No 1552/89); it is possible to make an exception to that principle only when the security turns out to be realisable without difficulty. Member States are not required to pay unsecured or insufficiently secured claims in advance.

64 Unlike the TIR carnets system, in which customs administrations are required to accept the 'security' or 'guarantee' defined at the international level (security, with a ceiling imposed for each carnet by the association of the country in which the customs debt arises), in other customs systems the amount of customs debts at issue is at all times covered by the security (Article 192 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1)) ('the Customs Code'). Customs debts which turn out to be unrecoverable by reason of a security system established by an international convention cannot be equated with secured claims within the meaning of Regulation No 1552/89. Otherwise, the Member States would always have to mobilise ordinary budget resources to make provision for irrecoverable claims without being in any way responsible for the impossibility of recovery.

65 The Commission is incorrect in distinguishing between the periods prior and subsequent to 1 January 1995. The cancellation of the reinsurance contract by the pool of insurers entailed the immediate and retroactive cessation of payments. Moreover, since the security was auxiliary in nature, before the German authorities could bring legal action against the guaranteeing associations, they were obliged to complete the research procedure and fiscal procedures (Article 8(7) of the TIR Convention), which sometimes last a number of years and therefore after 1994.

66 Contrary to the Commission's assertions, following the cancellation of the reinsurance contract at the end of 1994, the German authorities could not refuse to authorise the use of the TIR procedure, without accepting, in addition to the almost total paralysis of east-west trade, unilateral infringement of an integral part of Community customs law (Article 91 of the Customs Code). A Member State may not take the initiative to require additional security, without infringing the provisions of the TIR procedure.

67 In the alternative, even if they were 'secured claims', those amounts should not have been made available to the Commission, because it had not been possible to recover them, inter alia by reason of force majeure within the meaning of the first sentence of Article 17(2) of Regulation No 1552/89. Accordingly, such amounts should not have appeared either in the A accounts or in the B accounts, irrespective of whether it was the principal claim or an auxiliary claim, such as security. The German authorities took all possible measures to recover the claims owing from the guaranteeing associations (test case against the guaranteeing associations, inspection in regard to the inadequacy of the assets of the associations).

68 Moreover, since the IRU was forced to bring lengthy arbitration proceedings against the pool of insurers, proceedings which are still under way, and the economic recovery of the guaranteeing associations will take a number of years, it was clear from the outset that recovery was impossible in the long term, if ever, within the meaning of the second sentence of Article 17(2) of Regulation No 1552/89, because of the manifest and serious insufficiency of the assets of the guaranteeing associations and the lack of will on the part of the pool of insurers to accept liability for payment. The agreements with the guaranteeing associations was the first indication of their return to solvency and enabled them to resume their activities.

69 The Kingdom of Belgium states that the Member States must make customs duties available to the Commission only when they have actually been paid in full and not,

as the Commission maintains, when part of the duties are covered by security. Any other approach would run counter to the purpose of the B accounts, which is to ensure that Member States do not make available amounts which they cannot recover.

70 The Belgian Government also expresses the view that the Federal Republic of Germany has not breached the principle of Community loyalty. In concluding standstill agreements with the guaranteeing associations, the Federal Republic of Germany, as it explained, avoided even greater harm to the TIR system, because if there had been lawsuits those associations would have become bankrupt immediately, which would have led to the collapse of the TIR system and to a situation in which recovery was impossible, referred to in the second sentence of Article 17(2) of Regulation No 1552/89. It is, moreover, unfair on the part of the Commission to criticise Member States for having failed to fulfil their obligations under Community law when the Commission was aware of the payment problems encountered by the guaranteeing associations.

Findings of the Court

71 By this plea, the Commission essentially criticises the German authorities for having waived unilaterally their rights to legal recovery from the guaranteeing associations of the established claims relating to the TIR carnets covered by the present proceedings, for having made incorrect accounting entries for the corresponding own resources by not entering them in the A accounts, and for having failed to make them available to the Commission in a timely manner, contrary to, inter alia, Article 17(1) of Regulation No 1552/89.

72 The Court notes from the outset that the German Government does not deny that the legal recovery proceedings relating to the TIR carnets in dispute were suspended,

or were not brought, because agreements had been concluded with the guaranteeing associations by which the German authorities provisionally waived the right to enforcement of their claims. The German Government further acknowledges that the amount of the corresponding claims was entered in the B accounts and that those claims, arising from TIR operations, were established definitively between 1993 and 1995, with the result that they were established entitlements within the meaning of Article 2(1) of Regulation No 1552/89. The German Government denies, however, that it thereby breached its obligations under Regulation No 1552/89.

73 As noted by the Court in paragraph 66 of the judgment in Case C-392/02 *Commission* v *Denmark* [2005] ECR I-9811, under Article 17(1) and (2) of Regulation No 1552/89, Member States are required to take all requisite measures to ensure that the amounts corresponding to the duties established under Article 2 thereof are made available to the Commission. Member States are to be free from that obligation solely if, for reasons of force majeure, those amounts could not be collected or if it appears that recovery is impossible in the long term for reasons which cannot be attributed to them.

74 In regard to the accounting entries of own resources, Article 6(1) of Regulation No 1552/89 states that each Member State is to keep accounts for those resources with its Treasury or with the body appointed by it. Under Article 6(2)(a) and (b), Member States are obliged to include in the A accounts the entitlements established in accordance with Article 2 of that regulation, 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, without prejudice to the option of entering in the B accounts, within the same prescribed period, the established entitlements which have 'not yet been recovered' and for which 'no security has been provided', and also entitlements established and 'for which security has been provided [and which] have been challenged and might, upon settlement of the disputes which have arisen, be subject to change'.

75 For the purpose of making own resources available, Article 9(1) of Regulation No 1552/89 states that each Member State is to credit own resources to the account opened in the name of the Commission in accordance with the procedure laid down in Article 10 of that regulation. Under Article 10(1), after deduction of collection costs, 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 the same regulation, except for entitlements shown in the B accounts under Article 6(2)(b) of that regulation, for which 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'.

76 In the course of the present proceedings, the German Government has not stated that the entitlements in dispute were challenged within the prescribed periods and might, upon settlement of the disputes which had arisen, be subject to change within the meaning of Article 6(2)(b) of Regulation No 1552/89. It is common ground in the present case that the disputes concern the enforcement of the security and not the existence or amount of the claims in dispute, as that amount has been definitively established.

77 The German Government maintains that the unrecovered entitlements at issue could none the less legitimately be entered in the B accounts because they were not effectively covered by security within the meaning of Article 6(2)(b) of Regulation No 1552/89, referred to above. The German Government does not contest per se the classification of the security provided by the guaranteeing associations in the context of a TIR operation as 'security' within the meaning of that provision. It maintains that, due to the collapse, as from 1993, of the security system, on which the system of transit under cover of a TIR carnet is based, following on the refusal by the pool of insurers to reimburse the German guaranteeing associations, that security was not enforceable due to insolvency of those associations, with the result that the entitlements in question had to be entered in the B accounts as unsecured claims.

78 The Court notes that the guaranteeing association's rights and obligations under the TIR Convention are governed simultaneously by that convention, Community law and the security agreement, subject to German law, which it concluded with the Federal Republic of Germany (Case C-78/01 *BGL* [2003] ECR I-9543, paragraph 45).

79 Under Article 193 of the Customs Code, the security requested to ensure payment of a customs debt may be provided by a guarantor and, under Article 195 of the same code, the guarantor is to undertake in writing to pay jointly and severally with the debtor the secured amount of a customs debt which falls to be paid.

80 With more specific reference to the transport of goods under cover of TIR carnets, referred to in Article 91(2)(b) of the Customs Code, Article 8(1) of the TIR Convention indicates that, through the security agreement, the guaranteeing associations likewise undertake to pay the customs duties owed by the debtor and are jointly and severally liable with the debtors for the payment of those amounts, even though, under Article 8(7) thereof, the competent authorities are, so far as possible, to require payment from the person directly liable before making a claim against the guaranteeing association.

81 In those circumstances, it cannot be disputed that the security provided by the guaranteeing associations in the context of a TIR operation comes within the concept of security for the purposes of Article 6(2)(b) of Regulation No 1552/89.

82 However, under Article 8(3) of the TIR Convention, it is for the Member States to determine the maximum sum per TIR carnet which may be claimed from the guaranteeing association.

83 Accordingly, as the Commission, moreover, acknowledges, the established entitlements relating to TIR operations must in principle be entered in the A accounts and made available to the Commission in accordance with Article 10 of Regulation No 1552/89 up to the ceiling agreed upon for the TIR system, even where, as the case may be, the customs debt exceeds that amount.

84 As correctly pointed out by the Advocate General in points 86 and 89 of her Opinion, that interpretation is in keeping with the objectives pursued by the establishment of the B accounts, which is intended, as indicated by recital (5) in the preamble to Regulation No 1552/89, not only to enable the Commission to monitor more closely Member States' action to recover own resources, but also to take account of the financial risk which they incur.

85 The German Government's line of argument, to the effect that the crisis in the TIR system which led to the collapse of the security system on which the TIR system was based meant that, as from 1993, the disputed claims were in reality no longer secured and that the corresponding amounts therefore had to be entered in the B accounts, cannot be accepted.

86 Without its being necessary to examine whether the security system established by the TIR Convention was no longer functioning properly as from 1993, it appears that, as the Commission has contended, the unilateral decision by the German authorities to suspend the recovery procedures in dispute with the guaranteeing associations, to conclude standstill agreements with them and accordingly to enter those entitlements, which had been definitively established, in the B accounts in any event infringes the obligation which Member States have under Article 17(1) of Regulation No 1552/89 to take all requisite measures to ensure that the own resources established in accordance with the conditions laid down in that regulation are made available to the Commission.

87 Article 17(1) is a specific expression of the obligation of genuine cooperation under Article 10 EC, which requires Member States, when they encounter problems in the application of Community law, to submit those problems to the Commission (see, by analogy, inter alia Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031, paragraph 24) and, in addition, does not allow them to introduce national safeguard measures in response to objections, reservations or conditions which the Commission might put forward (see, by analogy, Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, paragraph 32). In the present case, it is common ground that the Federal Republic of Germany acted unilaterally, even after the Commission had expressed objections.

88 That obligation is all the more important because, as the Court noted in paragraph 54 of its judgment in Case C-392/02 *Commission* v *Denmark*, cited above, shortfalls in revenues of own resources must be offset either by another own resource or by an adjustment of expenditure.

89 Nor may the German Government rely on there being a case of force majeure within the meaning of Article 17(2) of Regulation No 1552/89. It is settled case-law that the concept of force majeure must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the party relying thereupon, the consequences of which, in spite of the exercise of all due care, could not have been avoided (see, inter alia, Case 145/85 *Denkavit* [1987] ECR 565, paragraph 11). In acting unilaterally in the manner described in paragraph 86 of this judgment, the Federal Republic of Germany did not exercise all due care to avoid the consequences alleged.

90 In those circumstances, the Court finds that the first plea is well founded.

The second plea: refusal to notify the Commission of other amounts entered incorrectly in the B accounts

— Arguments of the parties

91 The Commission states that Article 18(2) and (3) of Regulation No 1552/89 is an illustration, in the field of the Communities' own resources, of the obligation of cooperation by which the Member States are bound. In those circumstances, the Commission considers that it may, without breaching the principle of proportionality, require the Federal Republic of Germany to provide the information necessary to enable it to ascertain the existence and scope of the failure to fulfil obligations which it has alleged in the present proceedings.

92 The German Government replies that the Commission cannot rely on a general right to information. Such a right does not exist in the absence of rules laid down to that effect by the Council of the European Union. The obligation of genuine cooperation laid down in Article 10 EC does not allow the Commission to make unreasonable requests for information from the Member States, a fortiori as the information requested by the Commission in the present case would paralyse the work of the competent customs offices for many weeks.

— Findings of the Court

93 Article 10 EC makes it clear that the Member States are required to cooperate in good faith with the enquiries of the Commission pursuant to Article 226 EC, and to provide the Commission with all the information requested for that purpose (see, inter alia, Case C-478/01 *Commission* v *Luxembourg* [2003] ECR I-2351, paragraph 24).

94 Regarding the Member States' obligation to take, in genuine cooperation with the Commission, the measures needed to ensure the application of the Community provisions relating to establishment of possible own resources, the Court has held that it follows in particular from that obligation, laid down more specifically in respect of checks in Article 18 of Regulation No 1552/89, that where the Commission is largely dependent on the information provided by the Member State concerned, that Member State is required to make supporting documents and other relevant documentation available to the Commission under reasonable conditions, to enable it to verify whether and, as the case may be, to what extent the amounts concerned relate to the Communities' own resources (Case C-10/00 *Commission* v *Italy*, cited above, paragraphs 89 to 91).

95 Following the inspections carried out by the Commission's staff in Germany in November 1997, which showed a number of cases of definitively established entitlements arising from TIR operations which had been entered in the B accounts, the Commission had on several occasions, beginning in October 1998, requested the German authorities to provide it with all the other uncontested entitlements which had received the same accounting treatment and which concerned TIR carnets, and which had not been discharged by the German customs offices as from 1994.

96 By failing to comply with that request, the Federal Republic of Germany failed to fulfil its specific obligations under Article 18(2) of Regulation No 1552/89, which requires Member States, inter alia, to carry out additional inspections at the request of the Commission, which request must contain a statement of the reasons for the inspection.

97 As noted in paragraph 95 of this judgment, the reason for the Commission's request was the finding, in the course of the inspection carried out in November 1997, of a certain number of cases which, according to the Commission, pointed to a breach of Regulation No 1552/89. The Commission was therefore perfectly entitled to ask the Federal Republic of Germany to carry out additional inspections within the meaning of Article 18(2) of that regulation in order to provide it with information on other, similar cases during the period in question.

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

99 In the light of the foregoing considerations, the Court finds that:

— by failing properly to process certain transit documents (TIR carnets), with the result that the own resources arising therefrom were not correctly entered in the accounts or made available to the Commission within the prescribed periods;

— by failing to inform the Commission of all the other uncontested customs duties treated in the same way (entry in the B accounts instead of entry in the A accounts) in respect of the non-discharge of TIR carnets by the German customs authorities from 1994 until the amendment of the 1996 Federal Decree,

the Federal Republic of Germany has failed to fulfil its obligations under Regulation No 1552/89, replaced, with effect from 31 May 2000, by Regulation No 1150/2000.

## Costs

100 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 Federal Republic of Germany and the latter has been essentially unsuccessful, it must be ordered to pay the costs. In accordance with Article 69(4) of those Rules, the Kingdom of Belgium is to bear its own costs.

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

**1. Declares that:**

**— by failing properly to process certain transit documents (TIR carnets), with the result that the own resources arising therefrom were not correctly entered in the accounts or made available to the Commission of the European Communities within the prescribed periods,**

**— by failing to inform the Commission of the European Communities of all the other uncontested customs duties treated in the same way (entry in the B accounts instead of entry in the A accounts) in respect of the non-discharge of TIR carnets by the German customs authorities from 1994 until the amendment of the Decree of the Federal Minister for Finance of 11 September 1996,**

**the Federal Republic of Germany has failed to fulfil its obligations under 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, replaced, with effect from 31 May 2000, by 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. **Dismisses the remainder of the action;**

3. **Orders the Federal Republic of Germany to pay the costs;**

4. **Orders the Kingdom of Belgium to bear its own costs.**

[Signatures]