OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 10 March 2005 [1]

I — Introduction

1. In this case, the Commission of the European Communities seeks to show that, in view of the fact that the Danish authorities did not transfer to the Commission an amount of DKK 140 409.60, together with default interest thereon as from 20 December 1999, the Kingdom of Denmark has failed to fulfil its obligations under Community law and, in particular, under Article 10 EC and Articles 2 and 8 of Council Decision 94/728/EC, Euratom of 31 October 1994 on the system of the European Communities' own resources (hereinafter 'the 1994 Own Resources Decision'). [2]

2. Behind this, at first sight, seemingly technical dispute there lies a fundamental difference of opinion with regard to the nature and scope of the obligations imposed on Member States by the 1994 Own Resources Decision. This has led a number of Member States — the Kingdom of the Netherlands, the Federal Republic of Germany, the Kingdom of Belgium, the Republic of Portugal, the Kingdom of Sweden and the Republic of Italy — to intervene in support of the Kingdom of Denmark.

3. The difference of opinion between, on the one hand, the Commission and, on the other, the Kingdom of Denmark and the Member States which support it arises within the broader context of the 'Financial provisions' title of the EC Treaty (Articles 268 EC to 280 EC), as these provisions have been applied since the acceptance of the so-called 'Delors' triptych' in 1988. This put an end to the clashes between the Council and the European Parliament, as the co-legislator of the budget, over the scope and composition of the Community budgets, which between 1979 and 1987 had been an almost annual event. In describing the legal framework, I shall pay particular attention to this broader context since it is not without importance for the appraisal of the various points of law raised by this case.

1 — Original language: Dutch.

2 — OJ 1994 L 293, p. 9.

II — General context and legal framework

A — *Own resources*

4. For various reasons, since 1979, the process of determining the Community's annual budget has become increasingly complex. Firstly, the accession of Greece, Spain and Portugal resulted in the differences in prosperity within the European Community becoming considerably more pronounced. It was feared that the proposed completion of the internal market would make these differences in prosperity even greater. This strengthened the political demand for a more generous Community contribution to the less prosperous regions. Secondly, more and more problems seemed to arise during the period in which the compulsory expenditure on agricultural guarantees was being brought under control. The demands of this expenditure on the already overburdened Community budget rose to over 70%. Thirdly, because the compulsory Community expenditure threatened to crowd out the non-compulsory expenditure, for which the European Parliament, under Article 272 EC on co-authority for the budget, has special competence, an almost permanent stalemate arose between the Council and the Parliament.

5. To overcome this impasse, in February 1987, the Commission introduced a package of proposals for drastic changes in the Community's public finances (the so-called 'Delors' triptych'). The European Council of February 1988 succeeded in reaching an agreement on the broad outlines. The decision-making involved four important elements of Community finances. Since 1988, these four elements have continued to have a decisive influence on the Community's budgetary process and the content of the Community budget. The decision-making relating to the annual budget, as formally described in Article 272 EC, takes place within the space defined by these four elements.

6. These elements are:

(a) The financial framework for the medium term

This framework is established for a period of five or six years by the European Council, at the proposal of the Commission. After 1988, it was re-established by the Edinburgh European Council in December 1992 and again by the Berlin European Council in March 1999. Within these frameworks, the progression of the Community's maximum expenditure is laid down, both for the budget as a whole and for the more important of its individual chapters. They constitute, in more developed form, the subject-matter of inter-institutional agreements (hereinafter 'IIAs') between the European Parliament, the Council and the Commission. These IIAs establish the quantitative frameworks within which the budget-makers must operate during the period in question.

Naturally, distribution policy considerations play a major part in the construction and composition of the financial framework for the medium term.

(b) The own resources decisions

Every financial framework for the medium term has as its counterpart an own resources decision which determines the revenue that the Community needs to cover the expenditure provided for within the financial framework. Naturally, distribution policy considerations also play a large part in the estimation of the Community's various 'own resources' and the corresponding contributions to be made by the Member States. The latter tend to focus narrowly on the positive or, in some cases, negative balances allocated to them from the sum of the revenue and contributions.

(c) Budgetary discipline

The fragile budget-policy balance between the financial frameworks for the medium term and own resources is inherently vulnerable to overspending. Therefore, since 1988, with each new financial perspective measures have been taken to ensure that there will be no surprises on the expenditure side. These measures, now embodied in Council Regulation (EC) No 2040/2000 of 26 September 2000 on budgetary discipline, [3] are mainly concerned with the control of agricultural expenditure.

(d) The Structural Funds

Given the differences in prosperity within the European Community, expenditure on the Structural Funds, including the Cohesion Fund, plays a central role in the aforementioned distribution policy. In the decision-making on the financial perspectives, the distribution among the Member States of resources from the Structural Funds is worked out precisely. After each determination of the financial perspectives, it is usual for the Community regulations on the Structural Funds to be readjusted.

7. As far as the present case is concerned, it is the connection between the financial perspective for the medium term and the corresponding own resources decision that is of most importance. As already pointed out, the delicate agreement on the two decisions in European Councils mainly depends on the net outcome of the combined application of those decisions for the Member States. The

3 — OJ 2000 L 244, p. 27

contributions are closely connected with the consequences of the assessment of the various own resources for the Member States individually. In this respect, it should also be noted that from the last sentence of Article 268 EC, to the effect that Community budget expenditure and revenue must be in balance, it follows that disappointing revenues in relation to one 'own resource' must either be offset from another 'own resource' or lead to an adjustment of the expenditure provided for in the financial perspectives. In either case, the consensus that forms the basis for decision-making on the Community's revenue and expenditure is exposed to a certain risk. In view of this background of inherent vulnerability of the Community budget process, in the own resources decisions and the corresponding implementing regulations the obligations of the Member States are narrowly defined, as well as being closely monitored by the Commission.

8. The present case involves the interpretation of certain provisions of the 1994 Own Resources Decision and 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,[4] as amended by Council Regulation (Euratom, EC) No 1355/96 of 8 July 1996 amending Regulation (EEC, Euratom) No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources[5] (hereinafter 'Regulation No 1552/89'). These provisions concern the obligations of the Member States towards the Community in connection with the collection, entry in the accounts and transfer of customs duties as the Community's 'own resources'.

9. In the present case, the following provisions of the 1994 Own Resources Decision are relevant.

Article 2(1):

'Revenue from the following shall constitute own resources entered in the budget of the Communities:

(a) levies, premiums, additional or compensatory amounts, additional amounts or factors and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries within the framework of the common agricultural policy, and also contributions and other duties provided for within the framework of the common organisation of the markets in sugar;

(b) Common Customs Tariff duties and other duties established or to be estab-

4 — OJ 1989 L 155, p. 1.
5 — OJ 1996 L 175, p. 3.

lished 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;

...'

Article 2(3):

'Member States shall retain, by way of collection costs, 10% of the amounts paid under 1(a) and (b).'

Article 8(1):

'The Community own resources referred to in Article 2(1)(a) and (b) shall be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which shall, where appropriate, be adapted to meet the requirements of Community rules. The Commission shall examine at regular intervals the national provisions communicated to it by the Member States, transmit to the Member States the adjustments it deems necessary in order to ensure that they comply with Community rules and report to the budget authority. Member States shall make the resources provided for in Article 2 (1)(a) to (d) available to the Commission.'

Article 8(2), last part:

'... the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt the provisions necessary to apply this Decision and to make possible the inspection of the collection, the making available to the Commission and payment of the revenue referred to in Articles 2 and 5.'

10. The following provisions of Regulation No 1552/89, as they read at the material time, are relevant to the case.

Article 2:

'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 [now Decision 94/728] 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. ...

1b. In disputed cases, the competent administrative authorities shall be deemed, for the purposes of the establishment referred to in paragraph 1, to be in a position to calculate the amount of the entitlement no later than when the first administrative decision is taken notifying the debtor of the debt or when judicial proceedings are brought if this occurs first. ...'

Article 6:

'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.

1a. ...

2. (a) Entitlements established in accordance with Article 2 shall, subject to point (b) of this paragraph, be entered in the 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 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.'

3. and 4. These paragraphs of Article 6 describe the obligations upon Member States with regard to the periodic sending of statements of accounts to the Commission.

Article 17:

'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. These cases must be mentioned in the report provided for in paragraph 3 if the amounts exceed ECU 10 000, converted into national currency at the rate applying on the first working day of October of the previous calendar year; this report must contain an indication of the reasons why the Member State was unable to make available the amounts in question. The Commission has six months in which to forward, if appropriate, its comments to the Member State concerned.

... .'

B — *Member States and debtors*

11. The 1994 Own Resources Decision and Regulation No 1552/89 lay down the obligations of the Member States towards the Community in connection with the establishment, collection, entry in the accounts and transfer of the own resources defined in Article 2(1)(a) and (b). These 'traditional' own resources are characterised by the fact that they are completely defined by the Community legislature and the role of the Member States in connection with their collection and transfer is purely instrumental. Thus, Member States are required to exercise authority over individual debtors in order to ensure that the duties owed are in fact paid and can ultimately be made available to the Community. The necessary rules for the establishment and collection of customs duties and related levies are laid down in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (hereinafter the 'Customs Code'). [6]

12. The following provisions of the voluminous Customs Code are of particular interest in connection with the appraisal of the present dispute.

6 — OJ 1992 L 302, p. 1.

According to Article 4(9), '[c]ustoms debt' means 'the obligation on a person to pay the amount of the import duties (customs debt on importation) or export duties (customs debt on exportation) which apply to specific goods under the Community provisions in force'.

Article 4(10) describes what is meant by 'import duties':

— 'customs duties and charges having an effect equivalent to customs duties payable on the importation of goods,

— agricultural levies and other import charges introduced under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products.'

Article 201 describes how a customs debt on importation may be incurred.

'1. A customs debt on importation shall be incurred through:

(a) the release for free circulation of goods liable to import duties, or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

3. ... .'

Entry in the accounts and communication of the amount of duty to the debtor are dealt with in Article 217 et seq. In the present

context, the following articles are of particular interest:

Article 217

'1. 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).

The first subparagraph shall not apply:

(a) ...;

(b) ...;

(c) ...;

The customs authorities may discount amounts of duty which, under Article 221 (3), could not be communicated to the debtor after the end of the time allowed.

2. The Member States shall determine the practical procedures for the entry in the accounts of the amounts of duty. Those procedures may differ according to whether or not, in view of the circumstances in which the customs debt was incurred, the customs authorities are satisfied that the said amounts will be paid.

Article 218

1. Where a customs debt is incurred as a result of the acceptance of the declaration of goods for a customs procedure other than temporary importation with partial relief from import duties or any other act having the same legal effect as such acceptance the amount corresponding to such customs debt shall be entered in the accounts as soon as it has been calculated and, at the latest, on the second day following that on which the goods were released.

2. ... .

3. ... .

Article 219 ... .

Article 220

1. Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218

and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time-limit may be extended in accordance with Article 219.

2. Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where:

(a) the original decision not to enter duty in the accounts or to enter it in the accounts at a figure less than the amount of duty legally owed was taken on the basis of general provisions invalidated at a later date by a court decision;

(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration;

(c) the provisions adopted in accordance with the committee procedure exempt the customs authority from the subsequent entry in the accounts of amounts of duty less than a certain figure.

Article 221

1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

2. Where the amount of duty payable has been entered, for guidance, in the customs declaration, the customs authorities may specify that it shall not be communicated in accordance with paragraph 1 unless the amount of duty indicated does not correspond to the amount determined by the authorities.

Without prejudice to the application of the second subparagraph of Article 218(1), where use is made of the possibility provided for in the preceding subparagraph, release of the goods by the customs authorities shall be equivalent to communication to the debtor of the amount of duty entered in the accounts.

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period.'

13. By regulation, the Commission has established more detailed provisions for the implementation of the Customs Code. Of these, the following are relevant to the present case:

— Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (hereinafter 'Regulation No 2454/93'); [7]

— Commission Regulation (EC) No 1677/98 of 29 July 1998 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (hereinafter 'Regulation No 1677/98'); [8]

— Commission Regulation (EC) No 1335/2003 of 25 July 2003 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (hereinafter 'Regulation No 1335/2003'). [9]

14. At the time of the events that form the basis of the present dispute, Article 869(b) of Regulation No 2454/93 read as follows:

'The customs authorities shall themselves decide not to enter uncollected duties in the accounts:

(a) ...

(b) in cases in which they consider that the conditions laid down in Article 220(2)(b) of the Code are fulfilled, provided that the amount not collected from the operator concerned in respect of one or more import or export operations but in consequence of a single error is less than ECU 2 000.'

Article 1(5) of Regulation No 1677/98 replaced 'ECU 2 000' at the end of the abovementioned Article 869(b) by 'ECU 50 000'.

15. Article 871(1) of Regulation No 2454/93 reads: 'In cases other than those referred to

7 — OJ 1993 L 253, p. 1

8 — OJ 1998 L 212, p. 18.

9 — OJ 2003 L 187, p. 16.

in Article 869, where the customs authorities either consider that the conditions laid down in Article 220(2)(b) of the Code are fulfilled or are in doubt as to the precise scope of the criteria of that provision with regard to a particular case, those authorities shall submit the case to the Commission, so that a decision may be taken in accordance with the procedure laid down in Articles 872 to 876. ... .'

16. Article 1(1) and (2) of Regulation No 1335/2003 replaced Articles 869(b) and 871 of Regulation No 2454/93. Article 1 of Regulation No 1335/2003 has been applicable since 1 August 2003 to cases not submitted to the Commission before that date.

17. The amended Articles 869(b) and 871 of Regulation No 2454/93 now read as follows.

Article 869(b)

'The customs authorities shall themselves decide not to enter uncollected duties in the accounts:

(a) ...;

(b) in cases in which they consider that the conditions laid down in Article 220(2)(b) of the Code are fulfilled, except those in which the dossier must be transmitted to the Commission pursuant to Article 871. However, where Article 871(2), second indent, is applicable, the customs authorities may not adopt a decision waiving entry in the accounts of the duties in question until the end of a procedure initiated in accordance with Articles 871 to 876.'

Article 871(1) and (2)

'1. The customs authority shall transmit the case to the Commission to be settled under the procedure laid down in Articles 872 to 876 where it considers that the conditions laid down in Article 220(2)(b) of the Code are fulfilled and:

— it considers that the Commission has committed an error within the meaning of Article 220(2)(b) of the Code, [or]

— the circumstances of the case are related to the findings of a Community investigation carried out under Council Regulation (EC) No 515/97 of 13 March

1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters [10] or under any other Community legislation or any agreement concluded by the Community with a country or group of countries in which provision is made for carrying out such Community investigations, or

— the amount not collected from the operator concerned in respect of one or more import or export operations but in consequence of a single error is EUR 500 000 or more.

2. However, the cases referred to in paragraph 1 shall not be transmitted where:

— the Commission has already adopted a decision under the procedure provided for in Articles 872 to 876 on a case involving comparable issues of fact and of law,

— the Commission is already considering a case involving comparable issues of fact and of law.'

18. The first paragraph of Article 873 of Regulation No 2454/93 stipulates that: 'After consulting a group of experts composed of representatives of all Member States, meeting within the framework of the Committee to consider the case in question, the Commission shall decide whether the circumstances under consideration are or are not such that the duties in question need not be entered in the accounts.'

III — The facts of the case

19. At the beginning of the 1990s, a Danish undertaking (hereinafter 'the importer') imported into Denmark frozen mangetout peas from the People's Republic of China. Up to the end of 1995, these were sold for clearance into free circulation to a Danish wholesaler which handled the customs formalities itself. This wholesaler had a zero-rated import permit because, in its case, the peas were intended for a particular end-use. As from 1 January 1996, the importer began clearing the imports itself. The local customs authorities of Ballerup (Denmark)

10 — OJ 1997 L 82, p. 1.

accepted the customs declarations without investigating whether the importer actually had an end-use permit for the goods in question and went on to apply a zero tariff.

20. On 12 May 1997, the local customs authorities of Vejle (Denmark) established that the importer did not have the necessary approval for the application of a zero tariff. They thereupon rectified two customs declarations and applied a customs duty of 16.8%. On the same day, the importer appealed to the customs authorities of Ballerup, which corrected the rectifications and reapplied the zero tariff, without checking whether the importer had the necessary end-use approval for the goods concerned.

21. Following a post-clearance audit of 25 customs declarations lodged between 9 February 1996 and 24 October 1997, the competent customs authorities established that the importer did not have the necessary end-use permit. They then demanded payment of DKK 509 707.30 (approximately EUR 69 000) in respect of import duties which ought properly to have been collected. However, having decided that the correction of the rectifications by the local customs at Ballerup on 12 May 1997 could have led the importer legitimately to believe that the clearance procedure followed was correct, the Danish authorities asked the Commission whether under Article 220(2)(b) of the Customs Code there was justification for waiving the entry in the accounts of the import duties demanded from the importer for customs declarations lodged after that date. The amount involved was DKK 140 409.60 (approximately EUR 19 000).

22. In its finding of 19 July 1999, the Commission answered this question in the affirmative. Thus, the Commission found in particular that the correction by the local customs authorities of Ballerup on 12 May 1997 of the rectifications made by the local customs in Vejle ought to be treated as having been an error on the part of the competent Danish authorities which the trader could not reasonably have detected.

23. By letter of 21 October 1999, the Commission requested the Danish authorities to make available DKK 140 409.60 of own resources before the first working day after the 19th day of the second month following the dispatch of the letter, namely, 20 December 1999, failing which the default interest for which the applicable Community regulations provide would be applied. The Commission also requested that the amount should be clearly identified in the monthly accounting statement it received.

24. After the Danish authorities, by letter of 15 December 1999, had indicated their

unwillingness to comply with these requests, the Commission, by letter of 19 July 2000, declared the Danish Government to be in default. Being dissatisfied with the Danish Government's response of 29 September 2000, on 6 April 2001 the Commission sent the Kingdom of Denmark a reasoned opinion requesting it to comply within two months of service. Since, in its reply, the Danish Government continued to insist that Member States cannot be held financially liable for errors on the part of the customs authorities which, as agreed by the Commission, cannot be passed on to the person liable for payment, the Commission has brought the present action before the Court.

IV — Arguments of the parties

25. In summarising the arguments, I shall merely describe the main thrust of the extensive written and oral exchanges between, on the one hand, the Commission and, on the other, the Kingdom of Denmark and the Member States that support its views. Where necessary, I shall consider the arguments in more detail in my subsequent appraisal of the positions they have taken.

26. According to the Commission, 'traditional' own resources, within the meaning of Article 2 of the 1994 Own Resources Decision, originate with the customs debt and, consequently, the amount of DKK 140 409.60 ought to have been made available on the basis of Article 8(1) of that decision. Thus, the Danish authorities, in accordance with Article 2(1) of Regulation No 1552/89, ought to have established a Community entitlement to this revenue by correctly applying the relevant customs provisions and, in the absence of the required end-user declaration, ought to have collected the customs duties owed.

27. The determination of the moment at which the Danish authorities ought to have established the existence of a customs debt should also make it possible, in accordance with Article 10 of Regulation No 1552/89, to calculate the period within which the own resources in question ought to have been credited to the Commission's account. From the failure to observe this period, there follows the obligation to pay default interest, as provided for by Article 11 of Regulation No 1552/89. In support of this view, the Commission cites the judgment in *Commission* v *Germany*.[11]

28. According to the Commission, where the collection of customs duties by the Member States and their subsequent transfer to its account are concerned, a clear distinction must be made between the relationship between the Community and the Member States, on the one hand, and the relationship

11 — Case 303/84 [1986] ECR 1171, paragraphs 17 to 19.

between the Member States and the debtors, on the other. The legal relationship between the Community and the Member States is governed by the Community financing provisions, namely, the 1994 Own Resources Decision and Regulation No 1552/89, as well as by the Community principle of good faith laid down in Article 10 EC. On the other hand, the relationships between the Member States and traders are governed wholly by the Customs Code and the more detailed rules for its implementation, such as Regulation No 2454/93.

29. In fact, the Commission continues, there is merely a technical and legal linkage between the two systems of rules, because Regulation No 1552/89 refers to the various steps that must be taken in connection with the origination, establishment and collection of a customs debt. However, these references are of no significance as regards the financial liability of the national authorities towards the Community for the errors they may make in collecting 'traditional' own resources. If, for whatever reason, a Member State fails to collect the resources, it can be freed from its obligation to transfer those resources to the Commission only on the basis of Article 17 of Regulation No 1552/89, and then only under the conditions exhaustively described in that article. Accordingly, the fact that an undertaking has been absolved from having to pay customs duties under Article 220(2)(b) of the Customs Code cannot as such have any effect on the obligation upon the Member State concerned to hand over the duties to the Commission.

30. The reference to the Customs Code in Article 2 of Regulation No 1552/89, more particularly as regards the entry in the accounts of a customs debt, must necessarily be construed as a reference to the objective facts that the Customs Code requires before an entry in the accounts can be made and not to the question of whether or not the national authorities have actually proceeded to make an entry. From this the Commission concludes that, from the moment of actual importation of the goods into the Community customs territory, and hence from the moment the customs debt arises, the customs duties and agricultural levies belong to the Community and not to the Member States.

31. However, the Community has entrusted the collection of these revenues to the Member States since they possess the necessary operational infrastructure. In return, under Article 2(3) of the 1994 Own Resources Decision, the Member States are allowed to retain 10% (now 25%) of the own resources payable. From this the Commission concludes that the Community is all the more entitled to expect the Member States to perform their task conscientiously. Accordingly, it is the Member States that must bear the financial consequences of any negligence in the collection of own resources.

32. In support of its position, the Commission cites the principle of sound financial management laid down in Articles 248 EC and 274 EC, as embodied in Article 2 of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, [12] as last amended by Regulation (EC, ECSC, Euratom) No 762/2001. [13] Disregard for this principle would result in the lost revenue having to be spread over all the Member States via the so-called GNP resources, thereby disrupting the critical balance in the financing of the Community's resources.

33. In this connection, the Commission cites the judgments in *Pretore di Cento* [14] and *Commission* v *Netherlands*. [15] I shall give closer consideration to the content of these judgments and their significance for the settlement of the present dispute in my appraisal of the arguments.

34. In a detailed submission, the Danish Government argues against the Commission's view, maintaining that the relevant Community law does not make the Member States financially liable for errors committed by their national authorities in connection with the collection of Community own resources. This would require an explicit legal basis in the relevant Community regulations. However, there is nothing in the texts themselves or in the negotiating history of the 1994 Own Resources Decision or Regulation No 1552/89 — or their predecessors — to suggest that the intention was to make the Member States financially liable for errors and negligence in the collection of own resources. Articles 2 and 8 of the 1994 Own Resources Decision merely define the obligation to make import and export duty revenue available to the Commission. They do not specify the consequences of any errors or shortcomings on the part of the national customs authorities.

35. In this connection, the Danish Government also points out that for the Commission the present proceedings are in the nature of a test case. The Commission has repeatedly attempted to have the principle of the financial liability of the Member States for errors in the collection of own resources included in the own resources decisions and the corresponding implementing regulations. So far without success, since its proposals have not been accepted by the Council.

36. The Danish Government accepts that it follows from the principle of good faith laid down in Article 10 EC that the Member

12 — OJ 1977 L 356, p. 1.

13 — Council Regulation of 9 April 2001 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 2001 L 111, p. 1).

14 — Case 110/76 [1977] ECR 851.

15 — Case C-96/89 [1991] ECR I-2461.

States are under an obligation to ensure, through the efficient organisation of their customs administration, that own resources are collected and made available to the Commission. However, it cannot be deduced from the principle of good faith that a Member State is liable for any errors on the part of those authorities. It considers that the ensuing losses, being the almost unavoidable consequence of the delegation of the collection of own resources on behalf of the Community, should be borne by the Community itself. Otherwise, those Member States through which most of the Community's trade with non-member countries is channelled would be disproportionately affected.

37. In the Danish Government's view, a close analysis of the actual wording and the system of the 1994 Own Resources Decision and Regulation No 1552/89 shows that the Commission's arguments do not hold water. Thus, the provisions on which they are more particularly based, namely, Articles 2 and 8 of the 1994 Own Resources Decision, state only that the revenue from import duties must be made available to the Commission. They do not deal with the situation in which there is no revenue because the national customs administration has committed an error. Moreover, Regulation No 1552/89 is very detailed. From this it may be concluded, *a contrario*, that if the Council had had the intention of making the Member States accountable for resources lost to the Community as a result of the errors and negligence of their customs authorities, it would certainly have included an express provision to that effect in the regulation.

38. Unlike the Commission, the Danish Government considers that in the present case no argument can be derived from Article 17 of Regulation No 1552/89. That article defines the circumstances in which Member States can be freed from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements. However, in the present case, this situation does not arise. Instead, it is a question of the customs duties not having been established as own resources, the Commission having agreed, within the context of the procedure laid down in Article 220(2) of the Customs Code, in conjunction with Article 869(b) of Regulation No 2454/93, that import duties wrongly not entered in the accounts should not subsequently be demanded from the debtor because the latter can legitimately expect statements made by the competent customs authority to be correct. Thus, if the customs duties concerned no longer have to be entered in the accounts, there is no amount to be established in accordance with Article 2 of Regulation No 1552/89. Therefore there can be no entry of that amount in the own resources accounts, as required by Article 6(2) of Regulation No 1552/89, and that amount also cannot be made available to the Commission.

39. The Danish Government accepts the Commission's argument that the 1994 Own Resources Decision and Regulation No 1552/89, on the one hand, and the Customs Code, on the other, serve different purposes. None the less, it is of the opinion that in situations such as that which forms the basis of the present action, where as a result of the correct application of the Customs Code and the relevant implementing regulations certain customs duties can no longer be collected from the debtor, the Commission is no longer authorised to claim the duties as own resources. This applies a fortiori where — as a consequence of Article 873 of Regulation No 2454/93 — it is the Commission itself that is responsible for deciding whether Member States can waive the collection of import duties from undertakings in the circumstances mentioned in Article 220(2)(b) of the Customs Code. It is reasonable to assume that if the Commission has been given the authority to decide whether the Member States may forgo the collection of certain customs duties, it is because such decisions may lead to a loss of own resources for the Commission.

40. The Danish Government also makes an argument drawn from legal history for the existence of such a linkage between the own resources provisions and the Community customs regulations. It takes this argument from Regulation No 1697/79. [16] According to Article 9 of this regulation, revoked by the Customs Code, until the implementation of Community provisions specifying the conditions under which Member States are to establish the own resources accruing from the imposition of import duties or export duties, Member States are not obliged, where, pursuant to this regulation, they have taken no action for the post-clearance recovery of such duties, to establish the corresponding own resources within the meaning of 'the Regulation' (replaced by Regulation No 1552/89).

41. Finally, the Danish Government explains, at some length, why, in its view, the case-law of the Court cited by the Commission is not applicable to the present case. That case-law relates to situations in which the Member State concerned was obliged to undertake proceedings for the post-clearance recovery of an agricultural levy or an import duty from an undertaking, even though recovery had not taken place in due time. The legal background to these cases did not involve the application of provisions corresponding to Article 220(2)(b) of the Customs Code. Therefore in those cases it was in fact possible to proceed with the post-clearance recovery of the levies in question from the undertakings concerned. Accordingly, that case-law is not relevant to situations in which a Member State is no longer able to recover levies on account of an error made by the customs administration.

16 — Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1)

42. The Belgian, Italian, Netherlands, Portuguese and Swedish Governments have lined

up in support of the Danish Government. Although in their reasoning they may stress somewhat different aspects of the case, like the Danish Government they consider that the Member States cannot be made liable for errors or negligence on the part of national customs administrations. Like the Danish Government they take the view that the case-law of the Court cited by the Commission is not applicable to the present case. That case-law, they argue, does not relate to situations in which the Member States concerned can no longer proceed with the post-clearance recovery of customs duties or agricultural levies. In this connection, some Member States also note that errors, within the meaning of Article 220(2)(b) of the Customs Code, can also be made by the Commission itself or by the authorities in non-member countries.

43. In some submissions, it is also pointed out that, even when the customs legislation is diligently applied by an efficient customs administration, errors are unavoidable. The volume of trade with non-member countries makes it simply impossible to proceed without making any mistakes. The position taken by the Commission means that those Member States through which trade mainly flows run disproportionate financial risks, even if they do their utmost to conform with the Community principle of good faith laid down in Article 10 EC.

44. The German Government employs arguments slightly different from those of the other intervening Member States. It begins by raising the question of admissibility. Under Article 92(2) of its Rules of Procedure, the Court should of its own motion consider whether the action is in fact admissible, since it has no jurisdiction to take cognisance of the present case. The present action should actually be an action for damages for breach of the Customs Code. As there is no provision for such an action in the system of legal protection established by the EC Treaty, it should be a matter for the Danish courts, in accordance with Article 240 EC.

45. Secondly, the German Government notes that from the objective fact that customs traffic cannot be administered without making errors it follows that only in cases of a manifest and sufficiently well-defined infringement of Community customs and agricultural law, involving financial loss for the Community, can such an action for damages be allowed, by analogy with the criteria developed by the Court in its case-law on the liability of the Community and Member States to private individuals. The present case does not meet those criteria.

V — Appraisal

A — *Admissibility*

46. It seems to me that the argument of the German Government to the effect that in the present case it is a question not of an action for negligence but of a disguised action for damages rests on an incorrect reading of the Commission's application, which does not seek to have the Kingdom of Denmark ordered to pay a specified amount but to have that Member State declared guilty of failing to fulfil its obligations under Article 10 EC and the 1994 Own Resources Decision. The fact that the application mentions the sum of DKK 140 409.60 is inseparably linked with the subject-matter of this action for negligence, namely, the alleged failure of the Kingdom of Denmark to fulfil its obligations under the 1994 Own Resources Decision. Accordingly, in my opinion, the Commission's action is admissible.

47. Before proceeding to appraise the action on the merits, with reference to the foregoing I also note that the parties, including the intervening parties, are not always equally careful about the terminology used in their written and oral submissions. Central to this case is the question of the nature of the obligations imposed on the Member States by the 1994 Own Resources Decision and the implementing Regulation No 1552/89 and how far they extend in an actual situation such as that which forms the basis of the present case. Whether or not the Kingdom of Denmark is required to pay the amount in question depends essentially on the content and scope of those obligations. It is therefore wrong to characterise the (disputed) obligation to pay as following from a (disputed) liability for that amount.

B — *The merits*

48. The Commission and the Danish Government are in agreement as far as the underlying facts are concerned. Moreover, the Danish Government recognises that the competent customs authorities of Ballerup made an error by wrongly allowing a number of consignments to enter the Community customs territory at a zero rate, despite the fact that the importer was not in possession of the required end-use permit. Since the undertaking concerned had legitimate expectations with regard to the correctness of the customs authorities' decision, the customs duties owed could not subsequently be recovered from the debtor.

49. Before assessing whether the Danish Government failed to fulfil its obligations under Community law and whether it is therefore still required to hand over the own resources lost by the Community, I consider

it necessary to seek the answers to three closely related questions, namely:

— What are the obligations imposed on Member States by Articles 2(1)(a) and (b) and 8(1) of the 1994 Own Resources Decision, in conjunction with Articles 2 (1), 6(2) and 17 of Regulation No 1552/89?

— What is the connection between, on the one hand, the 1994 Own Resources Decision and Regulation No 1552/89 and, on the other, the Customs Code and implementing Regulation No 2454/93?

— More particularly, does the application of Article 220(2)(b) of the Customs Code, in conjunction with Articles 871 and 873 of the implementing Regulation No 2454/93, have consequences for the obligations of the Member States under the 1994 Own Resources Decision and Regulation No 1552/89?

C — The obligations under the 1994 Own Resources Decision and Regulation No 1552/89

50. The answer to the first question depends on the interpretation of Article 2(1) of Regulation No 1552/89 and, in particular, the passage: '... 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 ["la prise en compte du montant du droit"] and the notification of the debtor'.

51. According to the Commission, 'shall be established' applies not only to the situation in which the entitlement has actually been entered in the accounts and the debtor notified by the national authorities – after which the entitlement can be collected and transferred as own resources — but also to the situation in which the national authorities ought, on the basis of the objective facts, to have entered the entitlement but failed to do so.

52. The Danish Government, with the support of the Belgian, Netherlands and Portuguese Governments, proposes a different and more restrictive reading of Article 2(1), namely, that the Communities' entitlement

to own resources is established as soon as it has been entered in the accounts in accordance with the customs regulations and the debtor can be notified.

53. Although the text of Article 2(1) allows for both interpretations, I believe that the correct view is that defended by the Commission. In his Opinion in *Commission* v *Germany*, [17] in connection with a comparable point of interpretation concerning Regulation No 2981/77 – the regulation replaced by Regulation No 1552/89 — Advocate General Mancini noted that establishment is not the event which gives rise to the right to own resources but only the event which gives rise to the Member States' obligation to place those resources at the Commission's disposal. Accordingly, the right to own resources arises once the conditions laid down for that purpose by the Community legislature are fulfilled. If it were otherwise and the creation of the right depended on the initiative of the national authorities, the crediting of the own resources to the Community might be postponed at will or, I might add, be avoided.

54. In that case, the Court, without adopting the broader view taken by the Advocate General, nevertheless delivered a judgment consistent with his analysis, ruling that the obligation to credit the levies in question did not depend on 'the date on which these were established, but on the date on which they should have been established'. [18] This ruling was later confirmed by the judgments in *Commission* v *Greece* [19] and *Commission* v *Netherlands*. [20]

55. In my opinion, this case-law is wholly relevant in the context of the present case. If Community entitlements were to be considered established only if the Member States had entered them in the accounts, the 'best possible conditions' under which own resources must be available to the Community could not be ensured. Then, contrary to the express intent of the second recital in the preamble to Regulation No 1552/89, duties and levies wrongly not entered in the accounts as a result of errors or negligence on the part of the national administration could not be established as own resources.

56. Moreover, such an outcome would also be inconsistent with the system of Regulation No 1552/89. Thus, Article 17(2) provides, subject to very strict conditions, for Member States to be freed from their obligation to place the amounts corresponding to established entitlements at the disposal of the Commission as own resources if, for reasons of *force majeure*, these amounts could not be

17 — Cited in footnote 11; see, in particular, pp. 1176 and 1177

18 — *Commission* v *Germany*, cited in footnote 11, paragraph 17.

19 — Case 68/88 [1989] ECR 2965, paragraph 14.

20 — Cited in footnote 15, paragraphs 37 and 38.

collected and if, after thorough assessment, it appears that recovery is impossible for reasons that cannot be attributed to the Member State concerned. The restrictive effect of this provision would be almost fatally impaired if it were not to apply to cases in which the Member States concerned, on the basis of the objective facts and the applicable customs regulations, ought to have established customs duties but either failed to do so or established them incompletely or too late. However, there is little point in imposing strict requirements on Member States in connection with the fulfilment of obligations which are a consequence of the establishment of own resources if the obligation to establish those resources is not itself based on the fact that the relevant objective conditions are met, in fact and in law.

57. I find this to be confirmed in the case-law, where the Court has argued that there is an inseparable link between the obligation to establish the existence of the customs debt and the obligation to credit it to the Commission's account within the prescribed time-limit, together with default interest, where appropriate. [21] This inseparable link stands and falls, in particular, with the establishment of the own resources. It cannot depend on the arbitrary or even negligent conduct of a Member State. [22]

58. Finally, in describing the context of this case, I have already pointed out that the Community financing system is characterised by a series of delicate balances: between revenue and expenditure, between the components of the revenue and between the components of the expenditure. The vulnerability of the system demands that the obligations of the Member States in relation to the establishment, collection and transfer of own resources be strictly defined and strictly fulfilled. This requirement is incompatible with a situation in which the consequences of negligence in establishing traditional own resources on the part of a Member State are simply shared out among all the Member States via the so-called GNP resources. Such an eventuality, which is incompatible with the good faith which the Member States are also required to show each other, should be prevented precisely by a strict interpretation and application of the Community rules.

59. I therefore conclude that, under Article 2(1) of Regulation No 1552/89, on the basis of the facts of the case, the Danish authorities ought to have established an amount of DKK 140 409.60 in customs duties as

21 — See *Commission* v *Germany* (cited in footnote 11), paragraph 11; *Commission* v *Greece* (cited in footnote 19), paragraph 17; and *Commission* v *Netherlands* (cited in footnote 15), paragraph 38.

22 — *Commission* v *Netherlands* (cited in footnote 15), paragraph 37.

Community own resources. That negligence in itself already constitutes a violation of the obligations which Community law imposes on the Member State.

D — *The connection between the own resources regulations and the Community customs legislation*

60. Although the Danish Government acknowledges that its customs authorities made an error, as a result of which customs duties were not established as own resources, it denies that this shortcoming implies that it is still obliged to transfer to the Commission the amount of the resources that it failed to establish. It argues that in this case the application of Article 220(2)(b) of the Customs Code prevented it from collecting the duties in question from the debtor and that, in the absence of an explicit legal basis in Community law, it cannot be held 'liable' for its administration's error of judgment.

61. In my opinion, this argument is untenable. If, as established in point 59 above, it must be assumed that the Danish Government failed to apply Article 2(1) of Regulation No 1552/89, then an amount of DKK 140 409.60 was wrongly not established as Community own resources and wrongly not credited to the Commission's account. There can be no exemption on one of the grounds specified in Article 17(2) of Regulation No 1552/89 since the inability to collect was a direct consequence of an error of judgment on the part of the Danish administration. It follows that, under the Community's own resources regulations, the Danish Government is still obliged to transfer the own resources wrongly not established.

62. Nor do I set any store by the arguments which the Danish Government derives from the alleged connection between the own resources provisions and the Community customs provisions. The former system of provisions governs the legal relationship between the Community and the Member States as far as the establishment and transfer of own resources is concerned. The latter system governs the legal relations between the Member States and undertakings in connection with the assessment, imposition and collection of import and export duties. Although there is a link between the two sets of provisions in the sense that, under the customs provisions applicable, customs duties established as own resources have to be assessed, imposed and collected by the competent national customs authorities, that link is primarily technical and functional in nature.

63. In principle, eventualities involving the relationship between the customs authorities and the debtor do not carry over into the settlement between the Community and the Member States with respect to the treatment of revenue from customs duties as own resources which have been or ought to have been established as such. [23] If it were otherwise, then the settlement between the Member States and the Community with respect to the own resources in question would depend on the risks inherent in the administrative handling of customs traffic. It was precisely these risks that the Community legislature aimed to avoid by exhaustively listing in Article 17(2) of Regulation No 1552/89 the circumstances in which Member States can be freed from their obligation to credit the Commission's account with the own resources they have or ought to have established.

64. The basic rule that own resources are governed by an exhaustive system of provisions consisting, in the present case, of the 1994 Own Resources Decision and Regulation No 1552/89 can only be waived if and in so far as the Community legislature itself has attached to certain eventualities that may arise in connection with the imposition and collection of import and export duties explicitly specified consequences for the obligations of the Member States under the own resources rules. [24]

65. The Danish Government and the governments that support its position have responded by arguing that this would entail the 'liability' of the Member States for errors and negligence in the application of the customs legislation and would particularly affect the Member States with an above-average volume of trade with non-member countries. Aside from the fact that, as already noted in point 47 above, the use of the notion of liability is incorrect, this argument also seems to me untenable on other grounds. Since, under Article 2(3) of the 1994 Own Resources Decision, Member States could retain 10% of the traditional own resources to be transferred, [25] it can be maintained, following the same line of reasoning, that the Member States which say they are running disproportionate risks also have disproportionately large revenues. Furthermore, this argument is also curious in that it ultimately involves these risks simply being passed on to the Community and, indirectly, to the other Member States, which thus must suffer the financial consequences of the administrative carelessness

23 — See *Pretore di Cento* (cited in footnote 14), paragraphs 4 to 6.

24 — This basic rule of a ring fence separating the sphere of own resources from that of customs legislation can also be derived from the case-law of the Court. See, inter alia, Case C-61/98 *De Haan* [1999] ECR I-5003, paragraphs 34 and 35, and Case C-112/01 *SPKR* [2002] ECR I-10655, paragraph 34.

25 — Now 25%. See Article 2(3) of 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) (2000 Own Resources Decision).

in applying the customs regulations displayed by the Member States concerned. In short, these Member States wish to reap the benefits without assuming the obligations.

E — *The consequences of the application of Article 220(2)(b) of the Customs Code for the obligations under the own resources provisions*

66. The Danish Government argues that, in the present case, as a result of the application of Article 220(2)(b) of the Customs Code, in conjunction with Articles 871 and 873 of implementing Regulation No 2454/93, the import duties that the customs authorities ought to have assessed can no longer be assessed or collected. Accordingly, the case-law of the Court in *Commission* v *Germany*, [26] *Commission* v *Greece* [27] and *Commission* v *Netherlands*, [28] cited by the Commission, is not applicable to the present situation. Moreover, the Commission, under the procedure laid down in Articles 871 and 873 of implementing Regulation No 2454/93, has expressly approved the application of Article 220(2)(b) of the Customs Code. Naturally, in these circumstances, it must also have been aware of the consequences for the establishment and transfer of own resources.

26 — Cited in footnote 11.

27 — Cited in footnote 19.

28 — Cited in footnote 15.

67. Since it is now clear that in the present case the Danish Government ought to have established and collected a customs debt of DKK 140 409.60 and that the competent Danish customs authorities, through their actions, triggered the application of Article 220(2)(b) of the Customs Code, which made collection impossible, it only remains to investigate whether, in connection with the application of the aforementioned provision, the Customs Code or a rule based thereon absolves the Danish Government from the obligation to transfer to the Commission the customs duties it should have established as own resources.

68. I shall preface my answer to this question with the observation that there is absolutely no general legal basis for the view that customs duties which ought to have been established as own resources do not need to be transferred to the Commission. The case-law of the Court discussed in points 53 to 57 above relates to cases in which the Member States concerned had failed to establish levies or customs duties in due time. In these cases, the late fulfilment of the obligations under the own resources provisions of Community law resulted in the own resources in question, plus default interest, still having to be paid. There is no fundamental difference between arbitrary or negligent conduct on the part of a Member State that leads to a delay in the collection of duties and comparable conduct that makes the collection of the duties legally impossi-

ble. In both cases, the Member State concerned is responsible for ensuring that the intended result of the own resources rules, namely, the crediting of the own resources that the Member State ought to have established, is achieved.

69. The answer to the question itself is simple. Neither the Customs Code nor implementing Regulation No 2454/93 contains a provision expressly stating that Member States which, as a result of the application of Article 220(2)(b) of the Customs Code, cannot collect from the debtor entitlements which they should have established as own resources should be absolved from having to transfer the amounts involved to the Commission.

70. Accordingly, the Kingdom of Denmark's failure properly to fulfil its obligations under the 1994 Own Resources Decision and Regulation No 1552/89 means that it is still obliged to transfer to the Commission an amount equal to DKK 140 409.60, plus default interest.

71. For the sake of completeness, I also note that no arguments for the release of the Member States from their obligations under the own resources rules in connection with the application of Article 220(2)(b) of the Customs Code can be derived from the participation of the Commission in the procedure provided for in Articles 871 and 873 of implementing Regulation No 2454/93.

72. Firstly, those provisions do not grant the Commission the necessary authority. Secondly, within the framework of this procedure such authority would be out of place since the Commission would then have to weigh the legal principle of protection of the legitimate expectations of the debtor against the possible consequences for the Community's finances. Thirdly, the participation of the Commission in the procedure in question reflects a responsibility quite different from that of monitoring compliance with the own resources rules, namely, responsibility for equality and uniformity in the application of Community customs law.

F — *Costs*

73. As it is my opinion that the Commission should succeed in its action, I consider it right to conclude that the Kingdom of Denmark should be ordered to pay the costs.

VI — Conclusion

74. In the light of the foregoing, I would recommend that the Court:

(1) declare the Commission's application admissible;

(2) rule that, in not properly establishing an amount of DKK 140 409.60 in import duties and making it available to the Commission as own resources, together with default interest as from 20 December 1999, the Kingdom of Denmark has failed to fulfil its obligations under Community law and, in particular, those which follow from Articles 2 and 8 of Council Decision 94/728/EC, Euratom of 31 October 1994 on the system of the European Communities' own resources and from Article 2(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;

(3) order the Kingdom of Denmark to pay the costs.