

JUDGMENT OF THE COURT (First Chamber)

4 March 2010*

In Case C-38/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 January 2006,

European Commission, represented by G. Wilms and M. Afonso, acting as Agents,
with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Inez Fernandes, Â. Seiça Neves, J. Gomes
and C. Guerra Santos, acting as Agents,

defendant,

* Language of the case: Portuguese.

supported by:

Kingdom of Denmark, represented by J. Molde, acting as Agent,

Hellenic Republic, represented by E.-M. Mamouna and K. Boskovits, acting as Agents, with an address for service in Luxembourg,

Italian Republic, represented by I. Bruni, acting as Agent, assisted by G. De Bellis, avvocato dello Stato, with an address for service in Luxembourg,

Republic of Finland, represented by A. Guimaraes-Purokoski, acting as Agent,

interveners,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, E. Levits, A. Borg Barthet (Rapporteur), M. Ilešič and M. Safjan, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 January 2010,

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 asks the Court to declare that, by refusing to calculate and pay to the Commission own resources which were not collected in the period from 1 January 1998 until 31 December 2002 inclusive, in relation to imports of equipment and goods for specifically military use, and by refusing to pay default interest arising from the failure to pay those own resources to the Commission, the Portuguese Republic has failed to fulfil its obligations under Article 2 and Articles 9 to 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), as amended by Council Regulation (Euratom, EC) No 1355/96 of 8 July 1996 (OJ 1996 L 175, p. 3; 'Regulation No 1552/89'), in so far as the period from 1 January 1998 to 30 May 2000 inclusive is concerned, and, from 31 May 2000, the same articles of 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 (OJ 2000 L 130, p. 1).

Legal context

- ² Article 2(1) of Council Decision 88/376/EEC, Euratom of 24 June 1988 on the system of the Communities' own resources (OJ 1988 L 185, p. 24) and of Council Decision 94/728/EC, Euratom of 31 October 1994 on the system of the European Communities' own resources (OJ 1994 L 293, p. 9), provides:

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

...

- (b) Common Customs Tariff duties and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries and customs duties on products coming under the Treaty establishing the European Coal and Steel Community;

...

- 3 Article 20 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, the ‘Community Customs Code’), provides:

‘1. Duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities.

...

3. The Customs Tariff of the European Communities shall comprise:

(a) the combined nomenclature of products;

...

(c) the rates and other items of charge normally applicable to products covered by the combined nomenclature as regards:

— customs duties

...

- (d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment;
- (e) preferential tariff measures adopted unilaterally by the Community in respect of certain countries, groups of countries or territories;
- (f) autonomous suspensive measures providing for a reduction in or relief from import duties chargeable on certain products;
- (g) other tariff measures provided for by other Community legislation.

...

⁴ Article 217(1) of the Community Customs Code states:

‘Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called “amount of duty”, shall be calculated by the customs authorities as

soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

...'

- 5 In the context of making available to the Commission the Communities' own resources, the Council of the European Union adopted Regulation No 1552/89, applicable during the period at issue in this case until 30 May 2000. That regulation was replaced as from 31 May 2000 by Regulation No 1150/2000 which consolidates Regulation No 1552/89 but does not alter its content.

- 6 Article 2 of Regulation No 1552/89 provides:

'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 conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor.

1a. The date of the establishment referred to in paragraph 1 shall be the date of entry in the accounting ledgers provided for by the customs regulations.

...'

7 Article 9(1) of that regulation provides:

‘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.’

8 Under Article 10(1) of that regulation:

‘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 of this Regulation.

...’

9 Article 11 of Regulation No 1552/89 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.'

¹⁰ Under Article 22 of Regulation No 1150/2000:

'Regulation (EEC, Euratom) No 1552/89 shall be repealed.

References to the said Regulation shall be construed as references to this Regulation and should be read in accordance with the correlation table set out in Part A of the Annex.'

¹¹ Thus, apart from the fact that Regulations Nos 1552/89 and 1150/2000 contain references to Decision 88/376 and Decision 94/728 respectively, Article 2 and Articles 9 to 11 of those two regulations are, in essence, identical.

¹² The rate of 10% specified in Article 10(1) of Regulation No 1150/2000 was raised to 25% by Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42).

13 Recital 1 in the preamble of that decision states:

‘The European Council meeting in Berlin on 24 and 25 March 1999 concluded, *inter alia*, that the system of the Communities’ own resources should be equitable, transparent, cost-effective, simple and based on criteria which best express each Member State’s ability to contribute.’

14 Council Regulation (EC) No 150/2003 of 21 January 2003 suspending import duties on certain weapons and military equipment (OJ 2003 L 25, p. 1), adopted on the basis of Article 26 EC, states in recital 5 of the preamble:

‘In order to take account of the protection of the military confidentiality of the Member States it is necessary to lay down specific administrative procedures for the granting of the benefit of the suspension of duties. A declaration by the competent authority of the Member State for whose forces the weapons or military equipment are destined, which could also be used as a customs declaration as required by the Customs Code, would constitute an appropriate guarantee that these conditions are fulfilled. The declaration should be given in the form of a certificate. It is appropriate to specify the form which such certificates must take and to allow also the use of means of data processing techniques for the declaration.’

15 Article 1 of that regulation provides:

‘This Regulation lays down the conditions for the autonomous suspension of import duties on certain weapons and military equipment imported by or on behalf of the authorities in charge of the military defence of the Member States from third countries.’

16 Article 3(2) of that regulation states:

‘Notwithstanding paragraph 1, for reasons of military confidentiality, the certificate and the imported products may be submitted to other authorities designated by the importing Member State for this purpose. In such cases the competent authority issuing the certificate shall send before 31 January and 31 July of each year a summary report to the customs authorities of its Member State on such imports. The report shall cover a period of six months immediately preceding the month on which the report has to be submitted. It shall contain the number and issuing date of the certificates, the date of imports and the total value and gross weight of the products imported with the certificates.’

17 Article 8 of Regulation No 150/2003 states that that regulation is to apply as from 1 January 2003.

Pre-litigation procedure

18 By letter of formal notice dated 21 December 2001, issued in the framework of infringement procedure No 1990/2039, the Commission informed the Portuguese Republic that it had failed to fulfil its obligations by exempting, on the basis of Article 296 EC, its imports of products for military use from the customs duties provided for in European Union legislation.

19 By another letter, dated 20 December 2001, the Commission asked the Portuguese Republic to calculate the customs duties which it considers to be owed by that Member

State in respect of the imports in question and to make them available to it before 31 March 2002, the date from which it would apply the default interest provided for in Article 11 of Regulation No 1150/2000.

- ²⁰ After consideration of the Portuguese Republic's reply, dated 2 July 2002, stating that the imports in question were exempt from customs duty by reason of the fact that they were intended for specifically military purposes and that the exemption was necessary for the protection of the essential interests of the security of the Member State concerned in accordance with Article 296 EC, the Commission, by letter of 24 March 2003, once again asked the Portuguese Republic to make available to it the total amount of the customs duties which it considers to be owed by that Member State in respect of imports of military material carried out between 1998 and 2002, together with the accounting data necessary to calculate default interest.
- ²¹ By letter of formal notice, dated 17 October 2003, the Commission again requested the Portuguese Republic to calculate, as speedily as possible, the own resources which had not been paid, to make that amount available to it and to pay default interest pursuant to Article 11 of Regulation No 1150/2000.
- ²² Not being satisfied with the arguments put forward by the Portuguese Republic in its reply of 9 January 2004, the Commission sent to that Member State a reasoned opinion calling on it to take the measures necessary to comply therewith within a period of two months of its receipt.

- ²³ On 6 October 2004, the Portuguese Republic sent an additional letter of reply to the letter of formal notice of 17 October 2003.
- ²⁴ The Portuguese Republic having not replied to the reasoned opinion or made the payment of own resources and default interest claimed, the Commission has brought the present action.
- ²⁵ By order of 24 May 2006 the President of the Court allowed the applications to intervene of the Kingdom of Denmark, the Hellenic Republic, the Italian Republic and the Republic of Finland in support of the form of order sought by the Portuguese Republic.

The action

Admissibility

Arguments of the parties

- ²⁶ The Portuguese Republic considers that the present action should be held to be inadmissible. According to that Member State, it is clear from the terms of the application that the Commission is seeking to have paid to it amounts of own resources which it knows were neither liquidated, nor taken into account, nor notified nor, obviously, collected.

- 27 Thus, although the Commission is seeking a declaration that the Portuguese Republic has failed to fulfil some of its obligations under European Union law, that institution is in fact asking the Court to order the Portuguese Republic to compensate it for the damage it claims to have suffered by virtue of the fact that the Portuguese Republic wrongly failed to enforce the customs claims referred to in the Commission's application.
- 28 That divergence between the subject-matter of the proceedings and the application is, in the Portuguese Republic's view, contrary to the provisions of Article 38(1) of the Rules of Procedure, which presupposes that the subject-matter of the proceedings is in accordance with the form of order sought.
- 29 The Commission considers that the Portuguese Republic's objection of inadmissibility is wholly unfounded.
- 30 According to the Commission, first, the amounts which the Portuguese Republic owes to the Community budget are those which that Member State should have collected and credited to the Community budget in the performance of its obligations under European Union law. The question of assessing the failure to fulfil those obligations is a question of interpretation and application of the EC Treaty in regard to which the Court has jurisdiction pursuant to Article 220 EC, for which Article 226 EC lays down a specific procedure which the Commission must undertake. According to the Commission, the Court's jurisdiction is therefore undeniable.
- 31 Secondly, the Commission states that there is no divergence between the subject-matter of the proceedings and the forms of order it is seeking. The Commission's

action is brought under Article 226 EC and the subject-matter is a dispute between itself and the Portuguese Republic concerning a declaration that the latter has failed to fulfil its obligations under European Union law.

- ³² Thirdly, the Commission considers that the Court should reject the Portuguese Republic's claim that the action could be regarded as inadmissible on the ground that it is impossible, in practical terms, to adopt measures to give effect to the judgment which will be handed down. In any event, it is common ground that the practical difficulties, whether material or legal, which the Portuguese Republic might encounter when adopting measures to implement that judgment cannot constitute an obstacle to the admissibility of the action for failure to fulfil obligations which the Commission has brought against it.

Findings of the Court

- ³³ It must be observed that the Commission's objective in the present action is to obtain a declaration of a failure to fulfil obligations under Articles 2 and 9 to 11 of Regulations Nos 1552/89 and 1150/2000.
- ³⁴ In addition, as is clear from the very wording of the Commission's application, the latter has restricted itself to seeking a declaration that the alleged failure to fulfil obligations has taken place, without asking the Court to impose specific measures on the Member State concerned.
- ³⁵ There is therefore no divergence between the subject-matter of the proceedings and the form of order sought by the Commission.

36 Consequently, the Commission's action must be declared admissible.

Substance

Arguments of the parties

37 The Commission claims that the Portuguese Republic is wrong to rely on Article 296 EC to justify the refusal to pay customs duties in respect of the imports concerned, since the collection of such duties does not threaten the essential security interests of that Member State.

38 With regard to the interpretation of Article 296 EC, the Commission considers that the Portuguese Republic can exempt imports of goods for specifically military use from customs duties only if the conditions for the application of that article are satisfied and within the limits of the provisions adopted by the Council concerning exemption from such duties under Article 26 EC.

39 Moreover, according to the Commission, Regulation No 150/2003 follows a similar logic since the goods for which the regulation provides an exemption from customs duties are exempt only if certain conditions are satisfied.

40 The Commission considers that the judgment in Case C-414/97 *Commission v Spain* [1999] ECR I-5585, concerning exemptions from value added tax, shows that derogations from the Treaty, provided for, inter alia, in Article 296 EC, must be interpreted strictly. According to the Commission, the Member State must prove that the exemption of which it claims the benefit does not go beyond the situation provided for in

that article and that there are exceptional circumstances which justify the need to derogate from the rules of the Common Customs Tariff. Those criteria, developed by the Court in regard to value added tax, are, in the Commission's view, transposable to own resources.

- ⁴¹ In addition, the Commission rejects the Portuguese Republic's arguments concerning the increased cost of imported military material or the optimal use of the financial resources allocated for the upkeep and modernisation of its armed forces. According to the Commission, the Portuguese Republic has provided no evidence, backed up by figures, which shows that its defensive capacities have been endangered.
- ⁴² The Commission considers that protection of military confidentiality relied on by the Portuguese Republic to justify the exemption from customs duties of military material imported from non-Member countries applies only to the arrangements for inspection of imported goods and does not call into question the obligation to pay the customs duties laid down in European Union legislation.
- ⁴³ The Commission thus considers that the Portuguese Republic can adopt measures for the internal organisation of its administration which ensure the confidentiality which it is seeking. That approach is moreover supported by Regulation No 150/2003, which takes account of the protection of the military confidentiality of the Member States.
- ⁴⁴ With regard to the military confidentiality raised by the Portuguese Republic, the Commission has doubts as to the sincerity of the ground relied on. A great deal of information concerning imports of goods for military use by the Portuguese Republic, going far beyond the amount of detail required for the purposes of paying the customs duties owed to the Community, is contained in the United Nations Register of Conventional Weapons, to which the Portuguese Republic provides an annual summary of the principal imports of conventional weapons which it undertook and

is mentioned in the reports concerning trade in arms and other military equipment which are published by the principal exporting States. All that information is easily accessible to the public.

- ⁴⁵ With regard to the consistency of its conduct in regard to the adoption of Regulation No 150/2003, the Commission rejects the Portuguese Republic's accusations that its conduct is inconsistent with the content of that regulation.
- ⁴⁶ The Commission points out that, pursuant to Article 211 EC, its principal mission is to ensure that European Union law is applied and that the fact that it takes account of the interests of the Member States and of the Community when it exercises its right to propose legislation for the purpose of adopting rules which are better adapted to those interests cannot dispense the Member States from their obligations under European Union law in force before the adoption of those new rules, such as, in the present case, Regulation No 150/2003, or discharge the Commission from its responsibilities under Article 211 EC.
- ⁴⁷ With regard to the principles of the protection of legitimate expectations and legal certainty, the Commission considers that it has already taken account of those principles by seeking arrears of customs duties only for the period from 1 January 1998 to 31 December 2002, whereas the infringement in fact covers a much longer period.
- ⁴⁸ The Portuguese Republic considers that Article 296 EC constitutes a general derogation from all the other provisions of the Treaty which is limited, pursuant to the first paragraph of Article 298 EC, only by the list of armaments established by Council Decision No 255/58 of 15 April 1958 and by the mechanism, laid down in the second paragraph of Article 298 EC, whereby the Commission or any Member State may bring the matter directly before the Court if it considers that there has been what appears to be improper use of the derogation provided for in Article 296 EC.

- 49 The Portuguese Republic considers that, outside of those conditions, the Member States have a discretion in determining the measures which are contrary to the essential interests of its security. That power of the Member States to adopt, unilaterally, measures derogating from the provisions of the Treaty is justified by considerations relating to respect for the sovereignty, the territorial integrity and the defence of the Member States. Furthermore, the institutional balance of the Community requires that each Member State be responsible for defining the measures which it considers necessary for the protection of the essential interests of its security.
- 50 According to the Portuguese Republic, the Court's approach in *Commission v Spain* is to be viewed in the perspective of the applicability of the rules laid down in Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), in the light of Article 296 EC.
- 51 The Portuguese Republic bases its argument concerning the interpretation of Article 296 EC on the judgment in Case T-26/01 *Fiocchi munizioni v Commission* [2003] ECR II-3951, paragraph 58 of which states that Article 296 EC has, for the activities which it covers and on the conditions which it sets forth, a general scope, capable of affecting all the ordinary legal provisions of the Treaty. Furthermore, it is apparent from that judgment that Article 296(1)(b) EC confers on the Member States a particularly wide discretion in assessing the needs receiving such protection.
- 52 With regard to the consistency of the Commission's conduct, the Portuguese Republic has once again observed that in 1988, the Commission submitted a proposal for legislation which led to the adoption of Regulation No 150/2003. Thus, the subject-matter of the present action for failure to fulfil obligations is inconsistent with the Commission's role in the adoption of that regulation, which, moreover, establishes a list of military material exempt from customs duties which is longer than that laid down in Decision No 255/58.

- 53 The Portuguese Republic adds, that, for years, the Commission did not react to the practice it and a large number of other Member States adopted of exempting goods for military use from customs duties. Consequently, both the submission by the Commission of a proposal for a Council regulation suspending import duties on certain weapons and military equipment in 1988 and its continued lack of reaction over the 14 years which separate that proposal from the adoption of Regulation No 150/2003 gave rise to a legitimate expectation on the part of the Member States which led them to consider that the Commission tacitly accepted their practice and considered it to be in accordance with European Union law.
- 54 According to recital 2 to Regulation No 150/2003, '[i]t is in the interests of the Community as a whole that Member States are able to procure for their military forces the most technologically advanced and suitable weapons and military equipment. In view of the rapid technological developments in this industrial sector worldwide it is normal practice of the Member States' authorities in charge of national defence to procure weapons and military materials from producers or other suppliers located in third countries. Given the security interest of the Member States it is compatible with the interests of the Community that certain of these weapons and equipment may be imported free of import duties.' The Portuguese Republic considers that that Community interest did not come into existence with the publication of Regulation No 150/2003 but was already implicit from the list laid down in Decision No 255/58 and the said proposal submitted in 1988.
- 55 With regard to the protection of the military confidentiality of the Member States, the Portuguese Republic points to the need for information concerning the equipment of the armed forces to be reserved exclusively to the national defence forces, which would be endangered if customs duties were levied on goods intended for military use since the levying of such duties presupposes that the customs authorities can carry out a physical inspection of the goods. It is not sufficient, as the Commission suggests, to restrict inspection of military material to a limited number of 'trusted officials'.

- 56 According to the Portuguese Republic, the fact that customs controls on imports of military material could endanger the protection of military confidentiality was accepted by the Commission before the entry into force of Regulation No 150/2003, as is clear from recital 5 to that regulation, which states that ‘[i]n order to take account of the protection of the military confidentiality of the Member States it is necessary to lay down specific administrative procedures for the granting of the benefit of the suspension of duties’.
- 57 With regard to the Commission’s arguments regarding the publication of various pieces of information, very easily accessible to the public, concerning imports of military material by the Portuguese Republic, the latter states that information classified as ‘secret’ or ‘confidential’ is never revealed and provides several documents so classified in support of its claims.

Findings of the Court

- 58 It must be stated at the outset that the Court has ruled in several recent judgments (Case C-284/05 *Commission v Finland* [2009] ECR I-11705; Case C-294/05 *Commission v Sweden* [2009] ECR I-11777; Case C-387/05 *Commission v Italy* [2009] ECR I-11831; Case C-409/05 *Commission v Greece* [2009] ECR I-11859; Case C-461/05 *Commission v Denmark* [2009] ECR I-11887; and Case C-239/06 *Commission v Italy* [2009] ECR I-11913) on questions identical to those raised in the present case. The principles developed in those judgments must therefore be applied.
- 59 That being clear, it must first be recalled that the Community Customs Code provides for the charging of customs duties on imports of products for military use, such as those at issue, from third countries. There is no provision of European Union customs legislation which, in respect of the period of imports at issue, namely from 1 January 1998 to 31 December 2002, provided for any specific exemption from customs duties

on imports of products of that type. Consequently, in respect of that period, there was no express exemption from the obligation to make payment to the competent authorities of the duties which were payable, accompanied, as appropriate, by payment of default interest (*Commission v Greece*, paragraph 47).

⁶⁰ It can moreover be inferred from the fact that Regulation No 150/2003 provided for the suspension of customs duties on certain weapons and military equipment from 1 January 2003 that the European Union legislature started from the assumption that an obligation to pay those customs duties existed prior to that date (*Commission v Greece*, paragraph 48).

⁶¹ The Portuguese Republic has not at any time denied the existence of the imports at issue during the period under consideration. It has confined itself to challenging the Community's entitlement to own resources while arguing that, pursuant to Article 296 EC, the obligation to pay customs duties on armaments imported from third countries would cause serious damage to its essential security interests.

⁶² According to the Court's settled case-law, although it is for Member States to take the appropriate measures to ensure their internal and external security, it does not follow that such measures are entirely outside the scope of European Union law (see *Commission v Greece*, paragraph 50 and the case-law cited). As the Court has already held, the only articles in which the Treaty expressly provides for derogations applicable in situations which may affect public safety are Articles 30 EC, 39 EC, 46 EC, 58 EC, 64 EC, 296 EC and 297 EC, which deal with exceptional and clearly defined cases. It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific

requirements laid down by the Treaty, would be liable to impair the binding nature of European Union law and its uniform application (*Commission v Greece*, paragraph 50 and the case-law cited).

- ⁶³ Furthermore, the derogations provided for in Articles 296 EC and 297 EC must, in accordance with settled case-law in respect of derogations from fundamental freedoms, be interpreted strictly (*Commission v Greece*, paragraph 51 and the case-law cited).
- ⁶⁴ As regards, more particularly, Article 296 EC, it must be observed that, although that article refers to measures which a Member State may consider necessary for the protection of the essential interests of its security or of information the disclosure of which it considers contrary to those interests, that article cannot however be read in such a way as to confer on Member States a power to depart from the provisions of the Treaty based on no more than reliance on those interests (*Commission v Greece*, paragraph 52).
- ⁶⁵ Furthermore, in the area of value added tax, the Court declared in *Commission v Spain* that there had been a failure to fulfil obligations on the ground that the Kingdom of Spain had not shown that the exemption from that tax on imports and acquisitions of arms, ammunition and equipment exclusively for military use, an exemption provided for by Spanish legislation, was justified, under Article 296(1)(b) EC, by the need to protect the essential interests of the security of that Member State (*Commission v Greece*, paragraph 53).
- ⁶⁶ Consequently it is for the Member State which seeks to take advantage of Article 296 EC to prove that it is necessary to have recourse to that derogation in order to protect its essential security interests (*Commission v Greece*, paragraph 54).

- ⁶⁷ In the light of those considerations, a Member State cannot be allowed to plead the increased cost of military material because of the application of customs duties on imports of such material from third countries in order to avoid, at the expense of other Member States who collect and pay the customs duties on such imports, the obligations which the principle of joint financing of the European Union budget imposes on it (*Commission v Greece*, paragraph 55).
- ⁶⁸ As regards the argument that European Union customs procedures are not capable of safeguarding the security of the Portuguese Republic, in the light of the confidentiality requirements contained in agreements entered into with exporting States, it must be stated, as correctly observed by the Commission, that the implementation of the European Union customs system requires the active involvement of European Union and national officials, who are bound when necessary by an obligation of confidentiality, when dealing with sensitive data, which is capable of protecting the essential security interests of Member States (*Commission v Greece*, paragraph 56).
- ⁶⁹ Furthermore, the level of specificity required in the declarations which Member States must periodically complete and send to the Commission is not such as to lead to damage to the interests of those States in respect of either security or confidentiality.
- ⁷⁰ In those circumstances, and in accordance with Article 10 EC which obliges Member States to facilitate the achievement of the Commission's task of ensuring compliance with the Treaty, Member States are obliged to make available to the Commission the documents necessary to permit inspection to ensure that the transfer of the Community's own resources is correct. However, such an obligation does not mean that Member States may not, on a case-by-case basis and by way of exception, on the basis of Article 296 EC, either restrict the information sent to certain parts of a document or withhold it completely (*Commission v Greece*, paragraph 58).

- 71 In the light of the foregoing, the Portuguese Republic has not shown that the conditions necessary for the application of Article 296 EC are satisfied.
- 72 Lastly, as regards the Portuguese Republic's arguments seeking to show that, because of the Commission's prolonged inaction and the adoption of Regulation No 150/2003, that Member State could legitimately consider that the Commission would not bring this action since the latter had tacitly accepted the existence of an appropriate derogation, it must be observed that the Commission has not at any stage of the proceedings abandoned its position in principle.
- 73 In the declaration which the Commission made during the negotiations relating to Regulation No 150/2003, it expressed its firm intention to maintain its claim to the collection of customs duties which should have been paid for periods prior to the entry into force of that regulation and reserved the right to take the appropriate action in that regard.
- 74 It follows from the foregoing that, by refusing to calculate and pay to the Commission own resources which were not collected in the period from 1 January 1998 until 31 December 2002 inclusive, in relation to imports of equipment and goods for specifically military use, and by refusing to pay default interest arising from the failure to pay those own resources to the Commission, the Portuguese Republic has failed to fulfil its obligations, respectively, under Article 2 and Articles 9 to 11 of Regulation No 1552/89, in so far as the period from 1 January 1998 to 30 May 2000 inclusive is concerned, and under the same articles of Regulation No 1150/2000, in so far as the period from 31 May 2000 to 31 December 2002 is concerned.

Costs

- ⁷⁵ 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 Commission has applied for costs to be awarded against the Portuguese Republic and the latter has been unsuccessful, the Portuguese Republic must be ordered to pay the costs.
- ⁷⁶ In accordance with the first paragraph of Article 69(4) of the Rules of Procedure the Kingdom of Denmark, the Hellenic Republic, the Italian Republic and the Republic of Finland, which have intervened in the proceedings, are to bear their own costs.

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

1. **Declares that by refusing to calculate and pay to the Commission of the European Communities own resources which were not collected in the period from 1 January 1998 until 31 December 2002 inclusive, in relation to imports of equipment and goods for specifically military use, and by refusing to pay default interest arising from the failure to pay those own resources to the Commission of the European Communities, the Portuguese Republic has failed to fulfil its obligations, respectively, under Articles 2 and 9 to 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, as amended by Council Regulation (Euratom, EC) No 1355/96 of 8 July 1996, in so far as the period from 1 January 1998 to 30 May 2000 inclusive is concerned, and under the same articles of 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, in so far as the period from 31 May 2000 to 31 December 2002 is concerned;**

- 2. Orders the Portuguese Republic to pay the costs;**
- 3. Orders the Kingdom of Denmark, the Hellenic Republic, the Italian Republic and the Republic of Finland to bear their own costs.**

[Signatures]