JUDGMENT OF THE COURT (Second Chamber)

8 July 2010 *

In Case C-334/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 18 July 2008,

European Commission, represented by A. Aresu and A. Caeiros, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

* Language of the case: Italian.

supported by:

Federal Republic of Germany, represented by M. Lumma and B. Klein, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of Chamber, A. Rosas, U. Lõhmus, A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2009,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities claims that, by refusing to make available to the Commission own resources corresponding to the customs debt deriving from the issue by the Direzione Compartimentale delle Dogane per le Regioni Puglia e Basilicata (departmental head office of customs of the Regions of Apulia and Basilicata), located in Bari, as from 27 February 1997, of irregular authorisations to create and operate Type C customs bonded warehouses in Taranto, followed by consecutive authorisations for processing under customs control and to use the inward processing procedure, until their revocation on 4 December 2002, the Italian Republic has failed to fulfil its obligations under Article 10 EC, Article 8 of Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42) and Articles 2, 6, 10, 11 and 17 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 Framework

The system of the Union's own resources

2 With regard to the Union's own resources, 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Euratom of 31 October 1994 on the system of the European Communities' own resources (OJ 1994 L 293, p. 9), was repealed and replaced, with effect from 1 January 2002, by Decision 2000/597.

3 Under Article 2(1) of Decision 2000/597:

'1. Revenue from the following shall constitute own resources entered in the budget of the European Union:

…

(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 …

…'

4 Article 8(1) of Decision 2000/597 provides:

'The Communities' own resources referred to in Article 2(1)(a) and (b) shall be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which shall, where appropriate, be adapted to meet the requirements of Community rules.

The Commission shall examine at regular intervals the national provisions communicated to it by the Member States, transmit to the Member States the adjustments it deems necessary in order to ensure that they comply with Community rules and report to the budget authority.

Member States shall make the resources provided for in Article 2(1)(a) to (d) available to the Commission.'

5 Article 2(1) of Regulation No 1150/2000, which features in Title I of the regulation ('General provisions'), states:

'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 94/728/EC, 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.'

6 Article 6(1) to (3)(a) and (b) of that regulation, which feature in Title II of the regulation ('Accounts for own resources'), provide:

'(1) Accounts for own resources shall be kept by the Treasury of each Member State or by the body appointed by each Member State and broken down by type of resources.

(2) For own-resources accounting purposes, the month shall end no earlier than 1 p.m. on the last working day of the month during which establishment took place.

(3) (a) Entitlements established in accordance with Article 2 shall, subject to point (b) of this paragraph, be entered in the accounts [commonly known as "the A 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.

(b) Established entitlements not entered in the accounts referred to in point (a), because they have not yet been recovered and no security has been provided shall be shown in separate accounts [commonly known as "the B account"] 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.'

7 Article 9(1) of Regulation No 1150/2000, appearing under Title III of the regulation ('Making available own resources'), provides that:

'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. …'

8 Under Article 10(1) of Regulation No 1150/2000, within the same Title III:

'After deduction of 10% by way of collection costs in accordance with Article 2(3) of Decision 94/728/EC, 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.

However, for entitlements shown in the [B] account under Article 6(3)(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.'

9 According to Article 11 of Regulation No 1150/2000:

'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 Article 17(1) and (2) of Regulation No 1150/2000, featuring in Title VII of the regulation ('Provisions concerning inspection measures'), provides:

'(1) Member States shall take all requisite measures to ensure that the amounts corresponding to the entitlements established under Article 2 are made available to the Commission as specified in this Regulation.

(2) Member States shall be free from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements solely if, for

reasons of *force majeure*, these amounts have not been collected. In addition, Member States may disregard this obligation to make such amounts available to the Commission in specific cases if, after thorough assessment of all the relevant circumstances of the individual case, it appears that recovery is impossible in the long term for reasons which cannot be attributed to them. These cases must be mentioned in the report provided for in paragraph 3 if the amounts exceed EUR 10 000, converted into national currency at the rate applying on the first working day of October of the previous calendar year; this report must contain an indication of the reasons why the Member State was unable to make available the amounts in question. The Commission has six months in which to forward, if appropriate, its comments to the Member State concerned.'

11 Regulation No 1150/2000 was amended by Council Regulation (EC, Euratom) No 2028/2004 of 16 November 2004 (OJ 2004 L 352, p. 1; 'the amended Regulation No 1150/2000'), which entered into force on 28 November 2004.

12 Article 17(2) of the amended Regulation No 1150/2000 states:

'Member States shall be released from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements which prove irrecoverable either:

(a) for reasons of *force majeure*; or

(b) for other reasons which cannot be attributed to them.

Amounts of established entitlements shall be declared irrecoverable by a decision of the competent administrative authority finding that they cannot be recovered.

Amounts of established entitlements shall be deemed irrecoverable, at the latest, after a period of five years from the date on which the amount has been established in accordance with Article 2 or, in the event of an administrative or judicial appeal, the final decision has been given, notified or published.

If part payment or payments have been received, the period of five years at maximum shall start from the date of the last payment made, where this does not clear the debt.

Amounts declared or deemed irrecoverable shall be definitively removed from the [B] account. They shall be shown in an annex to the quarterly statement referred to in Article 6(4)(b) and where applicable, in the quarterly statement referred to in Article 6(5).'

Pre-litigation procedure

13 Following a complaint concerning customs irregularities alleged to have been committed within the Tarento (Italy) customs district, the Commission, by letter of 27 October 2003, requested clarification of the matter from the Italian authorities.

14 In their reply, those authorities sent to the Commission an internal audit report of 18 February 2003, according to which:

— on 27 February and 7 April 1997, the competent Italian customs authorities had granted, inter alia to Fonderie SpA ('Fonderie'), a number of authorisations to create two private Type C customs bonded warehouses and process aluminium ingots located there, ingots which fall within tariff heading 7601, under which a 6% rate of duty applies, into waste aluminium which falls within tariff heading 7602, under which a duty-free regime applies, for processing under customs control;

— the authorisations in question had been granted in breach of the Community customs rules and had therefore led to Community own resources not being established or collected in the period from 1997 to 2002, the customs debt being estimated to be approximately 46.6 thousand million Italian lira;

— following the lodging of a claim by a company in the same sector, the competent customs authorities revoked the authorisations in question on 4 December 2002 and established the Community's entitlements to the own resources in question;

— in addition to the companies concerned, some officials of the Italian customs authorities had also been held responsible for the amount of the customs debt and for the grant of the illegal authorisations, criminal proceedings having been instituted against them in that regard for 'aggravated smuggling' and 'forgery of public documents'.

15 By letter of 30 September 2005, the Italian authorities sent the Commission additional information indicating that the amount of misappropriated Community resources was EUR 22 730 818.35 and that that amount had been entered, in March, June and July 2003, in the B account, under Article 6(3)(b) of Regulation No 1150/2000.

16 Following an exchange of correspondence with the Italian authorities, the Commission, on 23 March 2007, sent a letter of formal notice to the Italian Republic calling upon the latter to make available to it, as soon as possible, the sum of EUR 22 730 818.35 corresponding to the own resources which that State itself had established and to include that sum in the annex to the monthly statement relating to the A account, referred to in Article 6(3)(a) of Regulation No 1150/2000.

17 The Italian authorities replied by letter of 7 May 2007, in which they expressed their disagreement with the Commission's position. In particular, the Italian authorities point out that, in the present case, what is at issue is not an 'error' or 'negligence' on the part of the authorities but rather the harmful effects of intentional third party conduct, of a fraudulent nature, which could not be attributed to the State.

18 On 23 October 2007, the Commission sent the Italian authorities a reasoned opinion, calling upon it to take the necessary steps, within a period of two months from the receipt of that opinion, in order to transfer to the Commission the sum of EUR 22 730 818.35 as own resources of the Communities. On 24 December 2007, the Italian authorities replied to that reasoned opinion, reiterating their objections to the Commission's claims.

19 It was in those circumstances that the Commission decided to bring the present action.

20 By order of 3 December 2008 of the President of the Court, the Federal Republic of Germany was granted leave to intervene in support of the forms of order sought by the Italian Republic.

The action

Complaint alleging infringement of Article 8 of Decision 2000/597 and Articles 2, 6, 10, 11 and 17 of Regulation No 1150/2000

Arguments of the parties

21 The Commission, while stating that the Italian customs authorities consider that both the issue of the irregular authorisations and the functioning of the customs systems concerned result from organised fraud committed by national officials, maintains that the Italian State cannot deny all liability for administrative acts carried out in its name. Thus, without waiting for the outcome of the criminal proceedings or the conclusion of the action for recovery brought against the debtors, the Italian State is bound to bear the financial consequences of the conduct of its own administrative bodies. It is therefore of secondary importance whether the irregularity could be attributed to the Italian authorities on the basis of an error or fraud committed by members of the administration, or whether it was caused by a failure of proper supervision or again by systematic malpractice.

22 The Commission claims that, in the context of the system of Community own resources and taking into account the principle of cooperation in good faith, a Member State may not be released from liability for a customs debt created directly as a result of the conduct of its own administration. It follows that, in the circumstances of the present case, it is not for the Community to shoulder the financial burden associated with *ex post facto* actions for recovery brought against debtors.

23 The Italian Republic observes that the facts giving rise to the present case are indisputably linked to acts of a criminal nature. Given that, in the context of criminal liability, there is a subjective dimension, the facts at issue cannot in any case be attributed to the administration to which the corrupt officials belong.

24 The Italian Republic notes that, under Article 17(2) of Regulation No 1150/2000, the Member States are not obliged to place at the disposal of the Commission amounts which could not be collected for reasons of *force majeure*. According to Italy, *force majeure* exists where the person proceeded against has done what was ordinarily within his power but, for reasons beyond his control, associated with intentional and fraudulent conduct by a third party, could not prevent an objectionable act from being committed. Unlawful action by officials falls outside the scope of administrative action and the duty of supervision and control incumbent upon the administration. Objective liability for payment of the Community resources cannot, therefore, be attributed to the Italian State, in the light of the proceedings instituted before both the criminal and civil courts against the persons responsible for those acts and the due care shown during the monitoring and prosecution in respect of those acts.

25 In its reply, the Commission points out that, while *force majeure* exonerates from all liability, that is because it is attributable to an event outside the control of the body in

connection with which the harmful event occurred, which can only suffer its negative effects. In the present case, on the contrary, the intentional act of the officials occurred within the administration itself to which the action of the officials in question is attributed. Therefore, what is at issue is not *force majeure*, but an illegal act of a national administration which is directly attributable to the Italian Republic.

26 That Member State replies that where an official acts in his own unlawful interests, dissociating himself completely from his institutional function, he places himself outside the administrative apparatus to which he belongs. If that were not the case any conduct, even fraudulent, perpetrated by a national official would give rise to liability on the part of the administration – in the present case the Member State to which, in the abstract, he belongs.

27 In its statement in intervention, the Federal Republic of Germany maintains that the Commission was not entitled, at the end of the period prescribed in the reasoned opinion, to claim that the own resources be placed at its disposal because, at that date, the failure to fulfil obligations attributed to the Member State in question had not occurred.

28 The Federal Republic of Germany claims, first, that the Italian authorities were correct in entering the own resources in question in the B account and not in the A account, since what was at issue was established entitlements which had not yet been collected and for which no security had been furnished. In addition, it followed from the case-law of the Court that there was no obligation to transfer the established amounts from the B account to the A account.

29 The Federal Republic of Germany recalls, moreover, that in principle, under Article 6(3)(b) in conjunction with Article 10(1), second paragraph, of the amended Regulation 1150/2000, the obligation to make available the entitlements entered in the B account presupposes the prior collection of the amounts by each Member State.

30 Derogation from that principle is permitted only on an exceptional basis, pursuant to Article 17(2) to (4) of the amended Regulation No 1150/2000. The Federal Republic of Germany adds that the provisions of the amended Regulation No 1150/2000 lay down the conditions on which a Member State may be released from its obligation to place at the disposal of the Community own resources entered in the B account, inter alia the condition that the amounts shall be irrecoverable. According to the German Government, if that condition is not satisfied, that is, if the amounts which the national authorities declared irrecoverable were in reality recoverable, the Member States would then exceptionally be subject to the obligation to place the own resources at the disposal of the Commission, even before they were collected.

31 In the present case, the national authorities did not declare the amounts in question to be irrecoverable, nor did they categorise them as amounts deemed irrecoverable. In those circumstances, the Commission would have had to wait until the expiry of the period of five years provided for in the third paragraph of Article 17(2) of the amended Regulation No 1150/2000, which runs from the entry of the own resources in the B account, before being able to require the Italian Republic to pay own resources. As such a period had not expired before July 2008, it must be concluded that the Italian Republic had not failed to fulfil its obligations by the end of the period prescribed in the reasoned opinion, that is, the end of December 2007.

32 In its reply, the Commission objects that, pursuant to the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union and Article 93(4) of the Rules of Procedure of the Court of Justice, an intervener may not, in its intervention, advance pleas in law which alter or distort the subject-matter of the case as defined by the application initiating proceedings. The pleas of the German Government with regard to the amended Regulation No 1150/2000 must therefore be declared inadmissible on the ground that they fall completely outside the subject-matter of the case defined by the parties and on the ground that they are not relevant in the light of the Italian authorities' observations.

33 Those pleas are, in any case, unfounded because, first, the special procedure covered by Article 17(2) to (4) of Regulation No 1150/2000 is not at all relevant and, second, the period of five years laid down in that regulation is not applicable. According to the Commission, that procedure can apply only to own resources which are correctly entered in the B account, and which therefore cannot be placed at the disposal of the Communities because they are irrecoverable. In the present case, by contrast, the amounts in question were entered in the B account owing to an error made by the Italian authorities, which should have entered them in the A account at the time of importation – and of consecutive customs clearance – of the goods to which the unlawful authorisations issued by those authorities applied.

Findings of the Court

34 As is apparent from Article 8(1) of Decision 2000/597, the Union's own resources referred to in Article 2(1)(a) and (b) of that decision are collected by the Member States who are obliged to make them available to the Commission.

35 Under Article 17(1) and (2) of Regulation No 1150/2000, Member States are required to take all requisite measures to ensure that the amounts corresponding to the duties established under Article 2 thereof are made available to the Commission. Member States are to be free from that obligation solely if, for reasons of *force majeure*, those amounts could not be collected or if it appears that recovery is impossible in the long term for reasons which cannot be attributed to them (see, to that effect, Case C-392/02 *Commission* v *Denmark* [2005] ECR I-9811, paragraph 66).

36 In the present case, neither the existence of that debt nor the amount of own resources are in dispute: that amount, moreover, has been established by the Italian authorities.

37 The Italian Republic argues that the failure to recover the own resources results not from administrative errors attributable to the national authorities but from the fraudulent behaviour of the customs officials who acted in concert with the employees of the company involved. The inevitable consequence of such conduct is that it breaks the causal link between the administration and the harmful act, thereby making it possible to acknowledge the existence of *force majeure*, within the meaning of Article 17(2) of Regulation No 1150/2000.

38 Such an argument cannot be accepted.

39 First, it should be pointed out that conduct of any State organ is, in principle, attributable to the State. An organ includes any person or entity which has that status in accordance with the national law of the State in question. The fact that, by its conduct, such a person or entity, empowered to exercise elements of governmental authority

and acting in that capacity, infringes legal provisions, exceeds competences or contravenes instructions of his superiors does not invalidate that conclusion.

40 In the present case, it is apparent from the internal audit report of 18 February 2003, sent by the Italian customs authorities to the Commission that, by decisions of 27 February and 7 April 1997, respectively, the competent customs authorities issued Fonderie with irregular authorisations to create two private Type C customs bonded warehouses and to process aluminium ingots located there into waste aluminium, thus placing the goods in question under a duty-free regime, whereas they would normally be liable to pay duty.

41 It also follows from that report that the illegalities mentioned above led to Union own resources not being established or collected in the period from 1997 to 2002.

42 It is not in dispute that, when they issued the illegal authorisations, the customs officials were acting in the exercise of their duties.

43 Those acts, carried out by the officials in the exercise of their duties, must therefore be regarded as acts of the administration itself.

44 In those circumstances, the illegal conduct of the national authorities must be attributed to the Italian Republic.

45 Second, the question arises whether that State may rely on *force majeure*, within the meaning of Article 17(2) of Regulation No 1150/2000, in order to be released from the obligation to make available the amount corresponding to the amounts corresponding to the established entitlements.

46 It follows from settled case-law that the concept of *force majeure* must be understood, in general, in the sense of abnormal and unforeseeable circumstances, outside the control of the party relying thereupon, the consequences of which, in spite of the exercise of all due care, could not have been avoided (see, inter alia, Case 145/85 *Denkavit België* [1987] ECR 565, paragraph 11; Case C-105/02 *Commission* v *Germany* [2006] ECR I-9659, paragraph 89; and Case C-377/03 *Commission* v *Belgium* [2006] ECR I-9733, paragraph 95).

47 One of the constituent elements of the concept of *force majeure* is the occurrence of an event outside the control of the person who wishes to rely on it, that is to say something which he cannot influence.

48 In addition, as the Advocate General states in point 31 of her Opinion, the Italian Republic is not permitted, in order to attempt to avoid all liability, to argue as grounds for *force majeure* that its normal controls did not lead to the detection of the irregularities committed, which were discovered only after a competing company lodged a complaint. As the cause of failure to collect duties falls, in the present case, within the sphere of responsibility of the Italian Republic, the specific measures that might or might not have led to prevention of the illegal practices in question are no longer relevant.

49 The considerations referred to in the preceding paragraphs show that the conduct of the customs officials in question cannot be considered as outside the control of the

administration to which they belong. Furthermore, it has not been established that the consequences of that conduct, attributable to the Italian Republic, could not have been avoided notwithstanding all the due care which Italy was able to show. Consequently, that Member State may not rely on *force majeure* in order to be released from the obligation to place Union own resources at the disposal of the Commission.

50 Last, with regard to the Italian Republic's obligation to make the amount corresponding to the established entitlements available to the Commission, it must be noted that, according to settled case-law, although an error committed by the customs authorities of a Member State leads to the non-recovery of the Union's own resources, such an error does not affect that Member State's obligation to pay the entitlements which have been established and default interest (see, to that effect, Case C-392/02 *Commission* v *Denmark*, paragraph 63, and Case C-275/07 *Commission* v *Italy* [2009] ECR I-2005, paragraph 100).

51 In those circumstances, a Member State which fails to establish the Union's own resources and to make the corresponding amount available to the Commission, without any of the conditions laid down in Article 17(2) of Regulation No 1150/2000 being met, falls short of its obligations under European Union law, in particular Articles 2 and 8 of Decision 2000/597 (Case C-19/05 *Commission* v *Denmark* [2007] ECR I-8597, paragraph 32).

52 With regard, also, to the Federal Republic of Germany's intervention in support of the pleas in law of the Italian Republic, the following observations must be made.

53 Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties.

54 Similarly, Article 93(5) of the Rules of Procedure provides, inter alia, that the statement in intervention is to contain the pleas in law and arguments relied on by the intervener.

55 While arguing, like the Italian Republic, that the Commission's action should be dismissed, the Federal Republic of Germany puts forward a ground of defence in its statement in intervention additional to those on which Italy based its arguments. Therefore, by proceeding in that way, the Federal Republic of Germany has not disregarded the abovementioned provisions of the Statute and of the Rules of Procedure of the Court of Justice (see, to that effect, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1 and Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraphs 131 to 157).

56 The statement in intervention of the Federal Republic of Germany must therefore be examined by the Court.

57 The plea put forward by the Federal Republic of Germany, claiming that there was no failure by the Italian Republic to fulfil its obligations by the end of the period prescribed in the reasoned opinion, rests on the premise that the amendments made by Regulation No 2028/2004 to Regulation No 1150/2000, and in particular to Article 17(2) of the latter, are applicable to the present case.

58 The Federal Republic of Germany submits that, because the Italian authorities have not declared the amounts in question irrecoverable or indeed deemed them irrecoverable, it would be necessary to wait until the expiry of the period of five years

provided for in Article 17(2) of the amended Regulation No 1150/2000, which runs from the entry of the established entitlements in the B account – that is, from March, June and July of 2003 – before the Commission could require the Italian Government to pay those duties. As such a period had not expired before July 2008, it appeared that the Italian Republic had not failed to fulfil its obligations by the end of the period prescribed in the reasoned opinion, that is, by the end of December 2007.

59 In that regard, it should be noted that the present infringement proceedings seek to establish that the Italian Republic has failed to fulfil its obligations under European Union law by refusing to make available to the Commission the Union's own resources resulting from imports carried out between 1997 and 2002, the established entitlements in respect of which were entered by that Member State in the B account in March, June and July of 2003, whereas Regulation No 2028/2004 entered into force only on 28 November 2004.

60 According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (see, in particular, Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9, and Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, paragraph 19).

61 Article 17(2) of the amended Regulation No 1150/2000 establishes a new procedure enabling a Member State's administrative authorities either to declare certain amounts of established entitlements irrecoverable or to consider the amounts of established entitlements to be deemed irrecoverable at the latest after a period of five years from the date on which the amount has been established. Those amounts are finally withdrawn from the B account and, subject to the Commission's rejection of

the reasons relied upon by the Member States based on *force majeure* or other reasons which cannot be attributed to them, the Member States are released from the obligation to place those amounts at the disposal of the Commission.

62 By amending Article 17(2) of Regulation No 1150/2000, the European Union legislature wished to create new procedures in order to correct the deficiencies of the former dual account system, by providing that some amounts of established entitlements which were irrecoverable would no longer appear in the B account without the Member States being obliged to place them at the disposal of the Commission.

63 Such an objective is apparent, in particular, from the sixth recital in the preamble to Regulation No 2028/2004, according to which '[t]he dual account system introduced in 1989 was set up to distinguish between recovered and outstanding duties. This system has only partly met its objectives regarding the mechanism used to discharge items from the [B] account. Checks by the European Court of Auditors and the Commission have highlighted recurrent anomalies in the keeping of the [B] account, which prevent the account from reflecting the real situation as regards recovery. The [B] account should be cleansed of those amounts where recovery is unlikely at the end of a given period and the retention of which gives an inaccurate balance.'

64 So far as procedural rules are concerned, they must, in accordance with the case-law referred to in paragraph 60 of the present judgment, be applied to the present case.

65 However, it must be pointed out at the outset that it is not sufficient, in order for a Member State to be exempted from its obligation to make available to the Commission the amounts corresponding to the established entitlements, that the conditions laid down in Article 17(2) of the amended Regulation No 1150/2000 be met; the condition that those entitlements were properly entered in the B account must also have been satisfied.

66 Article 6(1) of Regulation No 1150/2000 provides that each Member State is to keep an own resources account with its Treasury or with the body appointed by it. Under Article 6(3)(a) and (b) of that regulation, Member States are obliged to include in the A account the entitlements established in accordance with Article 2 of that regulation, at the latest on the first working day after the 19th day of the second month following the month during which the entitlement was established, without prejudice to the option of entering in the B account, within the same prescribed period, the established entitlements which have 'not yet been recovered' and for which 'no security has been provided', and also entitlements established and 'for which security has been provided [and which] have been challenged and might, upon settlement of the disputes which have arisen, be subject to change' (see, to that effect, *Commission* v *Germany*, paragraph 74).

67 For the purpose of making own resources available, Article 9(1) of Regulation No 1150/2000 states that each Member State is to credit own resources to the account opened in the name of the Commission in accordance with the procedure laid down in Article 10 of that regulation. Under Article 10(1), after deduction of collection costs, entry of the own resources is to 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 the same regulation, except for entitlements shown in the B account under Article 6(3)(b) of that regulation, for which the entry must be made at the latest on the first working day following the 19th day of the second month following the month in which the entitlements were 'recovered' (see, to that effect, *Commission* v *Germany*, paragraph 75).

68 Entry of own resources in the B account thus reflects an exceptional situation characterised by the decision to allow the Member State either not to place those entitlements at the disposal of the Commission from the time of their establishment, because they have not yet been recovered, under Article 6(3)(b) of Regulation No 1150/2000, or to be released from doing so because those entitlements prove irrecoverable for reasons of *force majeure* or other reasons which cannot be attributed to them, on the basis of Article 17(2) of that regulation.

69 In those circumstances, in order to be eligible for such exceptional treatment, the entry of entitlements in the B account must have been carried out by the Member States in compliance with European Union law.

70 In the present case, the failure to establish or collect the entitlements relating to Union own resources arising from the imports by Fonderie between 1997 and 2002 arises from the conduct of the Italian customs officials which, as the Court held in paragraph 44 of the present judgment, must be attributed to the Italian Republic.

71 If that conduct had been in conformity with the obligations imposed, in particular, by Articles 2(1) and (2) and 6(3)(a) of Regulation No 1150/2000, the entitlements concerning the own resources in question would have been established as soon as the imports were made and subject to consecutive customs clearance and, as a result, they would have been entered in the A account at the latest on the first working day after the 19th day of the second month following the month during which they were established.

72 It follows that, as the Advocate General stated in point 77 of her Opinion, the Italian Republic must, on the one hand, be treated in relation to the period from 1997

to 2002 as if it had established the entitlements and entered them in the A account. On the other hand, Italy cannot claim that the conditions governing entry in the B account are satisfied because by not establishing the entitlements, it has itself brought about the conditions of application of Article 6(3)(b) of Regulation No 1150/2000.

73 Since the Italian authorities unlawfully entered the own resources in the B account, the provisions of the amended Article 17(2) of Regulation No 1150/2000 do not apply to it.

74 Therefore, the additional plea in defence raised by the Federal Republic of Germany must be rejected.

Plea alleging infringement of Article 10 EC

75 As to the infringement of Article 10 EC, also relied on by the Commission, it is sufficient to point out that there are no grounds for holding that there has been a failure to fulfil the general obligations contained in that article which is separate from the established failure to fulfil the more specific obligations by which the Italian Republic was bound under Article 8 of Decision No 2000/597 and Articles 2, 6, 10, 11 and 17 of Regulation No 1150/2000 (see, to that effect, Case C-19/05 *Commission* v *Denmark*, paragraph 36).

76 In the light of all the foregoing, it must be held that, by refusing to place at the disposal of the Commission the own resources corresponding to the customs debt deriving from the issue by the Direzione Compartimentale delle Dogane per le Regioni Puglia e Basilicata, located in Bari, as from 27 February 1997, of irregular authorisations to create and operate Type C customs bonded warehouses in Taranto, followed by consecutive authorisations for processing under customs control and to use the inward processing procedure, until their revocation on 4 December 2002, the Italian Republic has failed to fulfil its obligations under Article 8 of Decision No 2000/597 and Articles 2, 6, 10, 11 and 17 of Regulation No 1150/2000.

Costs

77 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 Italian Republic and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs. In accordance with the first paragraph of Article 69(4) of the Rules of Procedure, the Federal Republic of Germany must bear its own costs.

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

1. **Declares that, by refusing to place at the disposal of the Commission the own resources corresponding to the customs debt deriving from the issue by the Direzione Compartimentale delle Dogane per le Regioni Puglia e Basilicata, located in Bari, as from 27 February 1997, of irregular authorisations to create and operate Type C customs bonded warehouses in Taranto, followed**

by consecutive authorisations for processing under customs control and to use the inward processing procedure, until their revocation on 4 December 2002, the Italian Republic has failed to fulfil its obligations under Article 8 of Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources and Articles 2, 6, 10, 11 and 17 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;

2. Orders the Italian Republic to pay the costs;

3. Orders the Federal Republic of Germany to bear its own costs.

[Signatures]