

**Action brought on 23 July 2004 by the Commission of the European Communities against the Kingdom of the Netherlands.**

(Case C-312/04)

(2004/C 228/64)

An action against the Kingdom of the Netherlands was brought before the Court of Justice of the European Communities on 23 July 2004 by the Commission of the European Communities, represented by Günter Wilms and Alexander Weimar, acting as Agents.

The applicant claims that the Court should:

1. Declare that, by

(a) not consistently deploying the necessary activity in order to effect the timely determination of the rights of the Communities to their own resources during the period up to and including 1 January 1992 in a number of cases of suspected irregularities in relation to transports covered by TIR carnets,

(b) determining too late the rights of the Communities to their own resources and thus making those resources available to the Commission too late, during the period from 1 January 1992 to the end of 1994 in a number of cases of suspected irregularities in relation to transports covered by TIR carnets, and

(c) refusing to pay the attendant interest on arrears,

the Kingdom of the Netherlands has failed to fulfil its obligations under Council Regulation (EEC, Euratom) No 1552/89<sup>(1)</sup> of 29 May 1989 implementing Decision 88/376/EEC, Euratom, on the system of the Communities' own resources,

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

*Pleas and main arguments*

As a result of an inspection in 1997 in the Netherlands, the Commission found there to have been a delay in establishing own resources from customs duties. That delay related to uncleared TIR carnets registered in the period from 1991 to 1993 and in respect of which the requests for payment were sent out too late by the Netherlands authorities.

Notwithstanding the fact that prior to 1992 there was no specific provision indicating the period of time after normal completion of the transaction within which the office of departure was required to act, it cannot be concluded that the Member States are not bound to act prior to establishment of the infringement and, in an appropriate case, prior to determination of the place where the infringement took place. The Netherlands authorities did not act with the care required in order to secure the financial interests of the Community. In the cases here referred to the requests for payment were issued after periods of time varying between 2 years and 4 1/2 months and 2 years and 10 months after registration of the carnets. In the Commission's view, such lengthy periods of time cannot be regarded as consistent with targeted activity.

From 1 January 1992 the applicable Community provisions in the matter, in conjunction with Article 11 of the TIR agree-

ment, provided for specific deadlines within which the Member States had to adopt the necessary measures. The Commission disagrees with the observations of the Netherlands authorities to the effect that the deadlines referred to are merely laid down in administrative provisions and not in legislative enactments and that it is in law not correct to embark on collection before the supplementary claim procedure has been completed.

As the inspection carried out by the Commission has shown, the Netherlands embarked on collection on average one year after expiry of the (final) deadline of 15 months and, in doing so, was therefore too late in making own resources available to the Commission; on that account, the Netherlands are liable to interest on the arrears.

<sup>(1)</sup> OJ L 155 of 7.6.1989, p. 1.

**Reference for a preliminary ruling by the Tribunal Superior de Justicia de la Comunidad Valenciana by order of that court of 12 July 2004 in the case of R.M. Torres Aucejo against Fondo de Garantía Salarial**

(Case C-314/04)

(2004/C 228/65)

Reference has been made to the Court of Justice of the European Communities by order of the Tribunal Superior de Justicia de la Comunidad Valenciana (Spain) (Chamber for Social and Labour Matters of the High Court of Justice of the Community of Valencia) of 12 July 2004 received at the Court Registry on 26 July 2004, for a preliminary ruling in the case of R.M. Torres Aucejo against the Fondo de Garantía Salarial.

The Tribunal Superior de Justicia de la Comunidad Valenciana asks the Court of Justice to rule on questions identical to those in Case C-520/03<sup>(1)</sup>.

<sup>(1)</sup> OJ C 59 of 6.3.2004.

**Action brought on 27 July 2004 by the European Parliament against the Council of the European Union**

(Case C-317/04)

(2004/C 228/66)

An action against the Council of the European Union was brought before the Court of Justice of the European Communities on 27 July 2004 by the European Parliament, represented by R. Passos and N. Lorenz, acting as Agents, with an address for service in Luxembourg.

The European Parliament claims that the Court should:

- annul Council Decision 2004/496/EC of 17 May 2004 <sup>(1)</sup>;
- order the defendant to pay all of the costs.

*Pleas in law and main arguments*

The European Parliament puts forward five pleas in support of its action.

The first two pleas challenge the legal basis of the contested decision. First, the Parliament submits that recourse to Article 95 EC is not justified, having regard in particular to the Court's recent case-law on the interpretation of that provision; indeed, Article 95 cannot be the basis for Community power to conclude the agreement, since it relates to the processing of data excluded from the scope of Directive 95/46 on the protection of personal data. Secondly, the agreement entails amendment of that directive adopted under the procedure referred to in Article 251 EC, and could therefore be concluded only after the assent of the Parliament had been obtained.

In its third plea, the Parliament takes the view that the agreement infringes fundamental rights, in particular the right to protection of personal data with regard to essential aspects of that right, and that it also constitutes an unjustifiable interference with private life, which is incompatible with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The fourth plea concerns infringement of the principle of proportionality, in particular on account of the fact that the agreement provides for the transfer of an excessive amount of passenger data and those data are stored by the American authorities for too long.

Finally, the Parliament also pleads the lack of a sufficient statement of reasons for a measure having such specific characteristics, and infringement of the principle of cooperation in good faith provided for in Article 10 EC, having regard to the very unusual circumstances surrounding the adoption of the contested decision, which took place during the procedure before the Court of Justice for request for opinion 1/04 on the aspects which clearly posed questions of a legal nature.

<sup>(1)</sup> Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection (OJ L 183 of 20.5.2004, p. 83)

**Action brought on 27 July 2004 by the European Parliament against the Commission of the European Communities**

**(Case C-318/04)**

(2004/C 228/67)

An action against the Commission of the European Communities was brought before the Court of Justice of the European Communities on 27 July 2004 by the European Parliament, represented by H. Duintjer Tebbens and A. Caiola, acting as Agents, with an address for service in Luxembourg.

The European Parliament claims that the Court should:

- annul under Article 230 EC Commission Decision 2004/535/EC of 14 May 2004 <sup>(1)</sup>;
- order the Commission of the European Communities to pay all of the costs.

*Pleas in law and main arguments*

The European Parliament puts forward four pleas in support of its action, namely, misuse of powers by the Commission, breach of the fundamental principles of Directive 95/46/EC, breach of fundamental rights and breach of the principle of proportionality.

In respect of misuse of powers, the Parliament argues that the Commission's decision was adopted *ultra vires*, without complying with the provisions laid down in the basic directive 95/46/EC on the protection of personal data and in breach of, *inter alia*, the first indent of Article 3(2) of Directive 95/46 on the exclusion of activities which fall outside the scope of Community law.

The European Parliament stresses in addition the following aspects: the CBP (United States Bureau of Customs and Border Protection) is not a third country within the meaning of Article 25 of Directive 95/46, the decision on adequacy authorises transfers to other US governmental authorities as well as to third countries, the decision entails infringement of Article 13 of Directive 95/46 on exemptions from and restrictions on the principles on the processing of personal data (exemptions and restrictions reserved to the Member States), and on the basis of the decision, the CBP has direct access to PNR (Passenger Name Record) data, not provided for by the directive. In the light of the interdependence between the decision on adequacy and the agreement between the European Community and the United States, the decision must be considered a measure which is not appropriate for the objective pursued, namely to provide for transfers of PNR data.