JUDGMENT OF THE COURT (Grand Chamber)

15 December 2009 *

In Case C-372/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 7 October 2005,

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

applicant,

v

Federal Republic of Germany, represented by M. Lumma, acting as Agent and C. von Donat, Rechtsanwalt,

defendant,

* Language of the case: German.

supported by:

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

Hellenic Republic, represented by E.-M. Mamouna, A. Samoni-Rantou and K. Boskovits, acting as Agents, with an address for service in Luxembourg,

Republic of Finland, represented by E. Bygglin and A. Guimaraes-Purokoski, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

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

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

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

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

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by refusing to calculate and to transfer the amount of own resources which were not collected in the period from 1 January 1998 until 31 December 2002, because imports of military material were, contrary to the provisions of the Community customs legislation, exempted from duty, and by refusing to pay default interest arising from the failure to make those own resources available to the Commission, the Federal Republic of Germany 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 (Euratom, EC) 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 products;

…

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

— customs duties

…

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

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

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

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

…'

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

'Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", shall be calculated by the customs authorities as

soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

…'

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

6 Article 2 of Regulation No 1552/89 provides:

'1. For the purpose of applying this Regulation, the Community's entitlement to the own resources referred to in Article 2(1)(a) and (b) of Decision 88/376/EEC, Euratom shall be established as soon as the conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor.

1a. The date of the establishment referred to in paragraph 1 shall be the date of entry in the accounting ledgers provided for by the customs regulations.

…'

7 Article 9(1) of that regulation provides:

‘In accordance with the procedure laid down in Article 10, each Member State shall credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed.

This account shall be kept free of charge.’

8 Under Article 10(1) of that regulation:

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

…’

9 Article 11 of Regulation No 1552/89 provides:

‘Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State’s money market on the due date for short-term public financing

operations, increased by two percentage points. This rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

10 Under Article 22 of Regulation No 1150/2000:

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

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

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

12 The rate of 10% specified in Article 10(1) of Regulation No 1150/2000 was raised to 25% by Council Decision 2000/597/EC, Euratom, of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42).

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

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

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

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

15 Article 1 of that regulation provides:

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

16 Article 3(2) of that regulation states:

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

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

Pre-litigation procedure

18 By letter of 20 December 2001 the Commission advised the Federal Republic of Germany that the fact that imports of military equipment 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 tax year and to make those amounts available to it by 31 March 2002. The Commission also advised the German authorities that default interest was payable from the latter date, pursuant to Article 11 of Regulation No 1150/2000.

19 In its replies of 13 March and 6 May 2002 the Federal Republic of Germany expressed the view that Article 296(1)(b) EC permits it to derogate from the application of the

Common Customs Code, where the imports are of equipment exclusively intended for military purposes, and where the objective is the protection of the essential interests of its security.

20 By letter of 24 March 2003 the Commission renewed its original request relating to imports prior to 1 January 2003, the period subsequent to that date being covered by Regulation No 150/2003.

21 In its reply of 12 May 2003 the Federal Republic of Germany maintained its position on making available the amounts of own resources in question.

22 By letter of 17 October 2003 the Commission gave formal notice to the Federal Republic of Germany.

23 In its reply of 19 January 2004 the Federal Republic of Germany maintained its position.

24 On 18 October 2004, after consideration of the Federal Republic of Germany's reply, the Commission issued a reasoned opinion calling upon that Member State to take the measures necessary to achieve compliance within a period of two months from the date of receipt. The Member State replied on 16 December 2004 that it was maintaining its position.

25 Since the Federal Republic of Germany moreover made a without prejudice payment of EUR 10 803 000 but did not break down that sum according to imports and different periods and the Commission did not have sufficient information to do so, on 16 December 2004 the Commission by letter called upon that Member State itself to provide that breakdown in order that default interest could be calculated. In its reply of

22 February 2005 the Federal Republic of Germany refused to send that information, and commented that such information was confidential.

26 Taking into account what the Federal Republic of Germany had said, the Commission took the view that the Federal Republic of Germany had not complied with the reasoned opinion and brought this action.

27 By orders dated 23 February 2006 and 4 May 2006, the President of the Court allowed the applications for leave to intervene of the Kingdom of Denmark, the Hellenic Republic and the Republic of Finland in support of the forms of order sought by the Federal Republic of Germany.

The action

Admissibility

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

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

30 Consequently, the first objection of inadmissibility must be rejected.

31 Secondly, the Federal Republic of Germany claims that this action is inadmissible because the Commission is not capable, due to the very nature of this action, of proving an infringement of the EC Treaty. Given that the Member State was not obliged to provide the information requested by the Commission, the Commission does not have sufficient evidence relating to the imports at issue to enable it to prove any failure to fulfil Treaty obligations.

32 Thirdly, the Federal Republic of Germany claims that it was entitled not to send the information requested by the Commission and that because the action is based, inter alia, on that failure the action is therefore also inadmissible in that respect.

33 With regard to the second and third objections of inadmissibility raised by the Federal Republic of Germany, it is clear that they relate, on the one hand, to the burden of proof incumbent on the Commission and, on the other hand, to the applicability and scope of Article 296 EC. They are related therefore more to the substance of the Commission's action than to its form or validity.

34 Consequently, the second and third objections of inadmissibility must be rejected.

35 In those circumstances, the Commission's action must be declared admissible.

Substance

Arguments of the parties

36 The Commission claims that the Federal Republic of Germany 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.

37 The Commission considers to be misguided the Member State's argument to the effect that information relating to imports of military equipment, and therefore to the security of the Federal Republic of Germany, could not be sent to the Commission, and that, consequently, the customs duties at issue did not have to be paid by the Federal Republic of Germany to the Commission.

38 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.

39 The Commission also considers that the mere fact that products appear on the list established by Council Decision 255/58 of 15 April 1958, a list which defines the

products to which Article 296(1)(b) EC may be applied, does not itself mean that that provision is applicable, since a prerequisite of its application is that all the conditions specified therein are satisfied.

40 The Commission claims, consequently, that it is for the Federal Republic of Germany to provide specific and detailed evidence that the collection of customs duties on the imports at issue in this case threatens essential interests of the security of the Federal Republic of Germany.

41 In that regard, the Federal Republic of Germany's general statements that its defence capacity is an essential part of its security policy and that the international cooperation which is fundamental to its defence policy would be significantly hindered by the obligation to pay customs duties on the material in question do not constitute such evidence. The same is true of the argument that confidentiality clauses in international treaties and military confidentiality preclude the application of the Community customs legislation. Lastly, the fact that other Member States collect and pay customs duties on imports of military material confirms that this is perfectly possible on that type of material.

42 The Commission considers that the way in which the Community customs system operates safeguards the confidentiality of processed information. Furthermore, since that system is implemented by national officials, the Federal Republic of Germany is in a position to safeguard its essential security interests.

43 The Commission considers that, as regards the Federal Republic of Germany's argument that an increase in the costs of imports of armaments is likely to damage its defence capacity, no specific evidence of such damage has been provided by the Federal Republic of Germany. On the contrary, the single payment, made in 2004, of customs duties payable for five years does not appear to have diminished the outlays of the Federal Republic of Germany on defence.

44 The Commission emphasises that it is not acceptable for a Member State to exempt imports of military equipment from customs duties in order to reduce the costs of war material, because that is evidence of a failure by that Member State to fulfil its obligations in respect of the joint co-financing of the Community budget.

45 The Commission states, in that regard, that the failure of the Federal Republic of Germany to collect the customs duties in question creates a disparity among the Member States in relation to their respective contributions to the Community budget. The effect of that failure to collect is a reduction of Community traditional own resources which can be offset only by an increase in the GNP resource, which is distributed between the Member States.

46 The Commission states that the Federal Republic of Germany'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 has no bearing on the issue.

47 Regulation No 150/2003 provides that Member States are to inform the Commission of the quantity of military equipment ordered. It is, consequently, astonishing that, in relation to the Communities' own resources, the Federal Republic of Germany relies on overriding security interests which preclude the communication of the information needed for the collection of those resources.

48 Furthermore, such a position can scarcely be reconciled, according to the Commission, with the fact that any individual can obtain access, on the internet, to information relating, for example, to the quantities purchased in that area. That freely accessible information is significantly more detailed than that needed for classification in the Common Customs Code and for payment of own resources.

49 The Commission rejects as unfounded the Federal Republic of Germany's argument that the negotiations which led to the adoption of Regulation No 150/2003 and the suspension, in 1984, of the infringement proceedings brought against the Federal Republic of Germany gave rise to a legitimate expectation, namely that that Member State could reasonably expect that, during the years when that regulation was under preparation, it was permitted to import certain military equipment free of duties.

50 The Commission adds that Regulation No 150/2003 is applicable from 1 January 2003 and that, during discussions on its adoption, the Commission declared that it was obliged to collect the customs duties at issue in respect of preceding years, so that no protection of legitimate expectations can be inferred from the adoption of that regulation. Moreover, that regulation is based on Article 26 EC, and not on Article 296 EC.

51 Similarly no protection of any legitimate expectation can be inferred from the suspension of particular infringement proceedings in 1984, since the Commission has, in the context of Article 226 EC, a wide discretion which allows it to decide, inter alia, whether it is appropriate to initiate or continue infringement proceedings.

52 The response of the Federal Republic of Germany is that, in the present case, the conditions for the application of Article 296(1)(b) EC are satisfied. It considers that it is clear from the very wording of that provision that the Treaty intended to confer on Member States a significant discretion in relation to measures which they may take for the protection of the essential interests of their security and which are connected with the products to which the provisions of Article 296(1)(b) EC apply. Accordingly, that article allows Member States to derogate from Article 26 EC and from the Community Customs Code in the case of imports of equipment exclusively intended for military purposes where the objective of those imports is the protection of the essential interests of the security of the Member State or Member States concerned.

53 The Federal Republic of Germany adds that it is not obliged to levy customs duties on imports of all military material and, consequently, there cannot be any infringement of Article 2 and Articles 9 to 11 of Regulations Nos 1552/89 or 1150/2000. There is no obligation of that kind, because, on the one hand, Community law does not provide for any unrestricted obligation to levy customs duties on military equipment and, on the other, the essential security interests of the Federal Republic of Germany preclude the levying of customs duties on imports of such equipment.

54 Moreover, the Federal Republic of Germany considers that the Commission has lost the right to seek a declaration of failure to fulfil obligations in relation to the exemption of imports of military equipment from customs duties because the Commission appeared, in 1984, to have brought to an end the infringement proceedings initiated for that purpose, but thereafter, although the situation was unaltered and taking into account the preparatory work for Regulation No 150/2003, resumed proceedings subsequently in order to penalise conduct which until then had been accepted or tolerated. Community Law does not recognise any mechanism for the 'provisional' suspension of infringement proceedings. The Commission was obliged, according to the Federal Republic of Germany, either to continue or terminate the infringement proceedings against it, and not interrupt the proceedings for 17 years.

55 The Federal Republic of Germany states that, before the entry into force of Regulation No 150/2003, no specific procedural provision provided for the levying of customs duties on imports of armaments and the monitoring of that levy, which was proof that there was no obligation under Community law to levy the customs duties at issue.

56 According to the Federal Republic of Germany, whether or not customs duties are levied on imports of armaments has effects on the trade in arms, munitions and war material. Whilst levying those customs duties restricts that trade, consequently reduces the operational capacity of the armed forces and impinges on that Member State's freedom of action in the area of acquisition of defence material, waiver of those duties makes it possible to extend trade and strengthen cooperation in relation to armaments for the purposes of Article 17 EU.

57 The Federal Republic of Germany also contends that the test of what is 'necessary' within Article 296 EC as interpreted by the Commission is unreasonably high. It does not involve having to demonstrate that grave damage to essential security interests would occur if the protective measure were not taken. It is enough if that measure improves the security situation and is merely necessary in the interests of national defence.

58 Similarly, the obligation of confidentiality prevents the Federal Republic of Germany communicating information to the Commission and a refusal to respect that obligation is likely to undermine the interests of that Member State in relation to the security of information. Moreover, the obligation of good faith provided for in Article 10 EC does not involve the introduction of measures which are disproportionate, such as the establishment of a specific customs procedure.

59 The open processing of information contained in a customs declaration may cause serious damage to the essential security interests of Member States. The confidentiality measures provided for by the Community Customs Code are not adequate to satisfy the requirements of security and confidentiality which a Member State is entitled to demand when the information concerned affects its security.

60 The Federal Republic of Germany maintains that the fact that a Member State has exempted imports of military materials from customs duties on the basis of Article 296 EC does not necessarily infringe the principle of Community solidarity. It would be inconsistent with that principle for Member States which bear the costs of higher defence spending to be called upon to make a greater contribution to the financing of the Community budget.

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

62 The Federal Republic of Germany observes that, on the basis of Regulation No 150/2003, the levying of customs duties on imports of certain armaments and military equipment from third countries was also excluded after 1 January 2003, the date on which that Regulation was declared to be applicable. Accordingly, as from that date, the interests of the Federal Republic of Germany in relation to imports of armaments have been protected by the provisions of that regulation. The waiver of customs duties on those imports was just as necessary before as after that date, in order to ensure the protection of the essential security interests of Member States. Moreover, the fact that, as early as 1988, the Commission submitted a proposal for a Council Regulation (EEC) temporarily suspending import duties on certain weapons and military equipment (OJ 1988 C 265, p. 9) ultimately proves that the Commission was aware of the fact that the waiver of customs duties on those imports was necessary in order to protect those interests.

63 That Member State concludes that, from the date of that proposal, and even though the outcome of that proposal in the form of Regulation No 150/2003 was seen only in 2003, Member States could justifiably take the view that it was not necessary to collect customs duties on imports of 'products exclusively for military use' appearing in the list established by Decision 255/58.

Findings of the Court

64 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.

65 It can moreover be inferred from the adoption of Regulation No 150/2003 which 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.

66 Furthermore, the Federal Republic of Germany has not at any time denied the existence of the imports at issue during the period under consideration. During the pre-litigation procedure, the Federal Republic of Germany moreover made a payment, under the heading of own resources, of EUR 10 803 000 related to the imports at issue, but did not break down that sum according to imports and different periods.

67 The Federal Republic of Germany has confined itself to challenging the Community's entitlement to the own resources at issue 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.

68 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).

69 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.

70 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.

71 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.

72 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.

73 In the light of those considerations, a Member State cannot be allowed to plead the increased cost of military material because of the application of customs duties on imports of such material from third countries in order to avoid, at the expense of other Member States who collect and pay the customs duties on such imports, the obligations which the principle of joint financing of the Community budget imposes on it.

74 As regards the argument that the Community customs procedures are not capable of safeguarding the security of the Federal Republic of Germany, 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 application 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.

75 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.

76 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.

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

78 Lastly, as regards the Federal Republic of Germany's arguments intended to show that, because of the Commission's prolonged lack of action and the adoption of Regulation No 150/2003, the Federal Republic of Germany could legitimately consider that the Commission would not bring this action on the ground that the Commission had tacitly

accepted the existence of an appropriate derogation, it must be observed that the Commission did not at any stage of the proceedings abandon its position in principle.

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

80 It follows from the foregoing that, by refusing to calculate, declare and to make available to the Commission the own resources relating to imports of military material during the period from 1 January 1998 to 31 December 2002 and by refusing to pay default interest payable due to the failure to make those own resources available to the Commission, the Federal Republic of Germany has failed to fulfil its obligations under Article 2 and Articles 9 to 11 of Regulation No 1552/89 and the same articles of Regulation No 1150/2000.

Costs

81 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 unsuccessful, the Federal Republic of Germany must be ordered to pay the costs.

82 Under Article 69(4) of the Rules of Procedure, the Kingdom of Denmark, the Hellenic Republic and the Republic of Finland, which have intervened in the proceedings, are to bear their own costs.

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

1. **Declares that, by refusing to calculate, declare and make available to the European Commission the own resources relating to imports of military material during the period from 1 January 1998 to 31 December 2002 and by refusing to pay default interest payable due to the failure to make those own resources available to the European Commission, the Federal Republic of Germany 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 (Euratom, EC) No 1355/96 of 8 July 1996, 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;**

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

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

[Signatures]