OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 25 March 2010[1]

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1. The context for the present action for failure to fulfil obligations is the law on own resources. However, the case is concerned in essence with questions of law relating to the methods of cooperation between customs authorities within the framework of a Europe Agreement under which tariff preferences are granted to products originating in the associated third country.

2. The dispute concerns motor vehicles which were imported from the Republic of Hungary into the European Union at a time when the Republic of Hungary was still an associated third country of the European Union. Under the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part [2] ('the Europe Agreement'), goods of Hungarian origin were treated preferentially on importation into the Community. In this case, the Hungarian customs authorities had issued proofs of origin in the form of EUR.1 movement certificates for certain motor vehicles. After these motor vehicles had been imported into Germany on preferential terms, the German customs authorities were informed via the Commission of the findings of a subsequent verification of the EUR.1 movement certificates carried out by the Hungarian customs authorities. According to those findings, the motor vehicles were not to be regarded as products originating in Hungary after all and the EUR.1 movement certificates had therefore been wrongly issued. The question central to this case is whether the German customs authorities were required from that point onwards to make a subsequent entry of the import duties in the accounts pursuant to the first sentence of Article 220(1) and to communicate the amount of duty to the debtor pursuant to Article 221(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [3] ('the Customs Code'), given that, at the same time, they had also been informed that an appeal had been lodged before a Hungarian court against the findings of the subsequent verification.

3. The present proceedings provide the Court of Justice with the opportunity, following its judgment in *Sfakianakis*, [4] to clarify questions relating to the methods for cooperation between customs authorities provided for in Protocol 4 to the Europe Agreement.

2 — Approved by the Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part (OJ 1993 L 347, p. 1).

3 — OJ 1992 L 302, p. 1.

4 — Joined Cases C-23/04 to C-25/04 *Sfakianakis* [2006] ECR I-1265.

I – Legal framework

A – *The Europe Agreement with the Republic of Hungary*

4. Protocol 4 to the Europe Agreement governs the concept of 'originating products' and the methods of administrative cooperation.

5. The versions of Protocol 4 applicable *ratione temporis* to the facts of this case are: the version established by Decision N° 1/95 of the Association Council, association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, of 17 July 1995 amending Protocol 4 to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, [5] and the version established by Decision N° 3/96 of the Association Council, association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, of 28 December 1996 amending Protocol 4 to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part. [6] In so far as the provisions of Protocol 4 in the version established by Decision N° 1/95 apply to this case, their content is broadly the same as that of the corresponding provisions of Protocol 4 in the version established by Decision N° 3/96. I shall therefore confine myself below to considering the version of the Protocol established by Decision N° 3/96 ('the Protocol').

6. Under Article 16(1)(a) of the Protocol, on importation into the Community products originating in Hungary are to benefit from the Agreement upon submission of a movement certificate EUR. 1. [7]

7. Pursuant to Article 17(1) of the Protocol, a movement certificate EUR.1 is to be issued by the customs authorities of the exporting country on application having been made in writing by the exporter or, under the exporter's responsibility, by his authorised representative. [8] Paragraph 5 of that article provides that the issuing customs authorities are to take any steps necessary to verify the originating status of the products and the fulfilment of the other requirements of this Protocol. [9] For this purpose, they are to have the right to call for any evidence and to carry out

5 — OJ 1995 L 201, p. 39.

6 — OJ 1997 L 92, p. 1.

7 — See Article 11 of the Protocol in the version of Decision N° 1/95. In addition, Article 16(1)(b) of the Protocol in the version of Decision N° 3/96 states that proof of origin may also be provided by way of an invoice declaration. That, however, is not relevant to this case.

8 — See Article 12(1) of the Protocol in the version of Decision N° 1/95.

9 — See Article 12(6) of the Protocol in the version of Decision N° 1/95.

any inspection of the exporter's accounts or any other check considered appropriate.

8. Pursuant to Article 31(2) of the Protocol, the Community and the Republic of Hungary are to assist each other, through the competent customs administrations, in checking the authenticity of the movement certificates EUR.1 and the correctness of the information given in these documents in order to ensure the proper application of this Protocol.

9. Article 32 of the Protocol governs the subsequent verification of proofs of origin. It provides as follows:

'(1) Subsequent verifications of proofs of origin shall be carried out at random or whenever the customs authorities of the importing country have reasonable doubts as to the authenticity of such documents, the originating status of the products concerned or the fulfilment of the other requirements of this Protocol.

(2) For the purposes of implementing the provisions of paragraph 1, the customs authorities of the importing country shall return the movement certificate EUR.1 … or a copy of these documents, to the customs authorities of the exporting country giving, where appropriate, the reasons for the enquiry. Any documents and information obtained suggesting that the information given on the proof of origin is incorrect shall be forwarded in support of the request for verification.

(3) The verification shall be carried out by the customs authorities of the exporting country. For this purpose, they shall have the right to call for any evidence and to carry out any inspection of the exporter's accounts or any other check considered appropriate.

(4) If the customs authorities of the importing country decide to suspend the granting of preferential treatment to the products concerned while awaiting the results of the verification, release of the products shall be offered to the importer subject to any precautionary measures judged necessary.

(5) The customs authorities requesting the verification shall be informed of the results of this verification as soon as possible. These results must indicate clearly whether the documents are authentic and whether the products concerned can be considered as products originating in the Community, Hungary or one of the other countries referred to in Article 4 and fulfil the other requirements of this Protocol.

(6) If in cases of reasonable doubt there is no reply within 10 months of the date of the verification request or if the reply does not contain sufficient information to determine the authenticity of the document in question or the real origin of the products, the requesting customs authorities shall, except

in exceptional circumstances, refuse entitlement to the preferences.'

10. In accordance with the first paragraph of Article 33 of the Protocol, where disputes arise in relation to the verification procedures of Article 32 which cannot be settled between the customs authorities requesting a verification and the customs authorities responsible for carrying out this verification or where they raise a question as to the interpretation of this Protocol, they are to be submitted to the Association Committee.

B – *Regulation N° 515/97*

11. Title III of Council Regulation (EC) N° 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] governs the relations between the customs authorities of the Member States and the Commission. Under Article 17(2) in that title, the Commission is to communicate to the competent authorities in each Member State any information that would help them to enforce customs legislation.

C – *The provisions of customs legislation*

12. The Customs Code has been amended on many occasions since its adoption. However, since the provisions applicable *ratione temporis* have not been amended, regard will be had below only to the Customs Code itself.

13. Under Article 201(1)(a) of the Customs Code, a customs debt on importation is to be incurred through the release for free circulation of goods liable to import duties.

14. The first subparagraph of Article 217(1) of the Customs Code governs entry in the accounts. Under that provision, each and every amount of duty resulting from a customs debt is to 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.

10 — OJ 1997 L 82, p. 1.

15. Where the amount of duty resulting from a customs debt has not been entered in the accounts or has been entered in the accounts at a level lower than the amount legally owed, in accordance with the first sentence of Article 220(1) of the Customs Code, the amount of duty to be recovered is to 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').

16. Under Article 221(1) of the Customs Code, the amount of duty is to be communicated to the debtor in accordance with appropriate procedures as soon as it has been entered in the accounts. The first sentence of Article 221(3) of the Customs Code provides that communication to the debtor is not to take place after the expiry of a period of three years from the date on which the customs debt was incurred.

D – *The provisions of the law on own resources*

17. In accordance with Article 2(1) of the Council Decision of 31 October 1994 on the system of the European Communities' own resources (94/728/EC, Euratom)[11] various kinds of own resources are to be entered in the budget of the European Communities. Under subparagraph (b) of that provision, such resources include *inter alia* Common Customs Tariff duties and other duties established by the institutions of the Communities in respect of trade with third countries.

18. Pursuant to the first sentence of Article 8(1) of that decision, customs duties are to be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which, where appropriate, are to be adapted to meet the requirements of Community rules. The third sentence of Article 8(1) of that decision provides that Member States are to make the own resources provided for in Article 2(1)(b) (customs duties) available to the Commission. Under Article 2(3) of that decision, Member States are to retain, by way of collection costs, 10% of the amounts paid under Article 2(1)(b) of that Decision.

11 — OJ 1994 L 293, p. 9. Decision 94/728 replaced the Council Decision of 24 June 1988 on the system of the Communities' own resources (88/376/EEC, Euratom), OJ 1988 L 185, p. 24, with effect from 1 January 1995 and was itself replaced with effect from 1 January 2002 by the Council Decision of 29 September 2000 on the system of the European Communities' own resources (2000/597/EC, Euratom), OJ 2000 L 253, p. 42.

19. Council Regulation (EEC, Euratom) Nº 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom [94/728] [12] on the system of the Communities' own resources, [13] which was 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 [Decision 94/728] on the system of the Communities' own resources [14] ('Regulation Nº 1552/89, as amended'), laid down the arrangements by which the Member States provide the Commission with the own resources allocated to the Communities.

20. Under Article 2(1) of that amended regulation, the Community's entitlement to own resources within the meaning of Article 2(1)(b) (customs duties) is to 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.

21. In accordance with Article 2(1a) of that amended regulation, the date of the establishment is to be the date of entry in the accounting ledgers provided for by the customs regulations.

22. Article 6(2)(a) of that amended regulation, provides that entitlements established in accordance with Article 2 are, subject to point (b) of this paragraph, to 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.

23. Pursuant to Article 6(2)(b) of that amended regulation, 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 are to 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.

24. However, under the first subparagraph of Article 9(1) of that amended regulation, in accordance with the procedure laid down in Article 10 of that amended regulation, each Member State is to credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed.

25. Pursuant to the first subparagraph of Article 10(1) of that amended regulation, after deduction of 10% by way of collection costs in accordance with Article 2(3) of Decision 88/376 [Decision 94/728], entry of the own resources within the meaning of Article 2(1)(b) (customs duties) is to be made at the latest on the first working day following the 19th day of the second month following the

12 — With effect from 1 January 1995, Decision 94/728 replaced Council Decision 88/376/EEC, Euratom of 24 June 1988 on the system of the Communities' own resources (OJ 1998 L 185, p. 24).

13 — OJ 1989 L 155, p. 1.

14 — OJ 1996 L 175, p. 3.

month during which the entitlement was established in accordance with Article 2. However, the second subparagraph states that, for entitlements shown in separate 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.

26. In accordance with Article 11 of that amended regulation, any delay in crediting the amount to the account referred to in Article 9(1) is to 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 is to be increased by 0.25 of a percentage point for each month of delay. The increased rate is to be applied to the entire period of delay.

27. In accordance with Article 17(1) of that amended regulation, Member States are to 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. Under the first and second sentences of Article 17(2) of that amended regulation, Member States are to 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 or 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.

28. Regulation 1552/89 as amended was codified in Council Regulation (EC, Euratom) Nº 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources. [15] Article 11 of Regulation 1150/2000 corresponds to Article 11 of Regulation Nº 1552/89 as amended.

II – Facts and pre-litigation procedure

29. From 1994 onwards, the Europe Agreement provided for the importation into Germany of motor vehicles from the Republic of Hungary which, upon submission of one of the EUR.1 movement certificates issued by the Hungarian authorities, benefited from tariff preferences.

30. By a mutual assistance communication which was sent to the German authorities in

15 — OJ 2000 L 130, p. 1.

English on 13 June 1996 and in German on 28 November 1996, the Unit for the Coordination of Fraud Prevention (UCLAF; I shall use the acronym "OLAF' below to refer both to UCLAF and its successor OLAF) issued a warning to the Member States concerning the imports of a particular manufacturer. It had doubts as to whether the motor vehicles satisfied the conditions governing recognition as products originating in Hungary within the meaning of the Protocol. In that mutual assistance communication, OLAF asked the Member States *inter alia* to request that the Hungarian authorities carry out a subsequent verification of the relevant EUR.1 movement certificates. In addition, OLAF urged the Member States in particular to require a guarantee of payment or the deposit of the customs duties payable before releasing the vehicles in question and to take all legal measures liable to suspend the limitation periods and ensure the possibility of post-clearance recovery. The Commission itself subsequently conducted further investigations, including an inspection mission to Hungary.

31. By a mutual assistance communication of 26 June 1998 which was likewise produced in German, OLAF informed the German authorities of the findings of the subsequent verification carried out by the Hungarian customs authorities. According to those findings, certain vehicles were not to be regarded as products originating in Hungary and, as far as those vehicles were concerned, the EUR.1 movement certificates had been wrongly issued. The communication showed that those motor vehicles included 19 123 vehicles imported into Germany. OLAF announced in the communication that it would send further information, the translation of the correspondence with the Hungarian customs authorities and files in which OLAF, on the basis of the information provided by the Hungarian customs authorities, would present the transactions carried out on a country-by-country basis.

32. By a letter received by the German authorities in English on 13 July 1998 and in German on 18 August 1998 ('the letter received on 18 August 1998'), OLAF dispatched the documents and files as announced. These included in particular the German translation of a letter from the Hungarian customs authorities of 26 May 1998 in which the customs authorities explained how the subsequent verification had been conducted and informed OLAF of the findings of that subsequent verification. They also included the documents and files which had been used to identify the vehicles which, in the view of the Hungarian customs authorities, could not, contrary to their original assessment be regarded as products originating in Hungary after all and in respect of which EUR.1 movement certificates had therefore been wrongly issued. In the letter of 26 May 1998, the Hungarian authorities also pointed out, however, that an appeal had been lodged against the findings of the subsequent verification and that legal proceedings were therefore pending.

33. Following receipt of that letter, the Federal Republic of Germany again requested sight of the final report of the Commission's inspection mission to Hungary. On 23 February 1999, OLAF sent to it the formal final report of the Community mission, which was received by the competent authorities on 2 March 1999.

34. On 15 April 1999, the German customs authorities began making a subsequent entry in the accounts of the amounts of duty applicable to the motor vehicles which, according to the findings of the subsequent verification carried out by the Hungarian customs authorities, were not products originating in Hungary. Owing to the three-year period within which the amount of duty must be communicated to the debtor in accordance with the first sentence of Article 221(3) of the Customs Code, import duties could not be fixed in respect of the motor vehicles imported before 15 April 1996. Nor were any own resources established or credited for that period.

35. By mutual assistance communication of 27 October 1999, OLAF informed the Member States that the proceedings before the Hungarian court had ended and that the Hungarian customs authorities had amended the findings of their subsequent verification accordingly. According to the amended findings, some of the vehicles which, in their letter of 26 May 1998, the Hungarian customs authorities had defined as not originating in Hungary were after all to be regard as products originating in Hungary. However, as far as the other vehicles were concerned, the customs authorities maintained their findings that these were not products originating in Hungary and that the movement certificates had been wrongly issued. The German authorities subsequently remitted or reimbursed the import duties in respect of those motor vehicles which the Hungarian customs authorities now regarded as originating in Hungary.

36. In May 2000, the Commission conducted an own resources inspection mission in Germany. This showed that the German customs authorities had not credited the own resources corresponding to motor vehicles

— which the subsequent verification carried out by the Hungarian customs authorities had initially found not to be of Hungarian origin and in respect of which EUR.1 movement certificates had therefore been wrongly issued;

— in respect of which that finding had not been changed following the judgment of the Hungarian court;

— which had been imported into Germany from 18 November 1995 onwards; and

— in respect of which the German authorities had not made a subsequent entry in the accounts or communicated the amounts of duty to the debtors in the course of post-clearance recovery from 15 April 1999 onwards following the expiry of the three-year limitation period laid down in the first sentence of Article 221(3) of the Customs Code.

Hereafter I shall refer to these motor vehicles as the 'motor vehicles concerned" and to the corresponding import duties as the 'import duties concerned'.

37. The Commission subsequently invited the Federal Republic of Germany to pay the corresponding own resources. At a meeting the course of which was recorded in the minutes of 12 June 2003, the Commission asked the German authorities to provide it with more detailed information on the relevant import duties. It announced that a letter of formal notice would follow in due course. Finally, it pointed out that payment within the prescribed time-limit would help avoid the calculation of default interest.

38. By letter of 30 March 2005, the German authorities informed the Commission that the relevant import duties amounted to EUR 408 735.53. By letter of 4 May 2005, the Commission asked the German authorities, under threat of an action for failure to fulfil obligations, to make available the relevant import duties minus the 10% by way of collection costs, that is to say, EUR 367 861.98 ('the amount of own resources in dispute'), within two months. It stated that it would calculate the default interest owed once that amount had been received.

39. By letter of 8 November 2005, the German authorities informed the Commission that they had made a payment in the amount of EUR 408 735.53 on 31 October 2005, but on condition that the Court of Justice give a judgment confirming the position taken by the Commission. The German authorities pointed out in that letter that that payment did not signify recognition of the position taken by the Commission and that the purpose of the payment was merely to limit any risk of default interest that might arise if they were unsuccessful before the Court of Justice.

40. By letters of 16 December 2005 and 30 March 2006, the Commission pointed out that the 10% collection costs (EUR 40 873.55) had not been retained by the German authorities and would therefore be reimbursed. In addition, the Commission explained the basis on which the default interest had been calculated and, on that basis, raised an invoice in the amount of EUR 571 011.21 ('the amount of default interest in dispute').

41. By letter of 13 June 2006, the German authorities refused to pay the amount of default interest in dispute and repeated once again

that payment of the principal had itself been made only on a conditional basis.

42. As a result, the Commission brought an action for failure to fulfil obligations under Article 226 EC. Having asked the Federal Republic of Germany, by letter of 18 October 2006, to submit its observations and having responded to those observations by letter of 19 February 2007, the Commission, on 29 June 2007, delivered a reasoned opinion in which it called on the Federal Republic of Germany to take the measures necessary to comply with the opinion within two months of its notification.

III – Procedure before the Court of Justice

43. Not satisfied with the Federal Republic of Germany's response of 24 August 2007 to the reasoned opinion, on 6 October 2008 the Commission brought an action for failure to fulfil obligations under Article 226 EC.

44. On 4 February 2009, a hearing was held at which the representatives of the Commission and of the German Government who attended supplemented their submissions and answered questions.

45. The Commission claims that the Court should:

(1) declare that the Federal Republic of Germany has failed to fulfil its obligations under Articles 2, 6, 9, 10 and 11 of Regulation N° 1552/89, as amended, and Regulation N° 1150/2000 by

— allowing customs claims to become time-barred, despite receiving the mutual assistance communication, and making a late payment of the own resources owed in this connection; and

— refusing to pay the accrued default interest.

(2) order the Federal Republic of Germany to pay the costs.

46. The Federal Republic of Germany contends that the Court should:

(1) dismiss the action; and

(2) order the Commission to pay the costs.

IV – The Commission's allegations

A – *The allegation of infringement of the first sentence of Article 220(1) and the first sentence of Article 221(1) of the Customs Code*

47. The Commission's action is based on three cumulative allegations of infringements of Community law. First, it alleges that the German customs authorities have infringed the first sentence of Article 220(1) and the first sentence of Article 221(1) of the Customs Code. In the Commission's view, on 18 August 1998, the German customs authorities were in possession of all the information necessary to make a subsequent entry in the accounts of the amount of the import duties concerned and to communicate that amount to the debtors. However, the German customs authorities did not begin to do so by 18 November 1998 at the latest, but only on 1 April 1999. As a result, the relevant import duties became time-barred (A). On the basis of that allegation, the Commission claims that Articles 2, 6, 9, 10 and 17 of Regulation N° 1552/1989 as amended have therefore been infringed. The amount of own resources in dispute was payable by 20 January 1999 at the latest. However, the Federal Republic of Germany did not credit that amount to the Commission until 31 October 2005 (B). Finally, the Commission alleges infringement of Article 11 of Regulation N° 1522/1989 and Regulation N° 1150/2000 in that the Federal Republic of Germany has failed to pay default interest on the amount of own resources in dispute (C).

48. Under Article 217(1) of the Customs Code, customs debts on importation which, in accordance with Article 201(1)(a) of the Customs Code, are incurred on the release for free circulation of goods liable to import duties must in principle be calculated and entered by the customs authorities as soon as they have the necessary particulars. However, where subsequent verification of the declaration indicates that goods have been imported on the basis of incorrect or incomplete information, the customs authorities are to take the measures necessary to regularise the situation, taking account of the new information available to them. Those measures include *inter alia* the subsequent entry in the accounts of the amount of import duty corresponding to the customs debt legally owed. In accordance with the first sentence of Article 220(1) of the Customs Code, the subsequent entry in the accounts must in principle be made 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. Pursuant to Article 221(1) of the Customs Code, the corresponding amount is to be communicated to the debtor in accordance with the appropriate procedures.

49. The Commission alleges first that the German customs authorities have infringed the first sentence of Article 220(1) and the first sentence of Article 221(1) of the Customs Code because, notwithstanding the letter received on 18 August 1998, they did not take the measures necessary to regularise the situation, taking account of the new information available to them. In its opinion, the German customs authorities should have carried out post-clearance recovery of the amounts of duty within three months of receipt of that letter, that is to say by 18 November 1998, having first made a subsequent entry of those amounts in the accounts and communicated them to the debtors.

50. However, in the view of the German Government, from 18 August 1998 onwards, the German customs authorities were no longer under an obligation to make a subsequent entry in the accounts and notify the debtors. Since a judicial appeal had been brought against the findings of the subsequent verification carried out by the Hungarian customs authorities, subsequent entry in the accounts and notification of the debtors was not permissible (1). Consequently, there was no legal basis for those measures. Article 220 of the Customs Code must not be extended to a case in which there are doubts *ex ante* that the amounts of duty are justified (2). Furthermore, the German Government is critical of the fact that the conclusions of the Hungarian customs authorities regarding the findings of the subsequent verification were not evaluated by OLAF. Moreover, the German customs authorities were permitted to act only on the basis of a final report produced by OLAF (3). Finally, the German Government argues that the Commission is contradicting its mutual assistance communication of 27 October 1999 (4).

1. Taking into account the fact that a judicial appeal is pending against the findings of the subsequent verification

(a) Arguments of the parties

51. The German Government relies first of all on *Sfakianakis*.[16] It is clear from paragraphs 32 and 43 of that judgment that, on receipt of the letter on 18 August 1998, the German customs authorities did not yet have to make a subsequent entry of the import duties in the accounts. The revocation of the

16 — Cited above in footnote 4.

EUR.1 movement certificates had not yet become definitive in this case. Consequently, the EUR.1 movement certificates were still 'in circulation' and therefore had to be taken into account by the German customs authorities. Any subsequent entry in the accounts would have unduly prejudiced the pending appeal.

I shall therefore examine below what legal effect was produced by the communication to the German customs authorities of the findings of the subsequent verification of the EUR.1 movement certificates carried out by the Hungarian customs authorities (ii) and whether the foregoing is influenced by the fact that an appeal was pending against the findings of the subsequent verification (iii).

52. The Commission takes the view that it cannot be inferred from *Sfakianakis* that the customs authorities of the Member States must take no action so long as there are appeal proceedings pending against the revocation of EUR.1 movement certificates. Furthermore, the Protocol does not preclude an obligation on the part of the German customs authorities to make a subsequent entry of customs debts in the accounts where the revocation has not yet become definitive. The Protocol makes no provision for such a situation. Furthermore, the provisions of the Customs Code afford sufficient remedies to debtors.

(i) Sfakianakis

54. Contrary to the view taken by the German Government, the Court of Justice did not find in *Sfakianakis* that subsequent entry in the accounts and communication to the debtors was not permissible in a case such as this.

(b) Assessment

53. It is necessary to determine first of all whether the findings in paragraphs 32 and 43 of *Sfakianakis* can be applied by analogy to this case (i). I take the view that they cannot.

55. As the German Government itself states, paragraph 32 of that judgment, which it cites, concerns cases where the authorities of the State of import are informed about decisions which have *already* been *delivered* by the courts of the State of export. That is not the case here. The German authorities did not become aware of the decision of the Hungarian courts until after 18 August 1998 and 18 November 1998, that is to say not until

they received the mutual assistance communication of 27 October 1999.

56. The view taken by the German Government is likewise unconvincing in so far as it is based on paragraph 43 of *Sfakianakis*. The Court held in paragraph 43 of that judgment that the effectiveness of the abolition of the imposition of customs duties under the Association Agreement precludes administrative decisions imposing the payment of customs duties taken by the customs authorities of the State of import before the definitive result of actions brought against the findings of the subsequent verification have been communicated to them, *when* the decisions of the authorities of the State of export which initially issued the EUR.1 certificates have *not* been *revoked or cancelled*. In my view, it cannot be concluded from this response by the Court that subsequent entry in the accounts is likewise not permissible in a situation such as that in this case. After all, the Court considered only a situation in which the customs authorities of a Member State could not ultimately conclude with certainty from the information available to them that they had received a communication from the Hungarian customs authorities to the effect that the EUR.1 movement certificates were wrongly issued.

57. This is clear first from the phrase 'when the decisions of the authorities of the State of export which initially issued the EUR.1 certificates have not been revoked or cancelled'. Secondly, as the Court found in paragraph 40 of that judgment, it was not apparent from the information provided by the national court in that case that the Hungarian authorities did proceed with such a revocation which would have allowed the Greek authorities to suspend the application of the preferential scheme to the goods in question. That finding must be viewed in conjunction with paragraph 11 of that judgment. This states that, following communication by the Commission of the information concerning the findings of the subsequent verification, the customs authorities of the Member State had received further information directly from the Hungarian customs authorities. In a letter of 3 November 1998, the Hungarian customs authorities had sent a list comprising three parts to the customs authorities of the Member State. The first part contained the identification details of the vehicles for which Hungarian origin had been established by both the manufacturer and the Hungarian inspection authorities; the second listed the vehicles for which the Hungarian authorities had established non-Hungarian origin, which had been formally recognised by the manufacturer; the third concerned the vehicles the status of which was the subject of legal proceedings. In relation to the third part, which included the vehicles in respect of which the additional duty was at issue before the national court, the Hungarian customs authorities stated that that they were unable to provide information on the outcome of the legal proceedings until such time as those proceedings came to an end; they asked the competent Greek authorities to be patient before proceeding with recovery of the customs duties at issue in the main proceedings. Against that background, the Court held, in paragraph 41 of the judgment, that it was for the national court to determine whether the Greek authorities had sufficient information available to them to find that the EUR.1 movement

certificates in question had not been revoked and therefore remained in effect.

58. The situation in this case is different. As the German Government made clear at the hearing, in this case, the German customs authorities received only the communication from the Commission on the findings of the subsequent verification. Unlike in *Sfakianakis*, they did not receive any further information directly from the Hungarian customs authorities which could have called into question the information contained in the letter received on 18 August. The situation in this case is not therefore the same as that which the Court considered in paragraph 43 of *Sfakianakis*.

59. The allegations made by the German Government on the basis of paragraphs 32 and 43 of *Sfakianakis* must therefore be rejected.

(ii) The effect of the subsequent verification

60. I shall now consider, first of all, what legal effect was produced by the communication to the German customs authorities of the findings of the subsequent verification. Since the provisions of the Protocol, as an international treaty, take precedence over the secondary legislation contained in the provisions of the Customs Code, it is necessary to look first of all at whether an answer to this question is apparent from the provisions of the Protocol.

61. Contrary to the view taken by the Commission,[17] the Protocol does indeed seem to me to determine what legal effects are produced by the communication of the findings of the subsequent verification where those findings are that the motor vehicles concerned are not to be regarded as products originating in Hungary and that the EUR.1 movement certificates were therefore wrongly issued. This is apparent from the system of

17 — See paragraph 52 et seq. of the Commission's application. In this connection, moreover, the Commission repeats verbatim the comments made by Advocate General Léger in point 61 et seq. of his Opinion in *Sfakianakis* (cited above in footnote 4). However, those comments are not geared towards the question whether the Protocol governs cases where the customs authorities of the State of export establish, on carrying out a subsequent verification, that the goods in question are not originating products and that the EUR.1 movement certificates were therefore wrongly issued. In point 34 of the Opinion, the Advocate General answered that question in the affirmative, although with reference to the system of cooperation and division of responsibilities *provided for in the Protocol*. The comments in point 61 et seq., on the other hand, concern the question whether account must be taken of the lodging of an appeal against the findings of a subsequent verification, or, more specifically, the suspensory effect of such an appeal.

administrative cooperation expressed in particular in Articles 16(1), 17(1) and 32 of the Protocol.

62. Under Article 16(1) of the Protocol, on importation into the Community, products originating in Hungary are to enjoy preferential treatment upon submission of a proof of origin. In accordance with Article 17(1) of the Protocol, the Hungarian customs authorities are responsible for the issue of EUR.1 movement certificates. In this connection, Article 17(4) and (5) of the Protocol requires them to take the steps necessary to verify the originating status of the products. Article 32(3) and (5) of the Protocol provides that the Hungarian customs authorities are also responsible for the subsequent verification of those products.

63. This system of administrative cooperation requires the customs authorities of the State of import first to accept, in principle, EUR.1 movement certificates issued by the authorities of the State of export. It further requires them to accept, in principle, the findings of a subsequent verification conducted by the customs authorities of the State of export. [18] The system of cooperation is, after all, based on a division of responsibilities and mutual trust between the customs authorities of the State of import and the customs authorities of the State of export. The division of responsibilities is justified by the fact that the authorities of the State of export are in the best position to verify directly the facts determining the originating status of the product concerned. That system can function only if the customs authorities of the State of import accept the determinations made by the authorities of the State of export, not only in relation to the issue of EUR.1 movement certificates but also in the event of their subsequent verification.

64. In this case, the German customs authorities were therefore required to accept the findings of the subsequent verification carried out by the Hungarian customs authorities to the effect that the motor vehicles concerned were not products originating in Hungary and that the EUR.1 movement certificates relating to those vehicles had been wrongly issued.

65. It is not possible to raise, as against that conclusion, the objection that, in this case, the subsequent verification took place in conjunction with an inspection mission by the Commission. It is true that Article 32(1) of the Protocol provides that a subsequent verification is to be carried out at random or where reasonable doubts exist on the part of the customs authorities of the State of import. However, this cannot be regarded as an exhaustive list. After all, an interpretation of Article 32(1) as making exhaustive provision

18 — Case C-97/95 *Pascoal & Filhos* [1997] ECR I-4209, paragraph 33; Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 20; and *Sfakianakis* (cited above in paragraph 4, paragraph 49).

for the cases in which a subsequent verification may be conducted would give rise to manifestly ludicrous consequences, since, in those circumstances, subsequent verifications carried out by the Hungarian authorities on their own initiative on the basis of information provided or suspicions aroused would also be precluded.

66. Furthermore, this conclusion cannot be countered with the argument that the communication did not take place directly between the Hungarian and the German customs authorities. Article 32(5) of the Protocol provides that the customs authorities which requested the subsequent verification are to be informed of the results of that verification. Although the term 'customs authorities' is used regularly in the Protocol to refer to the customs authorities of the Member States and Hungary, that provision should be applicable at least by analogy to the Commission, on whose initiative the comprehensive subsequent verification was to be carried out. This view is supported, first, by the fact that, under Article 31(2) of the Protocol, the Community and Hungary are to assist each other, through their customs administrations, in checking the authenticity of the EUR.1 movement certificates. In my view, the Community's 'customs administration' within the meaning of that provision also includes the Commission. Secondly, in the context of the internal relations between the Commission and the Member States, account must also be taken of Article 17(2) of Regulation N° 515/97, which authorises the Commission to communicate to the competent authorities in each Member State any information that would help them to enforce customs legislation.

67. Finally, the German Government's submission that the information communicated by the Commission did not constitute the definitive findings because the Hungarian customs authorities announced that they would communicate the definitive findings of the verification to the customs authorities of the Member States must also be rejected. The Hungarian customs authorities were clearly referring in this regard only to those customs authorities which had complied with the request made by the Commission in the mutual assistance communications of 13 June 1996 and 28 November 1996 and had themselves directly requested the Hungarian authorities to carry out a subsequent verification of the EUR.1 movement certificates. Since the German Government failed to comply with that request, it cannot rely on the fact that it expected a direct response from the Hungarian customs authorities. Furthermore, the letter from the Hungarian customs authorities of 26 May 1998 makes it sufficiently clear that these were themselves the definitive findings. The customs authorities of the Member

States that were to be notified directly were to be advised that they could obtain more detailed information from the Commission. That was the information which the Commission sent to the German customs authorities in the letter received on 18 August.

68. On the basis of the information provided in the letter received on 18 August, the German authorities had no alternative but to assume that the motor vehicles concerned had not been products originating in Hungary and that, on importation, the motor vehicles concerned should not therefore have benefited from preferential treatment under Article 16(1) of the Protocol. The German customs authorities should therefore have made a subsequent entry in the accounts of the amount of import duty owed and communicated that amount to the debtors.

(iii) The effect of the appeal

69. In this case, the question arises whether the fact that the German customs authorities had also been informed that an appeal was pending against the findings of the subsequent verification changed that legal position in any way. That question must be answered in the negative.

70. It must be stated at the outset that the Protocol contains no express provision requiring the findings of the subsequent verification to be definitive. In fact, Article 32(5) of the Protocol, under which the findings of the subsequent verification are to be communicated as soon as possible, seems to me to militate against that assumption.

71. Furthermore, it is true the Court has made clear that the customs authorities of the Member States must take account of previous decisions given by the Hungarian courts on appeal against the findings of subsequent verifications. [19] On the one hand, that requirement results from the division of responsibilities provided for in the Protocol and the mutual trust between the Hungarian customs authorities and the customs authorities of the Member States, which, ultimately, also extends to the courts. [20] On the other hand, it results from the need to guarantee an effective legal remedy. [21] However, contrary to the view held by the German Government, this does not mean that the German customs authorities are also required to refrain from making a subsequent entry in the accounts before such a judicial decision has been given.

19 — *Sfakianakis* (cited above in footnote 4, paragraph 32).
20 — *Sfakianakis* (cited above in footnote 4, paragraphs 21 to 26).
21 — *Sfakianakis* (cited above in footnote 4, paragraph 27 et seq.).

72. First of all, such an approach is militated against by the system of cooperation laid down in the Protocol, which is based on the principles of the division of responsibilities and mutual trust between customs authorities. As I have already mentioned above, [22] the customs authorities of the State of export are responsible for carrying out the subsequent verification of EUR.1 movement certificates, and the customs authorities of the State of import are required, in principle, to trust the accuracy of the findings. The fact that an appeal has been lodged against the findings of a subsequent verification is not in itself any indication of what prospects of success that appeal has. It is therefore not capable as such of calling into question the trust which the customs authorities of the Member States must place in the findings of the subsequent verification conducted by the Hungarian customs authorities.

73. Secondly, in this case, the principle of guaranteeing an effective legal remedy likewise does not make it necessary to refrain from making a subsequent entry in the accounts in accordance with the first sentence of Article 220(1) of the Customs Code and from notifying the debtors in accordance with the first sentence of Article 221(1) of the Customs Code. This would be necessary only if decisions given by the Hungarian courts on appeal against the findings of subsequent verifications could no longer effectively be taken into account after they had been delivered. This could not have been assumed to be the case here even if, after the judgment on appeal had been given, the Hungarian customs authorities had stated that the motor vehicles concerned were indeed to be regarded as products originating in Hungary (which they did not do). [23] For, as the Commission rightly points out, customs duties which subsequently prove not to be payable are to be remitted or reimbursed in accordance with Article 236(1) of the Customs Code. If the customs authorities of the Member States are informed that, on the basis of a judicial decision, the customs authorities of the State of export are making changes to the findings of their subsequent verification and now consider the products in question to be of Hungarian origin, they have an obligation to take that information into account. [24] Even in cases where it is unreasonable to await reimbursement, the Customs Code provides adequate remedies. For example, subject to the conditions laid down in Article 229 of the Customs Code, a payment facility may be granted to the debtor concerned. The grant of such a facility is conditional on the provision of security. However, this can be dispensed with where it would create serious economic or social difficulties.

22 — Point 61 of this Opinion.

23 — It is true that the Hungarian customs authorities made changes to the findings of their subsequent verification after the judgment on appeal had been given. However, those changes did not relate to the motor vehicles concerned, in respect of which they maintained their conclusion that these were not products originating in Hungary and that the EUR.1 movement certificates had therefore been wrongly issued. See point 36 of this Opinion.

24 — *Sfakianakis* (cited above in footnote 4, paragraph 32).

74. The mere fact that an appeal has been lodged against the findings of a subsequent verification does not therefore constitute grounds for refraining from making a subsequent entry in the accounts.

75. The situation is different where the information communicated by the customs authorities does not make it clear what the findings of the subsequent verification are. This is the case, for example, where the customs authorities of the State of export inform the customs authorities of the State of import that they cannot provide more detailed information until appeal proceedings have been concluded and ask the customs authorities of the State of import to be patient before proceeding with recovery of the customs duties at issue in the main proceedings. That is not the case here, however.

(iv) Conclusion

76. On the basis of the information provided to the German customs authorities by the letter received on 18 August, they should have made a subsequent entry in the accounts of the amount of import duty owed and communicated the corresponding amount to the debtor.

2. Extended application of the conditions laid down in Article 220 of the Customs Code

(a) Arguments of the parties

77. The German Government further argues that an extensive application of Article 220 of the Customs Code to cover the entry of import duties the justification for which is in doubt *ex ante* must not be based on the fact that the Customs Code provides for protective mechanisms for undertakings. In fact, in such cases, it is in the interests of the undertakings concerned not to make a subsequent entry in the accounts. The fact that customs debts become time-barred as a result must be accepted. If necessary, this problem can be resolved by amending the Customs Code.

(b) Assessment

78. This argument must also be rejected. As I stated above, in accordance with the provisions of the Protocol, the German customs authorities, on receiving the letter of 18 August 1998, had no alternative but to assume that there had been no basis for preferential treatment of the motor vehicles concerned. The first sentence of Article 220(1) of the Customs Code would not have been applied extensively in this case. The German Government's argument, which is based primarily on the claim that there was no legal basis for subsequent entry in the accounts, must therefore be rejected.

79. I would like to point out merely as a supplementary comment that the German Government's view is not only incorrect but, moreover, could also pose a significant threat to the Community budget. Under the first sentence of Article 221(3) of the Customs Code, communication to the debtors can take place only within a period of three years from the date on which the customs debt was incurred. The lodging of an appeal against the findings of the subsequent verification before the Hungarian courts has no bearing on that time-limit. If, therefore, in cases where such an appeal is lodged, the customs authorities of the Member States always had to await the decision of the Hungarian courts before they could make a subsequent entry in the accounts and notify the debtor, there would in many cases be a risk that the limitation period applicable to determination of the amount of duty owed, laid down in the first sentence of Article 221(3) of the Customs Code, would expire. It must be borne in mind in this connection that legal proceedings are not necessarily confined to one court, and a considerable period of time may therefore elapse before there is a final judgment and, therefore, a set of definitive findings. In addition, if the view taken by the German Government were to be applied, the debtor would quite clearly have an interest in prolonging the proceedings before the Hungarian courts in order to derive maximum benefit from the effect of the determination of the amount of duty owed becoming time-barred.

3. No evaluation by OLAF and the need for a final report

(a) Arguments of the parties

80. The German Government criticises the fact that OLAF failed to evaluate the findings

of the subsequent verification carried out by the Hungarian customs authorities. It further submits that the German customs authorities were permitted to take action only on the basis of a final report from OLAF. It bases that view, first, on the probative value of a final report and, secondly, on Point 4.5 of the Commission Guidelines on Conducting Community Missions in accordance with Regulation N° 515/97 [25] ('the Vademecum').

81. The Commission takes the view that neither an evaluation nor a final report was necessary. There were no longer any EUR.1 movement certificates in circulation in this case because they had been revoked by the Hungarian customs authorities. Furthermore, the Commission has no obligation to carry out local inspection missions. Lastly, the argument advanced by the German Government is contradictory. Even if a final report exists, this does not mean that there is a final, definitive decision by the Hungarian customs authorities, as the German Government claims.

(b) Assessment

82. These submissions by the German Government are also unconvincing. First, the point must be made once again that the system of cooperation can function only if the customs authorities of the State of import accept the determinations made by the authorities of the State of export, not only in relation to the issue of EUR.1 movement certificates but also in the event of their subsequent verification. [26] This fundamental requirement of acceptance is not subject to evaluation by OLAF or by the Commission of the determination made by the customs authorities of the State of export.

83. In so far as the German Government relies, first, on the assumption that only a final report under Regulation N° 515/97 is capable of giving the German customs authorities the minimum degree of certainty necessary to enable them to disregard the EUR.1 movement certificates issued by the Hungarian customs authorities, this claim is based on an incorrect premiss. The German customs authorities had been informed of the findings of the subsequent verification by the Hungarian customs authorities to the effect that the motor vehicles concerned were not products originating in Hungary and that, to that extent, the EUR.1 movement certificates had been wrongly issued. The German customs authorities therefore had no alternative

25 — Vademecum for the participants in community administrative and investigative cooperation missions in third countries.

26 — See point 61 of this Opinion.

but to assume that the motor vehicles concerned were not products originating in Hungary. For that reason alone, the premiss that proofs of origin had to be ignored in this case is inaccurate.

84. Secondly, the submission that the German customs authorities were required to wait for an evaluation by the Commission or for the Commission's final report on its inspection mission to Hungary must be rejected. It is true that the Commission itself conducted an inspection mission in Hungary in close conjunction with the subsequent verification carried out by the Hungarian customs authorities. It is nevertheless important to distinguish between the findings of the Commission's inspection mission and those of the subsequent verification carried out by the Hungarian customs authorities. The German customs authorities were informed of the findings of the Hungarian customs authorities' subsequent verification in the letter received on 18 August 1998. These were in principle to be accepted by the German customs authorities as the results of the subsequent verification within the meaning of Article 32(5) of the Protocol, without any need, in addition, for an evaluation or a final report by the Commission.

85. Thirdly, the submission based on Point 4.5 of the Vademecum to the effect that the Member States are required to await the Commission's final report before taking measures must also be rejected. First of all, the Vademecum is a document produced in April 2009 which, according to information provided by the Commission at the hearing, was not accepted by the Committee provided for in Article 43 of Regulation N° 515/97 until December 2009, in other words long after the material period between 18 August 1998 and 15 April 1999. Furthermore, as its introduction expressly makes clear, the Vademecum is not intended either to have binding effect or to operate as an instrument for the interpretation of Regulation N° 515/97.

86. In any event, in my opinion, Point 4.5 of the Vademecum cannot be interpreted as meaning that it applies to a case in which the Hungarian customs authorities *themselves* determine by way of the results of their subsequent verification that the goods concerned are not products originating in Hungary. For, in such a case, it is clear from the Protocol that the customs authorities of the Member States must accept those results irrespective of a final report by the Commission. This is true regardless of whether the subsequent verification was initiated on account of doubts on the part of the Commission or was conducted in conjunction with a Commission inspection mission.

87. As I see it, it applies rather to a case in which the customs authorities of the third country, notwithstanding the doubts expressed as to the originating status of the products concerned, conclude and determine by way of the results of their subsequent verification that the doubts as to the Hungarian origin of the products are unfounded and that the EUR.1 movement certificates were therefore properly issued. In such a case, the customs authorities of the Member States, despite their doubts, may not in principle unilaterally disregard the proofs of origin, which remain valid. The customs authorities may refuse to grant preferential treatment only in accordance with the conditions laid down in Article 32(6) of the Protocol, that is to say where, in cases of reasonable doubt, there is no reply within 10 months of the date of the request for a subsequent verification or the reply does not contain sufficient information. Cases which do not fall within the scope of Article 32(6) of the Protocol are to be disposed of in dispute settlement proceedings under Article 33 of the Protocol. For the reasons set out above, in cases in which the Hungarian customs authorities do not ultimately take into account the doubts expressed as to the originating status of the products concerned, it may be appropriate for the customs authorities of the Member States which did not participate in the Community mission to await the results of a final report. [27]

27 — However, the reason for this in my view, contrary to the view taken by the German Government, does not lie in the greater probative value of a final report. This is militated against, first, by the fact that, in accordance with Point 4.4 of the Vademecum, the customs authorities of the Member States which have taken part in a Community mission may take action even before they receive the final report. It is further militated against by the fact that Point 4.5 of the Vademecum expressly states that what is decisive, in principle, is not the final report itself but the documents annexed to it. The requirement under Point 4.5 of the Vademecum to await the final report is in all probability aimed rather at ensuring that the customs authorities of the Member States adopt a uniform approach.

4. The mutual assistance communication of 27 October 1999

(a) Arguments of the parties

88. Finally, the German Government relies on the mutual assistance communication of 27 October 1999. It claims that it is clear from that communication that the Commission itself was of the view that the German customs authorities were required to make a subsequent entry in the accounts only on the basis of the Commission's final report. The German Government bases its submission in this regard primarily on the request made by OLAF to the Member States in the mutual assistance communication to act on the basis of the conclusions of the Community's report of February 1999. [28]

(b) Assessment

89. This submission is likewise unconvincing.

28 — See the underlined text in paragraph 37 of the defence.

90. It must be noted as a preliminary point that the German Government cited the mutual assistance communication of 27 October 1999 only very briefly. In that communication, OLAF asked the customs authorities, first, to reject the revised conclusions of the Hungarian customs authorities which had been sent to the Member States on an individual basis in the summer of 1999 and, secondly, to act on the basis of the Community report of February 1999. Contrary to the view taken by the German Government, it cannot be inferred from that request that the Commission took the view that the customs authorities were required to act only after they had received the final report.

91. After all, from a factual point of view, it must be borne in mind that, after the judgment had been given by the Hungarian courts, the Hungarian customs authorities amended in part the findings of their subsequent verification and henceforth considered that certain motor vehicles were after all products originating in Hungary. In accordance with the system of cooperation laid down in the Protocol, the German customs authorities were, in principle, required to accept those amendments. OLAF's request that the Member States act on the basis of the Commission's final report must be viewed against that background. OLAF did not intend to accept the amended findings of the subsequent verification and therefore asked the Member States to rely on the Commission's final report in order to disregard those amended findings of the subsequent verification.

92. The question whether that request was compatible with the Protocol need not be answered here. It did not indicate that the Commission considered it necessary for reliance to be placed on the final report in relation to the motor vehicles concerned. The request made in the mutual assistance communication related only to motor vehicles which the Hungarian customs authorities now considered to be products originating in Hungary. In relation to the motor vehicles concerned, however, even after judgment had been given by the court, the Hungarian customs authorities had maintained their conclusion that these were not products originating in Hungary and that the EUR.1 movement certificates had therefore been wrongly issued.

5. Conclusion

93. It must therefore be concluded, first, that, on the basis of the information made available to them by the letter received on 18 August, the German customs authorities should have made a subsequent entry in the accounts of the amount of import duty owed in accordance with the first sentence of Article 220(1) of the Customs Code and should have notified the debtors of that amount in accordance with Article 221(1) of the Customs Code.

B – *The point at which the amount of own resources in dispute should have been credited*

1. Arguments of the parties

94. In the view of the Commission, the German customs authorities should have made a subsequent entry in the accounts of the amounts of duty owed and communicated those amounts to the debtors within three months from 18 August 1998, that is to say by 18 November 1998. It further submits that it follows from Articles 2, 6, 9, 10 and 17 of Regulation Nº 1552/1989, as amended, Regulation Nº 1150/2000 and from the case-law of the Court of Justice in Case C-392/02 *Commission* v *Denmark*[29] that the Federal Republic of Germany should have credited the amount of own resources in dispute, which corresponded to the relevant import duties minus 10%, from 20 January 1999 onwards.

95. The German Government submits that it cannot be accused of a failure to act under customs law and that, for that reason alone, the Community has not acquired an entitlement to own resources as against the Federal Republic of Germany. Furthermore, the German Government put forward for the first time at the hearing the submission that subsequent entry in the accounts and communication to the debtors within three months from 18 August 1998 would not necessarily have led to the creation of an entitlement to own resources from 20 January onwards. It contends that the Commission takes into account only the case provided for under Article 6(2)(a) of Regulation Nº 1552/89, as amended. It must be borne in mind, however, that, under Article 6(2)(b) of that regulation, entitlements which could not be included on account of the debtor's insolvency are to be shown in separate accounts. This is also possible where an appeal is lodged. It can be assumed with near certainty that such appeals would have been lodged.

2. Assessment

96. The Commission submits that the German customs authorities should have made a subsequent entry in the accounts and notified the debtors within three months from 18 August. It refers in this regard, on the one hand, to the complexity of the case and, on the other hand, to the fact that the Member States had been aware of the case since 1996. From a factual point of view, the German Government

29 — Case C-392/02 *Commission* v *Denmark* [2005] ECR I-9811.

does not contest that argument. [30] Taking into account the circumstances of the present case, the period of three months does not appear to me to be unreasonably short. For the purposes of these proceedings for failure to fulfil obligations, it may therefore be assumed that the German customs authorities should have made a subsequent entry in the accounts and notified the debtors within three months from 18 August 1998.

97. Under Article 2 of Regulation Nº 1552/89, as amended, the Communities' entitlement to own resources is to be established as soon as the competent authority of the Member State has communicated to the debtor the amount of duty owed by him. Pursuant to Article 6(2)(a) of that regulation, entitlements established in accordance with Article 2 are, subject to point (b) of that paragraph, to 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. In accordance with Articles 9 and 10(1), first subparagraph, the Member State is to credit the own resources to a Commission account 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 in accordance with Article 2.

98. In Case C-392/02 *Commission* v *Denmark*, the Court held that the Member States also have an obligation to establish the own resources where, contrary to customs law, the customs authorities of the Member States have failed to recover the amount of duty post-clearance from the debtor. With regard to the obligation to credit the own resources to the Commission's accounts within the prescribed time-limit, no distinction is to be made between a situation in which a Member State has established the own resources without paying them and one in which it has wrongfully omitted to establish them. [31]

99. If those legal requirements are applied to this case, it must be concluded that the Federal Republic of Germany clearly delayed in crediting the amount of own resources concerned. Subsequent entry in the accounts and communication to the debtors should have taken place no later than 18 November 1998. The own resources should have been credited by 20 January 1999. However, they were not credited until 31 October 2005.

100. The German Government submitted for the first time at the hearing that, in the (hypothetical) event that the German customs authorities had made a subsequent entry in the accounts and communicated the amounts

30 — In so far as the German Government considers this approach to constitute the unlawful imposition of a deadline by the Commission on its own initiative, I refer to point 108 et seq. of this Opinion.

31 — *Commission* v *Denmark* (cited in footnote 29, paragraphs 67 and 68).

of duty, those amounts could conceivably have been shown in separate accounts in accordance with Article 6(2)(b) of Regulation N° 1552/89 as amended. In that event, pursuant to Article 10(2)(2) of that regulation, the own resources would have had to be credited at the latest on the first working day after the 19th day of the second month following the month during which the amounts corresponding to the entitlements had been included.

101. This submission must be rejected, there being no need to determine whether it was permissible under the Court's Rules of Procedure to raise such a submission for the first time at the hearing. It must be pointed out first of all that, in accordance with the principle of *reus in excipiendo fit actor*, the obligation to present the facts and the burden of proof with respect to satisfaction of the conditions laid down in Article 6(2)(b) of Regulation N° 1552/89, as amended, lay with the Federal Republic of Germany. However, on the one hand, it has not made clear on what grounds the debtor should have been assumed to be insolvent in this case. [32] On the other hand, its argument relating to the possibility available to the Member States of showing the entitlements in separate accounts in the event of a dispute is unconvincing. The German Government contends that the debtors would almost certainly have challenged the entitlements. It is highly doubtful that that statement of fact is true. So long as the Hungarian customs authorities maintained the findings to the effect that the motor vehicles concerned were not products originating in Hungary, any challenge brought against the German customs authorities in respect of the entitlements established could have no prospect of success. Like the German customs authorities, the German courts had, in principle, to respect those findings. Consequently, a sensible debtor would first have tried to challenge the findings of the subsequent verification in Hungary. Contrary to the view taken by the German Government, it cannot therefore be assumed that a challenge to the customs claims established by the German customs authorities would have been made directly. Ultimately, therefore, we are left with a *non liquet* situation which operates to the detriment of the Federal Republic of Germany as the party carrying the burden of proof. That conclusion seems to me to be justified in this instance for the further reason that the impossibility of clarifying the situation in this case is attributable to the fact that, contrary to customs law, the German customs authorities failed to make a subsequent entry in the accounts and to communicate the amounts of duty to the debtors. It must further be pointed out that the entry of established entitlements in separate accounts in accordance with Article 6(2)(b) of Regulation N° 1552/89, as amended, is subject to the condition not only that those entitlements must be disputed but also that a security must be provided. The Federal Republic has not advanced any arguments in relation to that condition.

32 — In fact, there is some inconsistency between the general reference to possible insolvency and the assertion made by the German Government on page 5 of its rejoinder to the effect that, in many cases, it cannot be assumed that the debtors will suffer significant financial difficulties.

102. It must therefore be concluded that, by crediting the own resources belatedly, the

Federal Republic of Germany has infringed Articles 2, 6(2)(b), 9, 10(1), first subparagraph, and 17 of Regulation N° 1552/89, as amended.

C – *The refusal to pay default interest*

1. Arguments of the parties

103. Lastly, the Commission alleges infringement of Article 11 of Regulation N° 1522/89 and Regulation N° 1150/2000 on the ground that the Federal Republic of Germany has failed to pay default interest on the amount of own resources in dispute. Moreover, its statement in the minutes of 12 June 2003 that payment within the time-limit proposed by the Commission would help avoid the calculation of default interest does not preclude the obligation to pay interest. The Commission did not mean by that statement that default interest would accrue only from that date. The Federal Republic of Germany cannot rely on a legitimate expectation.

104. The German Government submits first that, in the absence of any belated crediting, there is no entitlement to interest. Even if it is assumed that there has been a failure to act in accordance with customs law, a delay did not arise until after the Commission had imposed a time-limit. It also argues that the entitlement to interest cannot run from the start of a three-month deadline set by the Commission *ex post*. The German Government further relies on the sentence contained in the minutes of 12 June 2003 to the effect that payment within the time-limit proposed by the Commission would help avoid the calculation of default interest. Since the Federal Republic of Germany made payment within the prescribed time-limit, it has a legitimate expectation.

2. Assessment

105. Under Article 11 of Regulation N° 1522/19, as amended, and its successor provision, Article 11 of Regulation N° 1150/2000, in the event of a delay in crediting own resources, the Member States are required to pay default interest. The Federal Republic of Germany did delay in this case. As set out above, the own resources concerned should have been credited no later than 20 January 1999; however, they were not credited until 31 October 2005.

106. The arguments put forward by the Federal Republic to rebut the existence of a delay are unconvincing.

107. First, the occurrence of a delay is not conditional on the requirement that the Commission imposes a time-limit and that that time-limit expires without any action having been taken. It is clear from Article 11 of Regulation Nº 1522/89, as amended, and its successor provision, Regulation Nº 1150/2000, that interest is payable in the event of belated crediting. In accordance with the wording of that provision, the imposition of a time-limit is irrelevant. It is also clear from the first subparagraph of Article 10(1) of Regulation Nº 1522/89, as amended, and its successor provision, Regulation Nº 1150/2000, that the entitlement is to be credited on the first working day after the 19th day of the second month following the month during which it was established. Under that provision also, the due date is determined by a calendar date specified by law. Here too, therefore, the imposition of a time-limit is irrelevant.

108. The German Government's submission that, in a case such as this, the Commission may not on its own initiative determine *ex post* the point from which crediting fell due is untenable. As set out above, the date on which crediting falls due is not governed by a time-limit set by the Commission. This is also true here. A distinction must be drawn, however, in relation to the question of the approach taken by the Commission in these proceedings. In this case, the precise date on which the German customs authorities should have been in a position to make a subsequent entry in the accounts and notify the debtors is difficult to determine objectively. For that reason, in its application, the Commission proceeded on the assumption that three months would have been a sufficiently long period of time for the German customs authorities to make a subsequent entry in the accounts and notify the debtors. The approach taken by the Commission in these proceedings must therefore be interpreted as meaning that an infringement had to be assumed to have been committed at that point at the latest. This does not mean, however, that the Commission actually imposed a time-limit determining the due date for crediting and the start date of the delay.

109. Nor can the German Government base its view on *Commission* v *Denmark*.[33] That judgment does not contain any evidence to show that, contrary to the wording of Articles 10 and 11 of Regulation Nº 1522/89, as amended, and its successor provision, Regulation Nº 1150/2000, the obligation to pay interest is dependent on the imposition of a time-limit. In so far as the German Government refers to paragraph 27 of that judgment,

33 — Cited in footnote 29.

it must be pointed out that, in that paragraph, the Court merely reproduced the facts. Contrary to the view taken by the German Government, the operative part of that judgment likewise does not support such a conclusion or provide consent for an administrative practice. After all, in those proceedings for failure to fulfil an obligation, the Commission merely sought a declaration of infringement for non-payment of default interest following expiry of the time-limit which it had imposed on the Member State for crediting the outstanding amounts. [34] The fact that the Court upheld that claim in the operative part of its judgment is based on the principle of *ne ultra petita*. It is not possible to infer from that principle an interpretation of Articles 10 and 11 of Regulation Nº 1552/89, as amended, and its successor provision, Regulation Nº 1150/2000, which is incompatible with the wording of those provisions. Rather, it is clear from the grounds set out by the Court in paragraph 67 of that judgment and from the case-law cited there that there is an inseparable link between the obligation to establish the Communities' own resources, the obligation to credit them within the time-limit prescribed (by the Regulation) and the obligation to pay default interest. This is based on the principle, likewise contained in paragraph 67 of that judgment, that, in the context of the law on own resources, a distinction cannot be drawn between a situation in which a Member State establishes the own resources without paying them and one in which it omits to establish the own resources in the first place. Accordingly, a Member State must not be able to derive an advantage from the fact that it failed to credit the own resources at the point in time provided for in Regulation Nº 1552/89, as amended, and its successor provision, Regulation Nº 1150/2000.

110. Secondly, the German Government submits that it is not required to pay default interest by virtue of a legitimate expectation on its part. According to the minutes of 12 June 2003, the Commission stated that payment within the time-limit proposed by it would help to avoid the calculation of default interest. Since it paid the amount of own resources in dispute within the time-limit fixed by the Commission, it has a legitimate expectation.

111. This submission must likewise be dismissed. A legitimate expectation on the part of the Federal Republic of Germany that it does not have to pay any default interest cannot be accepted in this case. The existence of a legitimate expectation is subject, first, to the requirement that precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given. In addition, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are

34 — *Commission* v *Denmark* (cited in footnote 29, paragraph 1).

addressed. Lastly, the assurances given must comply with the applicable rules. [35]

112. The first two of those conditions at least are not satisfied here. The German Government could not infer from the content of the minutes of 12 June 2003 sufficiently precise assurances that were such as to give rise to a legitimate expectation. It is true that, contrary to the view taken by the Commission, the sentence from the minutes may be interpreted otherwise than as being intended to refer only to the reduction of the length of the delay. Conversely, however, contrary to the view taken by the Federal Republic of Germany, that sentence does not necessarily have to be interpreted as meaning that, if the amount of own resources in dispute were credited within the prescribed time-limit, default interest would not accrue. That proposition is militated against not least by the fact that, owing to the passage of time, the default interest had reached a not insignificant amount (EUR 571 011.21) which exceeded the amount of own resources in dispute (EUR 367 861.98). Furthermore, the Commission's statement could also be interpreted as meaning that the Commission, in order to calculate the default interest owed by all Member States which, contrary to customs law, had failed to carry out post-clearance recovery and pay the corresponding own resources to the Commission, wished to set not only a uniform start date but also a uniform end date. [36] Such an approach would have made it easier to calculate the default interest because the length of the delay would not then have had to be differentiated individually for each Member State. Ultimately, the question of what that statement was intended to mean can be left unanswered. It is safe to say that the sentence lacked the precision necessary to justify a legitimate expectation on the part of the Federal Republic.

113. In this connection, the German Government submits in this regard that any uncertainty must operate to the detriment of the Commission. This follows from the fact that particular significance is to be attributed to the principle of legal certainty in the context of the allocation of the burden of proof. Regardless of whether the principle of legal certainty is to be accorded the same significance in the context of the accrual of entitlements under the law on own resources, this submission cannot be upheld. The legal basis which governed the accrual of entitlement to interest was formed by the provisions of Article 11 in conjunction with Article 10 of Regulation N° 1552/89, as amended. Those provisions are clear and unambiguous. This

35 — Case T-347/03 *Branco* v *Commission* [2005] ECR II-2555, paragraph 102.

36 — Such an interpretation is supported in particular by the fact that the Commission had taken 18 November 1998 to be the uniform date for default interest owed by all the Member States concerned, irrespective of whether the customs authorities of the Member States had the information necessary to make a subsequent entry in the accounts as early as 13 July 1998 or did not have it until 18 August 1998. Accordingly, it was perfectly logical that, in referring to payment by the Member States within the time-limit set by it, the Commission also meant to fix a uniform end date, which would have made it possible to carry out a uniform calculation of default interest.

case is concerned rather with the question whether the Federal Republic of Germany, on the basis of the statement made in the minutes of 12 June 2003, could expect that the Commission would waive an entitlement to interest. The principles set out in point 111 of this Opinion are applicable in this regard.

114. Thirdly, the existence of a legitimate expectation on the part of the Federal Government is also militated against by the following consideration. Even if the sentence in the minutes of 12 June 2003 were to be interpreted as meaning that, if the own resources were credited within the time-limit fixed by it, the Commission would not assert the entitlement to interest accrued, the conditions governing the existence of a legitimate expectation on the part of the Federal Republic of Germany would not be met. In view of the not insignificant amount of the interest entitlement and in the light of the background to the case, such an offer could in all fairness have been understood to mean only that the Commission waives the payment of interest where the Member States, for their part, recognise their obligation to pay the own resources in dispute. Regardless of whether such an approach by the Commission would have been permissible, the fact is that the Federal Republic expressly paid the amount of own resources in dispute only on a conditional basis and without recognising the existence of an entitlement under the law on own resources.

115. The Federal Republic of Germany was therefore required to pay default interest for the period from 21 January 1999 to 30 October 2005. It must be concluded that the Federal Republic of Germany failed to fulfil its obligation to pay default interest under Article 11 of Regulation N° 1552/89, as amended, and its successor provision, Regulation N° 1150/2000.

V – Costs

116. 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 arguments advanced by the Federal Republic of Germany have been unsuccessful, it must be ordered to pay the costs.

VI – Conclusion

117. In the light of the foregoing considerations, I propose that the Court of Justice should:

(1) declare that, by not crediting own resources in the amount of EUR 367 861.98 by 20 January 1999 at the latest, and in not doing so until 31 October 2005, the Federal Republic of Germany has failed to fulfil its obligations under Article 9 in conjunction with Articles 2, 6(2)(a), and 10(1), first subparagraph, of Council Regulation (EEC, Euratom) N° 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources, as amended by Council Regulation N° 1355/96 of 8 July 1996 amending Regulation (EEC, Euratom) N° 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources.

(2) declare that, by refusing to pay default interest in the amount of EUR 571 011.21 which accrued between 21 January 1999 and 30 October 2005 by virtue of the delay in crediting the amount of own resources owed, the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of Regulation N° 1552/89, as amended by Regulation N° 1355/96, and Article 11 of Council Regulation (EC, Euratom) N° 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources.

(3) order the Federal Republic of Germany to bear the costs.