

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 13 December 1988 *

*Mr President,
Members of the Court,*

1. In the present case the Commission is asking the Court to settle a question of principle concerning the collection of the Community's own resources by the Member States.

2. The essential facts may be summarized as follows: Following an inspection carried out by the Commission's officers in June and July 1980 in Ravenna it was found that the Italian customs authorities had entered customs duties in the accounts as coming under the ECSC Treaty and therefore as national resources. The contested entitlements had originally been determined in January, February and March 1980. After rectification the corresponding sums were credited to the Commission's account on 20 September 1980.

3. The Commission, which at the hearing did not pursue the second and third claims of failure to fulfil obligations which it had originally formulated, is basically asking for a declaration that, by refusing to pay interest on those sums, the Italian Republic has failed to fulfil its obligations under Article 11 of Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19

December 1977 implementing the decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (hereinafter referred to as 'the regulation').¹

4. First of all, I agree with Mr Advocate General Lenz that

'the financial provisions of Community law are among the fundamental rules of the Community legal structure which must be strictly observed if the Community is to function properly'.²

5. The interpretation of the rules relating to own resources and the procedures whereby the Member States collect them and make them available to the Community must ensure that the implementation of the applicable provisions scrupulously observes that objective. That is the principle behind the decisions of the Court refusing to consider that a foreseeable strike may justify delay in crediting own resources³ or that a Member State may judge whether it is opportune to comply with a request to bring forward the entering of resources.⁴ In both

1 — OJ L 336, 27 12 1977, p. 1.

2 — Opinion in Case 70/86 *Commission v Hellenic Republic* [1987] ECR 3545, at p. 3554

3 — Case 70/86, *supra*

4 — Judgment of 18 December 1986 in Case 93/85 *Commission v United Kingdom* [1986] ECR 4011

* Original language: French

cases default interest is due pursuant to Article 11 of the regulation.

6. I shall now examine the present case in the light of those principles.

7. The Italian Republic contends that default interest is not payable since the rectification constitutes a 'new establishment' within the meaning of the second paragraph of Article 2 of the regulation and the credit was entered within the period prescribed by Article 10 of the regulation, running from the date of that new establishment.

8. The Commission denies that there has been a 'new establishment' within the meaning of the second paragraph of Article 2. It submits that any such possibility presupposes that there has been an original correct establishment. That is not so in the present case since the duties were entered as falling under the ECSC Treaty. Accordingly the only date which had to be taken into account was the one on which the claim ought to have been determined. Therefore default interest is payable.

9. The Commission's view and that of the defendant State, let me point out, seem to have a common premise: In the event of a new establishment within the meaning of the second paragraph of Article 2 the period laid down in Article 10 runs from that date and therefore if it is observed default interest is not payable.

10. That analysis leads the parties to expend considerable efforts in order to show, in the

case of the Commission, that there is no new establishment and, in the case of the Italian Republic, that the second paragraph of Article 2 applies in this case.

11. For my part, I consider that it is not there that the real difficulty in the present case lies, for I am far from disposed to attach to the term 'new establishment' the consequences which the parties seem to agree should be attributed to it.

12. I do not share the opinion of the parties that in the case of a 'new establishment' an entry made within the period laid down by Article 10 is automatically 'in order'.

13. I would observe first of all that neither the second paragraph of Article 2 nor Article 8, which relates to *entry in the accounts (and not to crediting the account of the Commission)* of the 'new establishments', calls for an interpretation, which undoubtedly finds its sole support in the wording of Article 10. That article, let me recall, provides that 'the entry referred to in Article 9 (1) shall be made at the latest by the 20th day of the second month following the month during which the entitlement was established'.

14. If the Court were to consider that the entry is not belated if it is made within the above period, taken as running from the *actual establishment*, even when the latter was made after a time-limit, the like view would have to be taken where a new establishment was made after an incorrect establishment, for only the actual establishment of the entitlement should be taken into account.

15. However, in Case 303/84 where the Federal Republic of Germany, which had not determined the claim on the date laid down by the Community rules, refused to pay default interest on the ground that the entry had been made within the period prescribed by Article 10, taken as running from the actual establishment, the Court held that:

'the wording of Article 11 of Regulation No 2891/77 shows that *interest is payable in respect of "any delay"* in crediting the amounts to the Commission's account'.

And the Court further held:

'Regardless of the reason for the delay in making the entry in the Commission's account, interest is payable without any distinction being called for according to whether the delay was caused by failure to determine the relevant amounts by the due date or by failure to comply with the time-limit laid down in Article 10 (1) of Regulation No 2891/77'.⁵

16. In view of the terms of that judgment I consider that there will similarly be a delay in entry giving rise to default interest where a new establishment has had to be made and the Community has not received the sums due to it before the expiry of the period laid down in Article 10, taken as running from the date when the claim ought to have been determined.

'If it were otherwise, and the creation of the right depended on the determination of the resources by the Member States, the States would in practice recover a power to impose taxes which they have surrendered.'⁶

17. The fact that there is an error in accounting or establishment *stricto sensu* must have no effect upon the Community's entitlements. If that error brings about a delay in entry, default interest is payable pursuant to Article 11 of the regulation. And the periods of grace which it is open to the Commission to grant in no way affect the force of the principle. It is therefore quite futile, in my view, to enquire whether there is a new establishment in the present case within the meaning of the second paragraph of Article 2 since in any event the delay in entry is obvious and accordingly the Italian Republic cannot refuse to pay interest pursuant to Article 10.

18. The strictness of the interpretation which I am suggesting is deliberate. It amounts to proposing that the Court should declare that there is an obligation on the part of the Member States to achieve a particular result as regards making available the Community's own resources within a period running from the date when the claim should have been determined. The diligence and accuracy displayed by national administrative authorities cannot determine whether 'the Community is to function properly'.⁷ The Communities must 'dispose of their own resources under the best possible conditions'.⁸

5 — Judgment of 20 March 1986 in Case 303/84 *Commission v Federal Republic of Germany* [1986] ECR 1171, at p. 1183, paragraph 17, emphasis added

6 — Opinion of Mr Advocate General Mancini in Case 303/84, cited above

7 — Opinion of Mr Advocate General Lenz in Case 70/86, cited above

8 — Eleventh recital in the preamble to Regulation No 2891/77

19. I therefore propose that the Court should:

- (i) declare that, by refusing to pay default interest pursuant to Article 11 of Regulation No 2891/77 following mistakes in the classification of certain customs duties in the first three months of 1980, the Italian Republic has failed to fulfil its obligations under the Treaty;
- (ii) order the defendant State to bear the costs.