JUDGMENT OF THE COURT (First Chamber)

5 October 2006 *

In Case C-312/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 July 2004,

Commission of the European Communities, represented by G. Wilms and A. Weimar, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by H. G. Sevenster and J.G.M. van Bakel, acting as Agents,

defendant,

* Language of the case: Dutch.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, J. N. Cunha Rodrigues (Rapporteur) and E. Levits, Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities is seeking a declaration by the Court that:

— by not promptly taking the measures necessary to effect the rapid establishment of the entitlements 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 transport operations carried out under the cover of TIR carnets,

— by delaying, from 1 January 1992 to 1994 inclusive, to establish the entitlements of the Communities to their own resources and by thus making those resources available to the Commission too late, in a number of cases of suspected irregularity concerning transport operations carried out under the cover of TIR carnets,

— by refusing to pay the corresponding default interest,

the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 2(1), 6(2), 10(1) and 11 of Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155, p. 1).

Legal context

The TIR Convention

2 The Customs Convention on the International Transport of Goods under Cover of TIR Carnets ('the TIR Convention') was signed in Geneva (Switzerland) on 14 November 1975. The Kingdom of the Netherlands is a party to the Convention, as is the European Community, which approved it by Council Regulation (EEC) No 2112/78 of 25 July 1978 (OJ 1978 L 252, p. 1). That convention became effective in respect of the Community on 20 June 1983 (OJ 1983 L 31, p. 13).

3 The TIR Convention provides, in particular, that goods carried under the TIR procedure which it establishes are not to be subject to the payment or deposit of import or export duties and taxes at customs offices en route.

4 For those facilities to be applied, the TIR Convention requires that the goods be accompanied throughout the transport operation by a standard document, the TIR carnet, which serves to check the regularity of the operation. It also requires that the transport operations be guaranteed by associations approved by the contracting parties, in accordance with the provisions of Article 6 of the Convention.

5 Article 6(1) of the TIR Convention provides as follows:

'Subject to such conditions and guarantees as it shall determine, each Contracting Party may authorise associations to issue TIR carnets, either directly or through corresponding associations, and to act as guarantors.'

6 A TIR carnet consists of a set of sheets each comprising vouchers No 1 and No 2 with the corresponding counterfoils, on which appears all the necessary information, one pair of vouchers being used for each territory crossed. At the start of the transport operation, counterfoil No 1 is left with the customs office of departure; discharge takes place once counterfoil No 2 is returned from the customs office of exit in the same customs territory. The procedure is repeated for each territory crossed, using the pairs of vouchers in the one carnet.

7 TIR carnets are printed and distributed by the International Road Transport Union ('the IRU'), established in Geneva, for issue to users by the national guaranteeing associations authorised to do so by the administrations of the contracting parties. The TIR carnet is issued by the guaranteeing association of the country of departure, the guarantee provided being covered by the IRU and a pool of insurers established in Switzerland.

8 Article 8 of the TIR Convention provides:

'1. The guaranteeing association shall undertake to pay the import or export duties and taxes, together with any default interest, due under the customs laws and regulations of the country in which an irregularity has been noted in connection with a TIR operation. It shall be liable, jointly and severally with the persons from whom the sums mentioned above are due, for payment of such sums.

2. In cases where the laws and regulations of a Contracting Party do not provide for payment of import or export duties and taxes as provided for in paragraph 1 above, the guaranteeing association shall undertake to pay, under the same conditions, a sum equal to the amount of the import or export duties and taxes and any default interest.

3. Each Contracting Party shall determine the maximum sum per TIR carnet, which may be claimed from the guaranteeing association on the basis of the provisions of paragraphs 1 and 2 above.

4. The liability of the guaranteeing association to the authorities of the country where the customs office of departure is situated shall commence at the time when

the TIR carnet is accepted by the customs office. In the succeeding countries through which goods are transported under the TIR procedure, this liability shall commence at the time when the goods are imported ... .

5. The liability of the guaranteeing association shall cover not only the goods which are enumerated in the TIR carnet, but also any goods which, though not enumerated therein, may be contained in the sealed section of the road vehicle or in the sealed container. It shall not extend to any other goods.

6. For the purpose of determining the duties and taxes mentioned in paragraphs (1) and (2) of this article, the particulars of the goods as entered in the TIR carnet shall, in the absence of evidence to the contrary, be assumed to be correct.

7. When payment of sums mentioned in paragraphs 1 and 2 of this Article becomes due, the competent authorities shall so far as possible require payment from the person or persons directly liable before making a claim against the guaranteeing association.'

9 Article 11 of the TIR Convention reads as follows:

'1. Where a TIR carnet has not been discharged or has been discharged conditionally, the competent authorities shall not have the right to claim payment of the sums mentioned in Article 8(1) and (2) from the guaranteeing association unless, within a period of one year from the date of acceptance of the TIR carnet by those authorities, they have notified the association in writing of the non-discharge or conditional discharge. The same provision shall apply where the certificate of discharge was obtained in an improper or fraudulent manner, save that the period shall be two years.'

2. The claim for payment of the sums referred to in Article 8(1) and (2) shall be made to the guaranteeing association at the earliest three months after the date on which the association was informed that the carnet had not been discharged or had been discharged conditionally or that the certificate of discharge had been obtained in an improper or fraudulent manner and at the latest not more than two years after that date. However, in cases which, during the abovementioned period of two years, become the subject of legal proceedings, any claim for payment shall be made within one year of the date on which the decision of the court becomes enforceable.

3. The guaranteeing association shall have a period of three months, from the date when a claim for payment is made upon it, in which to pay the amounts claimed. The sums paid shall be reimbursed to the association if, within the two years following the date on which the claim for payment was made, it has been established to the satisfaction of the customs authorities that no irregularity was committed in connection with the transport operation in question.'

The Community customs legislation

10 Article 10 of Council Regulation (EEC) No 719/91 of 21 March 1991 on the use in the Community of TIR carnets and ATA carnets as transit documents (OJ 1991 L 78, p. 6), applicable from 1 January 1992 to 31 December 1993, provides:

'1. This Article shall apply without prejudice to the specific provisions of the TIR and the ATA Conventions concerning the liability of the guaranteeing associations when a TIR or an ATA carnet is being used.

2. Where it is found that, in the course of or in connection with a transport operation carried out under cover of a TIR carnet or a transit operation carried out under cover of an ATA carnet, an offence or irregularity has been committed in a particular Member State, the recovery of duties and other charges which may be payable shall be effected by that Member State in accordance with Community or national provisions, without prejudice to the institution of criminal proceedings.

3. Where it is not possible to determine in which territory the offence or irregularity was committed, such offence or irregularity shall be deemed to have been committed in the Member State where it was noted unless, within a period to be determined, proof is furnished, to the satisfaction of the competent authorities, of the regularity of the operation or of the place where the offence or irregularity has actually been committed.

...'

11 In accordance with Article 2 of Commission Regulation (EEC) No 1593/91 of 12 June 1991 providing for the implementation of Regulation No 719/91 (OJ 1991 L 148, p. 11), also applicable from 1 January 1992 to 31 December 1993:

'1. Where an infringement or an irregularity is found to have been committed in the course of or in connection with a transport operation carried out under cover of a TIR carnet or a transit operation carried out under cover of an ATA carnet, the competent authorities shall notify the holder of the TIR carnet or ATA carnet and the guaranteeing association within the period prescribed in Article 11(1) of the TIR Convention or Article 6(4) of the ATA Convention, as the case may be.

2. Proof of the regularity of the operation carried out under cover of a TIR carnet or an ATA carnet within the meaning of Article 10(3) of Regulation (EEC) No 719/91 must be furnished within the period prescribed in Article 11(2) of the TIR Convention or Article 7(1) and (2) of the ATA Convention, as the case may be.

...'

12 Articles 10(1) and (2) of Regulation No 719/91 and 2(1) and (2) of Regulation No 1593/91 were replaced with effect from 1 January 1994, respectively, by Articles 454(1) and (2) and 455(1) and (2) of 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 (OJ 1993 L 253, p. 1, the 'implementing regulation'), which are almost identical in content.

13 Under Article 457 of the implementing regulation:

'For the purposes of Article 8(4) of the TIR Convention, where a consignment enters the customs territory of the Community or starts from a customs office of departure situated in the customs territory of the Community, the guaranteeing association shall become or shall be responsible to the customs authorities of each Member State the territory of which the TIR consignment enters, up to the point at which it leaves the customs territory of the Community or up to the customs office of destination in that territory.'

The system of the Communities' own resources

14 Article 2 of Regulation No 1552/89, included under Title I, entitled 'General Provisions', states:

'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 amount due has been notified by the competent department of the Member State to the debtor. Notification shall be given as soon as the debtor is known and the amount of entitlement can be calculated by the competent administrative authorities, in compliance with all the relevant Community provisions.

...'

15 The first and second paragraphs of Article 3 of Regulation No 1552/89, which is also part of Title I, provide:

'Member States shall take all appropriate measures to ensure that the supporting documents concerning the establishment and the making available of own resources are kept for at least three calendar years, as from the end of the year to which these supporting documents refer.

If verification of these supporting documents by the national administration alone or in conjunction with the Commission shows that a finding to which they relate

may have to be corrected, they shall be kept beyond the time-limit provided for in the first paragraph for a sufficient period to permit the correction to be made and monitored.'

16 Article 6(1) and (2)(a) and (b) of that regulation, set out in Title II entitled 'Accounts for own resources', provides:

'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.

2. (a) Entitlements established in accordance with Article 2 shall, subject to point (b) of this paragraph, be entered in the accounts [currently referred to as 'A 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 [currently referred to as 'B 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.'

17 According to Article 9 of Regulation No 1552/89, set out in Title III entitled 'Making available own resources':

'1. 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.

2. The amounts credited shall be converted by the Commission and entered in its accounts ...'

18 Under Article 10(1) of Regulation No 1552/89, included in the same Title III:

'After deduction of 10% by way of collection costs in accordance with Article 2(3) of Decision 88/376/EEC, 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.

However, for entitlements shown in [B] accounts under Article 6(2)(b), the entry must be made at the latest on the first working day following the 19th day of the second month following the month in which the entitlements were recovered.'

19 Article 11 of Regulation No 1552/89, also set out under Title III, provides:

'Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by two percentage points. This rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

The pre-litigation procedure

20 According to the Commission, when its staff made an inspection of the Customs Directorate in Rotterdam (the Netherlands) on 2 October 1997, they found that there had been a delay in the establishment of own resources from customs duties. Those findings concerned undischarged TIR carnets, accepted from 1991 to 1993, the payment notices for which had been sent late by the Netherlands authorities since, in the 15 cases confirmed, the notices had only been sent on average two and a half years after those carnets had been accepted, although the authorities had noted that voucher No 2 of those carnets had not been returned to the customs office of departure.

21 By letter of 18 December 1997, the Commission informed the Kingdom of the Netherlands of its findings. Subsequently, by letters of 9 March 1998 and 6 January 2000, the Commission asked that Member State to make available to it NLG 267 682.43 in respect of default interest under Article 11 of Regulation No 1552/89. The Commission states that, for the purpose of calculating that default interest, it

acted on the basis of the maximum period of 15 months, from the validation of the documents in question, fixed for the purpose of notification of the duty to the party liable, a time-limit stemming from Article 455 of the implementing regulation and Article 11 of the TIR Convention.

22 In their replies of 15 April 1998 and 7 March 2000, the Netherlands authorities rejected the claim for payment of default interest on the grounds that that claim was unfounded in law and that, under the first paragraph of Article 3 of Regulation No 1552/89, that request was also time-barred in respect of some of the files in question, one of which dated from 1986.

23 As regards the alleged delay determined by the Commission's staff, the Netherlands authorities maintain that there is no legal basis allowing recovery from the holder of a TIR document while the investigation procedure remains unfinished. Thus, entry in the accounts of the amounts due cannot take place until the end of that investigation procedure. On that basis, exceeding the 3-month period laid down in Article 11(2) of the TIR Convention pending the results of the investigation cannot, according to those authorities, be regarded as a late entry in the accounts which allows default interest to be claimed.

24 The Commission, on 18 October 2002, addressed a letter of formal notice to the Kingdom of the Netherlands which took issue with the arguments of the Netherlands authorities. In that letter it sets out its assessment, based on the provisions of Community legislation applicable from 1991 to 1993, of the delays in making own resources available following from the prolonged inaction of the Netherlands authorities as regards the TIR operations to which these proceedings relate. Taking account of the difficulty in determining a fixed date in respect of default interest concerning TIR operations effected prior to 1992, the Commission submits that default interest is not due in respect of that period as a result of the lack of a mandatory time-limit for the recovery of the duties in question but that the

Netherlands authorities have nevertheless not done all required to protect the Community's financial interests. As regards the TIR operations carried out on and after 1 January 1992, the Commission requests the Netherlands authorities to pay without delay, pursuant to Article 11 of Regulation No 1552/89, default interest of EUR 110 239.17.

25 In their reply of 19 December 2002, the Netherlands authorities maintained their point of view.

26 On 11 July 2003 the Commission issued a reasoned opinion, in which it repeats the arguments set out in its letter of formal notice. It called on the Kingdom of the Netherlands to take the necessary measures to comply with the reasoned opinion within a period of two months as from the date of its notification. The Government of that Member State replied to the reasoned opinion by a letter of 10 September 2003 in which it once again set out its previous arguments.

27 In those circumstances, the Commission decided to bring the present action.

The action

Admissibility

Arguments of the parties

28 The Netherlands Government claims that the action is inadmissible as being time-barred under Article 3 of Regulation No 1552/89, which requires Member States to

keep supporting documents concerning the establishment and the making available of own resources for at least three calendar years as from the end of the year to which those supporting documents refer. It follows that the same period is available to the Commission for it to lodge an action or an application against a Member State, since in the opposite situation the Member State will have no means of defending itself. In the present case, in so far as there is no legal basis on which that period may be extended, as provision for an extension exists only where an inspection by the Commission carried out during the same period results in a correction, the Netherlands authorities were required to keep the supporting documents relating to the periods to which these proceedings relate only up to the end of 1997 at the latest. The fact that the Netherlands authorities had not yet destroyed the documents does not alter the fact that a limitation period applies.

29 Furthermore, the Commission's request is in any event inadmissible as regards the period up to 1 January 1992 inasmuch as it has no legal interest in bringing proceedings concerning that period. In submitting that no default interest is due in respect of that period, the Commission was merely seeking a declaration from the Court that the Netherlands authorities were late in declaring and paying the own resources due. Such an application should be considered to be inadmissible because any decision given would not be capable of changing the legal position of the Kingdom of the Netherlands.

30 In response to the first plea of inadmissibility, the Commission submits that Article 3 of Regulation No 1552/89 is intended solely to ensure the mandatory conservation of the supporting documents, which must be kept for three years 'at least', and does not establish any limitation period in respect of the recovery of own resources. Even were it to be accepted that Article 3 should be interpreted as establishing a limitation period, that period has not been exceeded in the present case since the Netherlands authorities were informed within that period that delays had occurred. That information was provided by the Commission to the Netherlands authorities in a letter of 18 December 1997, whereas the claim for payment of default interest sent by the Commission concerned TIR carnets accepted in 1993 in respect of which the

own resources were established and effectively made available during 1994 and 1995. Under Article 3 of Regulation No 1552/89, the supporting documents relating to own resources declared in 1994 and 1995 therefore ought to have been kept until the end of 1997 and 1998 respectively. In addition, the period referred to in Article 3 can be extended when a correction has to be made to the relevant declarations. Consequently, since the result of the investigation carried out by the Commission rendered such corrections necessary, there can be no limitation of the action.

31 As regards the second plea of inadmissibility, the Commission is of the opinion that the very nature of the infringement procedure in Article 226 EC specifically allows a declaration to be made that a Member State has not fulfilled its obligations, without this actually altering its legal position.

Findings of the Court

32 So far as the first plea of inadmissibility is concerned, in contrast to the submission put forward by the Netherlands Government, Article 3 of Regulation No 1552/89 does not provide for any limitation period in respect of the recovery of own resources. That provision seeks only to require Member States to keep the supporting documents concerning the establishment and the making available of own resources for a specified minimum period, which may be extended if necessary for a sufficient period to permit any correction to be made and monitored where inspection by the national authorities, alone or in association with the Commission, shows such a correction to be necessary. The use of the phrase 'at least' in relation to the three-year holding period supports the view that the intention of the Community legislature was not to establish a limitation period.

33 In addition, it is common ground that the Netherlands authorities did not destroy the documents relating to the operations which are the subject of these proceedings, with the result that the Kingdom of the Netherlands cannot plead any infringement of its right to due process.

34 This plea must therefore be rejected.

35 As regards the second plea of inadmissibility, deriving from the absence of any legal interest in proving a failure to fulfil obligations concerning the period prior to 1 January 1992 where there is no claim for payment of default interest, suffice it to note that the failure by a Member State to fulfil an obligation imposed by a rule of Community law in itself constitutes a failure to fulfil obligations (see, inter alia, Case C-363/00 *Commission* v *Italy* [2003] ECR I-5767, paragraph 47).

36 Since that plea is also unfounded, it must be rejected and the action must be held to be admissible in its entirety.

Substance

Arguments of the parties

37 The Commission observes that the Member States must act promptly in the recovery of the Communities' own resources in order to make them rapidly available to it. Within the context of the implementation of the TIR Convention, that means

that a Member State must establish as soon as possible after the acceptance of a TIR carnet whether there has been any irregularity committed concerning the transport operation which it covers. If such is the case, it should inform the user and, after the expiry of the period during which that party may adduce evidence that the transit was properly effected or that the irregularity was committed elsewhere, the Member State must commence recovery of the duties in question.

38 The Commission points out that it makes a distinction in these proceedings between the period prior to 1 January 1992 and the period from that date until 1994, on the basis that Article 11 of the TIR Convention was applicable for the entire duration of the period covered. As regards the period prior to 1 January 1992, it does not require the payment of default interest from the Netherlands Government. According to the Commission, up to and including that latter date, only Article 11 of the TIR Convention was applicable and it was not possible to point to an exact date at which the competent authorities ought to have commenced recovery in so far as the TIR Convention, which does not concern the user of the scheme, but the guaranteeing association, does not set out any time-limit for the purposes of notification of the offence to the user of the scheme, nor any period during which the user may adduce evidence that the offence took place elsewhere, or indeed that it did not occur. However, the Netherlands authorities did not take the care necessary to safeguard the Community's financial interests. The Member States are required to take the necessary measures promptly in order to effect the rapid establishment of the entitlements of the Communities to their own resources. Where neither voucher No 2 of the TIR carnet nor any other document reaches the office where that carnet was accepted in the days following the estimated end of the physical transit operation, the authorities concerned should take in a reasonable time the appropriate measures to uphold the financial interests of the Community. In the situations to which the present proceedings relate, the payment notices were sent after varying periods of between two years and four and a half months and two years and ten months from the date at which the TIR carnet was accepted. Such periods cannot be considered to be compatible with the promptness required.

39 By contrast, so far as the period from 1 January 1992 to 31 December 1993 is concerned, the Commission observes that Article 10 of Regulation No 719/91 and

Article 2 of Regulation No 1593/91, read in conjunction with Article 11 of the TIR Convention, set out specific time-limits within which the Member States had to take the measures necessary to declare offences. The point from which the time starts to run and the duration of the 'period to be determined', during which proof of the regularity of the operation or of the place where the offence or irregularity was actually committed can be furnished in accordance with Article 10(3) of Regulation No 719/91, can be inferred from Article 2 of Regulation No 1593/91, read in conjunction with Article 11 of the TIR Convention.

40 According to the Commission, it is apparent from those provisions that if the customs office of departure does not receive voucher No 2 of the TIR carnet or any other document from the office of exit within the prescribed period (set at a maximum of one month in the reasoned opinion), it must inform the user of the scheme and the guaranteeing association within a period of one year from the date on which that carnet was accepted, and a period of two years where a TIR carnet obtained in an improper or fraudulent manner is discharged. The interested party has three months in which to adduce evidence of the absence of any irregularity or of the place where that irregularity actually occurred. Where no evidence is provided, the irregularity will be deemed to have been committed in the Member State in which the office of departure is situated and that State must proceed with recovery of the customs debt.

41 According to the Commission, the power left to Member States to choose not to undertake recovery at the earliest possible date provided for in Article 11(2) of the TIR Convention, but at a later date before the expiry of the maximum period of two years referred to in that provision, is of importance only in regard to the relationship between the authorities of that State and the debtor. Under the own resources scheme, notification of the debtor should occur as soon as that person is known and the amount of the debt is fixed, that also being the time at which the authorities concerned can undertake recovery under the applicable Community legislation. The Community legislature clearly wished to create a scheme which allows legal evidence of the irregularity of a TIR operation to be submitted as soon as the first indication that it has occurred is discovered.

42 The Commission adds that, in accordance with Article 2(1) of Regulation No 1552/89, the Communities' entitlement to the own resources referred to is established as soon as the amount of the entitlement has been notified by the competent department of the Member State to the debtor. Notification is to be given as soon as the debtor is known and the amount of entitlement can be calculated by the competent administrative authorities, in compliance with all the relevant Community provisions. In so far as it appears from the foregoing that the competent authorities can undertake recovery one year and three months at the latest after receipt of the TIR carnet, and that the debtor and the amount of entitlement must also be deemed to be known on expiry of that period at the latest, the notification referred to in Article 2(1) of Regulation No 1552/89 should take place at the latest 15 months after that carnet has been accepted. As soon as that period has expired, the Communities will be deemed to have established an entitlement to the own resources concerned.

43 According to the Commission, the Member States are required to enter the established duties in the general accounts as a credit to the Commission's account from the first working day after the 19th day of the second month following the month in which the entitlement referred to in Article 2(1) of Regulation No 1552/89 was established when, as in this instance, the Member State in question does not hold a separate account (B account) within the meaning of Article 6(2)(b) of Regulation No 1552/89. The entry of own resources must take place on the same working day at the latest (Article 10 of Regulation No 1552/89), such that, in the present case, default interest under Article 11 of that regulation is also due, the Netherlands authorities having made the own resources at issue available to the Commission out of time inasmuch as they only undertook recovery on average one year after the expiry of the maximum period of 15 months.

44 The Netherlands Government points out that, so far as the period prior to 1992 is concerned, Article 11 of the TIR Convention alone was applicable and that provision does not include any time-limit for the recovery of the customs debt by the Member States. It submits that the Commission does not explain what it understands by the notion of 'promptness' or demonstrate or define specifically the failure to fulfil

obligations alleged. Furthermore, there is no legal basis for a recovery until completion of the investigation procedure allowing the conclusion that an infringement or an irregularity has been committed. In some situations, more than two years might legitimately pass between acceptance of the TIR carnet and dispatch of the payment notice.

45 As regards the period from 1 January 1992 to 31 December 1993, the Netherlands Government submits that the time-limits which, according to the Commission, were deemed to apply — besides not being intended to govern the customs authorities' relationship with that institution, but merely that with litigants — are in practice impossible to comply with. As Article 2(1) of Regulation No 1552/89 provides, the authorities of the Member States are not required to enter in the accounts the amounts due and to undertake recovery of the sums at issue before the end the investigation procedure (that is to say, the post-clearance recovery procedure). Until that time, the Member State in question is not able to establish the irregularity, the place where it was committed, the source of the customs debt, the competent State or the amount of the duties. The mere fact of not having received voucher No 2 of the TIR carnet at the most points towards a presumption of irregularity, whereas the power to recover does not arise until the irregularity and the place where it was committed have been ascertained.

46 Furthermore, according to the Netherlands authorities, Article 2(1) of Regulation No 1593/91, read in conjunction with Article 11(2) of the TIR Convention, indicates that the holder of a TIR carnet must have at least three months and at the most two years for the purpose of adducing evidence that the transport was properly carried out. The Commission is wrong to convert the minimum time-limit set out in Article 11(2) of the TIR Convention into a maximum time-limit. Not only should the holder of the TIR carnet have the opportunity to adduce the required evidence, but the Member State concerned should also have enough time to be able to assess the probative value of the evidence thus adduced.

47 In the event that the view taken by the Commission should be accepted, the Netherlands Government wishes to highlight the exceptional circumstances surrounding the period at issue, namely the difficulties linked to the correct implementation of the TIR scheme.

48 So far as the interpretation of Articles 10 and 11 of Regulation No 1552/89 is concerned, the Netherlands Government points out that, by definition, not all the facts are known at the end of the three-month period, with the result that there cannot be an obligation to make the entry in the accounts at that time. Therefore, there also cannot be an obligation to send notification to the debtor. It concludes that there was no late entry of the customs debt in the Commission's account and, consequently, no delay in the transfer of own resources to the Commission, with the result that no interest can be due under Article 11 of Regulation No 1552/89.

Findings of the Court

49 The Commission's complaint must be examined first in so far as it relates to the period during which the specific provisions of Regulations No 719/91 and No 1593/91 on the recovery of the customs debt were applicable.

— The TIR carnets accepted between 1 January 1992 and 31 December 1993

50 In accordance with Article 10(2) of Regulation No 719/91, where it is found that, in the course of or in connection with a transport operation carried out under cover of a TIR carnet, an offence or irregularity has been committed in a particular Member State, the recovery of the duties and other charges which may be payable is to be effected by that Member State in accordance with Community or national provisions, without prejudice to the institution of criminal proceedings. In the event of such a finding, under Article 2(1) of Regulation No 1593/91, the customs authorities are required to notify the holder of the TIR carnet and the guaranteeing association within the period prescribed in Article 11(1) of the TIR Convention, that is to say, within a period of one year from the date of the TIR carnet's acceptance by those authorities where the carnet was not discharged or two years in the event of the certificate of discharge being obtained in an improper or fraudulent manner.

51 Under Article 11(2) of the TIR Convention, the claim for payment is to be made to the guaranteeing association at the earliest three months after notification that the carnet had not been discharged or that the certificate of discharge had been obtained in an improper or fraudulent manner and at the latest not more than two years after that date, except in cases which, during the previously mentioned period of two years, have become the subject of legal proceedings, in which cases any claim for payment must be made within one year of the date on which the decision of the court becomes enforceable.

52 It is clear from a combined reading of the foregoing provisions that the claim for payment of the customs debt must, in the event of the carnet not being discharged, be made, as a rule, no later than three years after the date on which the TIR carnet is accepted and four years in the event of a certificate of discharge which has been obtained in an improper or fraudulent manner.

53 Article 8(7) of the TIR Convention requires the competent authorities, so far as possible, to require payment from the person or persons directly liable for that debt before making a claim against the guaranteeing association. It also follows from Article 10(3) of Regulation No 719/91 and Article 2(2) of Regulation No 1593/91, in that they do not distinguish between the holder of a TIR carnet and the guaranteeing association as regards the competence to provide evidence that the operation was properly carried out under the cover of a TIR carnet, that the aforementioned periods of three and four years apply to both the holder and the guaranteeing association (in this regard, concerning Articles 454 and 455 of the implementing regulation, see inter alia Joined Cases C-310/98 and C-406/98 *Met-Trans and Sagpol* [2000] ECR I-1797, paragraph 49).

54 It must, however, be pointed out that, as the objective of Article 2(1) of Regulation No 1593/91 is to ensure diligent and uniform application of the provisions relating to the recovery of customs debts in order to secure rapid and effective availability of the Communities' own resources (see, by analogy, inter alia, Case C-460/01 *Commission v Netherlands* [2005] ECR I-2613, paragraphs 60, 63, 69 and 70), notification of the offence or the irregularity must, in any event, be made as soon as possible, that is to say, as soon as the customs authorities know of that infringement or irregularity and, if necessary, well before the expiry of the maximum respective periods of one year and, in the event of fraud, of two years, referred to in Article 11(1) of the TIR Convention.

55 On the same grounds, the claim for payment within the meaning of Article 11(2) of the TIR Convention must be sent as soon as the customs authorities are in a position to do so and, if necessary, before the expiry of the period of two years following notification of the offence or irregularity to the interested parties.

56 In the present case, it is common ground that the claims for payment at issue were sent less than three years after the date on which the TIR carnets were accepted and thus before the expiry of the maximum period of three years following that acceptance. As to the remainder, the Commission has not shown that, as regards the operations covered by the TIR carnets accepted in 1992 and 1993 and to which the present proceedings refer, that the claim for payment was not made at the earliest possible stage, that is to say, as soon as the customs authorities were in a position to do so.

57 In so far as the Commission is not seeking a declaration that there has been a failure to comply with Regulations No 719/91 and No 1593/91, but rather a declaration that Articles 2, 6, 9, 10 and 11 of Regulation No 1552/89 have been infringed, it is still necessary to ascertain whether, by its conduct, the Kingdom of the Netherlands has infringed those provisions.

58 Under Article 2(1) of Regulation No 1552/89, the Communities' entitlement to own resources is established 'as soon as' the competent authorities notify the debtor of the amount due, which must be done as soon as the debtor is known and the amount of entitlement can be calculated by the competent administrative authorities, in compliance with the relevant applicable Community provisions (see, inter alia, *Commission* v *Netherlands*, paragraph 85), that is to say, Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, the 'Customs Code'), Regulations No 719/91 and No 1593/91, and the TIR Convention. The claim for payment under Article 11(2) of the TIR Convention must therefore be considered to be a notification within the meaning of Article 2 of Regulation No 1552/89.

59 As the Court observed in paragraph 59 of the judgment in Case C-392/02 *Commission* v *Denmark* [2005] ECR I-9811, it follows from Articles 217, 218 and 221 of the Customs Code that the abovementioned conditions are met when the customs authorities have the necessary particulars and, therefore, are in a position to calculate the amount of duties and determine the debtor (see, to that effect, *Commission* v *Netherlands*, paragraph 71, and Case C-104/02 *Commission* v

Germany [2005] ECR I-2689, paragraph 80). The Member States may not dispense with determining claims, even where these are disputed; otherwise, it would have to be accepted that the financial equilibrium of the Communities may be disrupted by the conduct of a Member State (*Commission* v *Denmark*, paragraph 60).

60 Article 6(1) of Regulation No 1552/89 states that the Member States must keep accounts for own resources at the Treasury or the body appointed by the Treasury. Under Article 6(2)(a) and (b), the Member States are required to enter the 'entitlements established in accordance with Article 2' of that regulation 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, either in the A accounts or, where certain conditions are met, in the B accounts.

61 As a result, Member States are required to establish the Communities' entitlement to own resources as soon as their customs authorities are in a position to calculate the amount of duties arising from a customs debt and determine the debtor (*Commission* v *Denmark*, paragraph 61) and, accordingly, to enter those entitlements in the accounts in compliance with Article 6 of Regulation No 1552/89.

62 In the present case, it is not alleged that the Netherlands authorities failed to enter the customs debt in the accounts immediately after it had been established, but that they established and notified the entitlements at issue too late, an allegation which, in the light of the foregoing considerations, must be rejected. Accordingly, the Commission has not shown that the entry in the accounts was made too late.

63 For the purposes of making own resources available, Article 9(1) of Regulation No 1552/89 provides that each Member State must credit own resources to the account opened in the name of the Commission in accordance with the procedure laid down in Article 10 thereof. Under Article 10(1), after deduction of the collection costs, entry of the own resources must 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 that regulation, except for the entitlements entered in the B account pursuant to Article 6(2)(b) of Regulation No 1552/89, in respect of which the entry must be made at the latest on the first working day following the 19th day of the second month following the month in which the entitlements were 'recovered'.

64 It is not disputed that during the period at issue the Netherlands authorities did not keep a B account, although there is no allegation either that those authorities failed to credit the Commission's account with the sums at issue within the period laid down in Article 10 of Regulation No 1552/89 after the calculation of the entitlement.

65 In those circumstances, the issue of payment of default interest under Article 11 of Regulation No 1552/89 also cannot arise.

66 Accordingly, the Commission's complaint, in so far as it concerns the TIR carnets accepted during 1992 and 1993, must be rejected.

— The TIR carnets accepted in 1991

67 Concerning the TIR carnets accepted in 1991, and thus before 1 January 1992, the Commission submits that only Article 11 of the TIR Convention was applicable and that it was not possible to indicate an exact date at which the competent authorities ought to have commenced recovery. However, the Netherlands authorities failed to exercise adequate care in safeguarding the Community's financial interests. Where neither voucher No 2 of the TIR carnet nor any other document reaches the office where the carnet was accepted in the days following the estimated end of the physical transit operation, the authorities concerned should take, within a reasonable time, the appropriate measures to safeguard the financial interests of the Community. In the cases which are the subject of these proceedings, the payment notices were sent after varying periods of between two years and four and a half months and two years and ten months from the date at which the TIR carnet was accepted. Such periods cannot be considered to be compatible with the promptness required.

68 As pointed out in paragraph 54 of this judgment, the Member States are required to secure rapid and effective availability of the Communities' own resources. However, the Commission has not shown that the Netherlands Government failed to take all due care necessary for a rapid establishment of the entitlements to own resources in the event of suspected irregularities concerning operations carried out under cover of TIR carnets accepted before 1 January 1992, and to which these proceedings relate. The Commission confined itself to stating in general terms that sending a claim for payment two and a half years on average after the acceptance of a TIR carnet is incompatible with the care which should be taken to safeguard the Community's financial interests.

69 As a result, the Commission's complaint alleging infringement of Articles 2, 6, 9, 10 and 11 of Regulation No 1552/89 must, in so far as it relates to the TIR carnets

accepted during 1991, be rejected on the same grounds as those set out previously in respect of the TIR carnets accepted as from 1992, and, consequently, the action must be dismissed in its entirety.

Costs

70 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 Kingdom of the Netherlands has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]