JUDGMENT OF THE COURT (Grand Chamber)

15 December 2009 *

In Case C-387/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 21 October 2005,

European Commission, represented by G. Wilms, L. Visaggio and C. Cattabriga, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, and by G. De Bellis, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

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,

Portuguese Republic, represented by C. Guerra Santos, L. Inez Fernandes and J. Gomes, acting as Agents,

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent,

interveners,

THE COURT (Grand Chamber),

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

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: 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 unilaterally exempting imports of material capable of use both for civil and military purposes during the period from 1 January 1999 to 31 December 2002 from customs duties and by refusing to calculate and pay the own resources which were not collected because of that exemption and the default interest payable because of the failure to make those own resources available to the Commission in good time, the Italian Republic has failed to fulfil its obligations under, on the one hand, Article 26 EC, 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*') and, consequently, the Common Customs Tariff and, on the other, Articles 2, 9, 10 and 17(1) 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 the Community Customs Code provides:

'1. Duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities.

…

3. The Customs Tariff of the European Communities shall comprise:

(a) the combined nomenclature of goods;

…

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

— customs duties

…

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

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

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

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

…'

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

'Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

…’

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

6 Article 2 of Regulation No 1552/89 provides:

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

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

…’

7 Article 9(1) of that regulation provides:

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

This account shall be kept free of charge.’

8 Under Article 10(1) of that regulation:

‘After deduction of 10% by way of collection costs in accordance with Article 2(3) of Decision 88/376/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 17(1) of Regulation No 1552/89 provides:

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

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, Articles 2, 9, 10 and 17(1) of those two regulations are, in essence, identical.

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

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

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

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

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

15 Article 1 of that regulation provides:

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

16 Article 3(2) of that regulation states:

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

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

Pre-litigation procedure

18 As part of infringement proceedings commenced against the Italian Republic the Commission issued a reasoned opinion on 25 July 1985, claiming an infringement of Article 28 of the EC Treaty (now, after amendment, Article 26 EC) and of the Community customs legislation in relation to imports of material which was not specifically military. Those proceedings were later suspended.

19 In the absence of any agreement on the proposal for a Council Regulation (EEC) relating to the temporary suspension of customs duties on certain armaments and military equipment (OJ 1988 C 265, p. 9), the Commission then decided to resume those proceedings. The Commission sent to the Italian Republic a letter of formal

notice, dated 31 January 2002, calling upon it to submit its observations on the infringement of Article 26 EC and the Community customs legislation.

20 On the same date the Commission also sent to the Italian Republic a second letter of formal notice relating more specifically to the financial consequences of the infringement in question. The Commission called upon that Member State to calculate the amount of own resources which had not been paid to the Community for the budgetary years following 1 January 1999, to make those resources available to it and to pay default interest payable pursuant to Article 11 of Regulation No 1150/2000.

21 No reply was made however by the Italian Republic to those two letters.

22 Regulation No 150/2003 entered into force as from 1 January 2003.

23 By letter of 24 March 2003 the Commission renewed its original request concerning imports prior to 1 January 2003, the period after that date being covered by Regulation No 150/2003. The Italian Republic chose not to reply to that letter either.

24 The Commission therefore decided to issue a reasoned opinion by letter of 11 July 2003 calling upon the Italian Republic to take, within a period of two months following receipt, the measures necessary to comply with that opinion.

25 The Italian Republic replied to the reasoned opinion by letter of 26 February 2004, in which it relied on Article 296(1)(b) EC to justify the exemption from customs duties applied prior to 31 December 2002. The Italian Republic states in that regard that Regulation No 150/2003 recognised the significance to the security interests of

Member States of imports of material which was not specifically military by permitting, in Article 2(2), the suspension of customs duties for that type of material.

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

27 By order of 5 May 2006 the President of the Court allowed applications to intervene of the Kingdom of Denmark, the Hellenic Republic, the Portuguese Republic and the Republic of Finland in support of the forms of order sought by the Italian Republic.

The action

Admissibility

28 The Italian Republic claims that, in the reasoned opinion, the Commission did not request, in relation to the exemption of imports of goods not intended for specifically military purposes from customs duties, evidence that there was no adverse effect on the conditions of competition in the market, whereas, in its action, the Commission does request such evidence.

29 It is however clear that the grounds of complaint presented by the Commission in its reasoned opinion and in its application are identical. The sole purpose of the Commission's assertion that there is no evidence of any adverse effect on competition in the market for the abovementioned goods is to rule out the justification advanced by the Italian Republic on the basis of Article 296(1)(b) EC, and it is not therefore a new

ground of complaint. The objection of inadmissibility raised by the Italian Republic must, consequently, be rejected.

The merits

Arguments of the parties

30 The Commission claims that the Italian Republic is wrong to rely on Article 296 EC to justify the refusal to pay customs duties on the imports concerned, since the collection of such duties does not threaten the essential security interests of that Member State.

31 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.

32 The Commission claims, consequently, that it is for the Italian Republic 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 Italian Republic.

33 Measures which involve depriving the Community of resources which should have been paid to it as own resources but are diverted to the general funding of military expenditure cannot, at least without additional justification, be considered to be necessary for the protection of the essential interests of the security of Member States.

34 The Commission considers that Regulation No 150/2003 applies as from 1 January 2003 and that no retroactive effect was conferred on it. Moreover, the legal basis of that regulation is Article 26 EC on the establishment of customs duties and not Article 296 EC, which, even in the context of the new legislation, cannot justify the suspension of customs duties as provided for by that regulation.

35 Furthermore, in relation to material which is not specifically military, Article 296(1)(b) EC lays down an additional condition before a Member State can derogate from a obligation imposed on it by the Treaty, namely that the national measure should not adversely affect the conditions of competition in the common market. In the present case, no proof that that condition is satisfied has been provided.

36 The Commission states, in that regard, that the failure of the Italian Republic 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.

37 The Italian Republic considers that evidence that the exemption from customs duties at issue is necessary for the protection of the essential interests of the security of the Member State concerned need not be adduced because the Community legislature itself has provided that evidence by adopting Regulation No 150/2003.

38 The Italian Republic does not accept the Commission's argument that, under Article 26 EC, the Council alone has the power to decide on any exemption or suspension of customs duties chargeable on any given product and that, consequently, an exemption decided at national level constitutes an unlawful derogation from that provision.

39 The Italian Republic states that, by adopting Regulation No 150/2003, the Community legislature itself took the view that an exemption from customs duties facilitated the protection of the essential security interests of Member States. According to the Italian Republic, that is evidence that the conditions laid down in Article 296(1)(b) EC were satisfied in relation to the exemption unilaterally applied by it prior to 31 December 2002.

40 Since the connection between the non-collection of customs duties and the protection of the essential security interests of Member States has been acknowledged by Regulation No 150/2003, the Italian Republic sees no reason why further evidence should be adduced to demonstrate that the collection of those duties constitutes a threat to its essential security interests.

41 The Italian Republic states lastly, and alternatively, that the Commission's request relating to the payment of own resources which were evaded because of the exemption from customs duties at issue in this case should be rejected to the extent that it concerns the period prior to receipt of the additional letter of formal notice of 31 January 2002. The Italian Republic contends that, given the Commission's inaction over the long period of time between notification of the reasoned opinion of 25 July 1985 and the despatch of the additional letter of formal notice of 31 January 2002, the Italian Republic could infer that the Commission had implicitly accepted that exemption. It would therefore be appropriate, in the light of the principles of the protection of legitimate expectations and legal certainty, to restrict the obligation to repay the own resources in question.

Findings of the Court

42 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 1999 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.

43 It can moreover be inferred from the fact that Regulation No 150/2003 provided for the suspension of customs duties on certain weapons and military equipment from 1 January 2003 that the Community legislature started from the assumption that an obligation to pay those import duties existed prior to that date.

44 The Italian Republic has not at any time denied the existence of the imports at issue during the period under consideration. It has confined itself to challenging the Community's entitlement to own resources while arguing that, pursuant to Article 296 EC, the obligation to pay customs duties on armaments imported from third countries would cause serious damage to its essential security interests.

45 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).

46 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.

47 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.

48 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.

49 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.

50 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.

51 As regards the argument that the Community customs procedures are not capable of safeguarding the security of the Italian Republic, in the light of the confidentiality requirements contained in agreements entered into with exporting States, it must be stated, as correctly observed by the Commission, that the implementation of the Community customs system requires the active involvement of Community and national officials, who are bound when necessary by an obligation of confidentiality, when dealing with sensitive data, which is capable of protecting the essential security interests of Member States.

52 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.

53 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.

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

55 The foregoing arguments, to the effect that Article 296 EC is not applicable in relation to imports of military material, hold good *a fortiori* in respect of imports of dual-use material for both civil and military use, whether or not such material was imported exclusively for military purposes.

56 As regards the Italian Republic's request seeking a restriction of the effects of this judgment, as regards the obligation concerning the payment of own resources evaded through the exemption from customs duties at issue in this case, in respect of the period prior to receipt of the additional letter of formal notice of 31 January 2002, it must be observed that the justification for this request is the claim that the Italian Republic was

led to have a legitimate expectation because of the prolonged inaction of the Commission and the adoption of Regulation No 150/2003.

57 It should be recalled in this connection that it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may be moved to restrict for any person concerned the opportunity of relying upon a provision which it has interpreted, with a view to calling in question legal relations established in good faith (see, inter alia, Case C-104/98 *Buchner and Others* C-104/98 [2000] ECR I-3625, paragraph 39).

58 The Court has taken such a step only in certain specific circumstances, where there is a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force, and where it appears that both individuals and national authorities have been led into adopting practices which did not comply with Community law by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed (Case C-359/97 *Commission* v *United Kingdom* [2000] ECR I-6355, paragraph 91).

59 Even if judgments delivered under Article 226 EC were to have the same effects as those delivered under Article 234 EC and, therefore, considerations of legal certainty might, exceptionally, make it necessary to limit their temporal effects (see Case C-178/05 *Commission* v *Greece* [2007] ECR I-4185, paragraph 67; judgment of 12 February 2009 in Case C-475/07 *Commission* v *Poland*, paragraph 61; and judgment of 26 March 2009 in Case C-559/07 *Commission* v *Greece*, paragraph 78), it must be stated, in the present case, that the Commission did not at any stage abandon its position in principle. 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.

60 The request of the Italian Republic relating to a limitation on the temporal effects of this judgment must, therefore, be rejected.

61 It follows from the foregoing that, by exempting imports of material capable of use both for civil and military purposes from customs duties during the period from 1 January 1999 until 31 December 2002 and by refusing to calculate, declare and make available to the Commission the own resources which were not collected because of that exemption and the default interest payable because of the failure to make those own resources available to the Commission in good time, the Italian Republic has failed to fulfil its obligations under, on the one hand, Article 26 EC, Article 20 of the Community Customs Code and, consequently, the Common Customs Tariff and, on the other hand, Articles 2, 9, 10 and 17(1) of Regulation No 1552/89 and the same articles of Regulation No 1150/2000.

Costs

62 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 Italian Republic and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

63 In accordance with the first paragraph of Article 69(4) of the Rules of Procedure, the Kingdom of Denmark, the Hellenic Republic, the Portuguese 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 exempting imports of material capable of use both for civil and military purposes from customs duties during the period from 1 January 1999 until 31 December 2002 and by refusing to calculate, declare and make available to the European Commission the own resources which were not collected because of that exemption and the default interest payable because of the failure to make those own resources available to the European Commission in good time, the Italian Republic has failed to fulfil its obligations under, on the one hand, Article 26 EC, Article 20 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code and, consequently, the Common Customs Tariff and, on the other, Articles 2, 9, 10 and 17(1) 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 Italian Republic to pay the costs.

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

[Signatures]