Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 6 March 2014[1]

Case C-335/12

European Commission
v
Portuguese Republic

(Action for failure to fulfil obligations brought by the Commission against the Portuguese Republic)

(Own resources — Post-clearance recovery of import duties — Financial liability of the Member States — Surplus stocks of non-exported sugar)

1. In connection with an infringement alleged by the Commission against the Portuguese Republic concerning the transfer of levies on surplus stocks of non-exported sugar following the accession of that Member State, the question has arisen of the legal nature of the duties relating to those surplus stocks. Therefore, the Court of Justice has the opportunity to rule on the classification of those financial resources which the Commission, contrary to the view of the Portuguese Republic, considers to be the Union's 'own resources'.

2. Should the Court take the view that those resources are own resources, as I shall argue in this Opinion, it must then decide whether the Portuguese Republic exercised due care in complying with its obligation to recover the amount owed in that respect or whether, on the contrary, it must ultimately be accountable to the Union by assuming responsibility for payment of the amount which it failed to recover.

I – **Legislative framework**

A – *Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties*[2]

3. Article 254 of the Act of Accession provides as follows:

'Any stock of products in free circulation in Portuguese territory on 1 March 1986 which in quantity exceeds what may be considered representative of a normal carry-over stock must be eliminated by and at the expense of the Portuguese Republic under Community procedures to be specified, and within the time-limits to be determined, under the conditions provided for in Article 258.

…'

1 — Original language: Spanish.

2 — OJ 1985 L 302, p. 23; 'Act of Accession'.

4. Under Article 371(1) of the Act of Accession, '[t]he Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources ... shall be applied in accordance with Articles 372 to 375'.

5. In accordance with the first paragraph of Article 372 of the Act of Accession, '[t]he revenue designated as "agricultural levies" referred to in the first paragraph of Article 2(a) of the Decision of 21 April 1970 shall also include the revenue from any amount recorded on import in trade between Portugal and the other Member States and between Portugal and third countries ...'

B – *Decision 85/257/EEC, Euratom*[3]

6. The first paragraph of Article 2 of Decision 85/257 provides as follows:

'Revenue from:

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

(b) Common Customs Tariff duties and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries,

shall constitute own resources entered in the budget of the Communities.'

7. Article 7(1) of Decision 85/257 provides:

'The Community resources referred to in Articles 2 and 3 shall be collected by the Member States in accordance with national provisions imposed by law, regulation or administrative action, which shall, where necessary, be amended for that purpose. Member States shall make these resources available to the Commission.'

C – *Regulation No 1697/79*[4]

8. In accordance with Article 1 of Regulation No 1697/79:

'1. This regulation shall determine the conditions under which the competent authorities shall undertake post-clearance recovery of import duties or export duties on goods entered for a customs procedure involving the obligation to pay such duties for which, for whatever reason, payment has not been required of the person liable for payment.

2. For the purposes of this Regulation:

(a) "import duties" means customs duties and charges having equivalent effect as well as agricultural levies and other import charges laid down within the framework of the common agricultural policy or in that of specific arrangements applicable, pursuant to article 235 of the Treaty, to certain goods resulting from the processing of agricultural products;

3 — Council Decision 85/257/EEC, Euratom of **7 May 1985 on the Communities' system of own resources** (OJ 1985 L 128, p. 15).

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

…

(c) “entry in the accounts” means the official act by which the amount of the import duties or export duties ... is duly determined;

(d) “customs debt” means the obligation on a natural or legal person to pay the amount of the import duties or export duties which apply ... to goods liable to such duties.’

9. Article 2 of Regulation No 1697/79 is worded as follows:

‘1. Where the competent authorities find that all or part of the amount of import duties or export duties legally due on goods entered for a customs procedure involving the obligation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected.

However, such action may not be taken after the expiry of a period of three years from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the said goods was incurred.

2. Within the meaning of paragraph 1 action for recovery shall be taken by notifying the person concerned of the amount of import duties or export duties for which he is liable.’

D – *Regulation No 3771/85* [5]

10. In accordance with Article 1 thereof, Regulation No 3771/85 ’shall lay down the general rules for the application of Article 254 of the Act of Accession’.

11. Under Article 3(1)(b) of the regulation, ‘[p]roducts shall be considered as being in free circulation in Portuguese territory where ... they are ... imported into Portugal, in respect of which import formalities have been completed and on which customs duties and equivalent charges have been collected in Portugal, without any total or partial drawback thereof.’

12. Article 8 of Regulation No 3771/85 provides as follows:

‘1. Detailed rules for the application of this Regulation shall be adopted in accordance with the procedure laid down in Article 38 of Council Regulation No 136/66/EEC of 22 September 1966 on the establishment of a common organisation of the market in oils and fats [6] or, as the case may be, in corresponding Articles in other regulations on the common organisation of the agricultural markets.

2. The detailed rules referred to in paragraph 1 shall relate in particular to:

…

(d) the procedures for disposing of surplus products.

3. The detailed rules referred to in paragraph 1 may make provision for:

…

5 — Council Regulation (EEC) No 3771/85 **of 20 December 1985 on stocks of agricultural products in Portugal** (OJ 1985 L 362, p. 21).

6 — OJ 1985 L 172, p. 3025.

(c) the collection of a charge in cases where a party concerned does not comply with the procedures for disposing of surplus products.'

E – *Regulation No 579/86*[7]

13. The second recital in the preamble to Regulation No 579/86 declares that 'in view of the likelihood of speculation in the new Member States in respect of sugar ... arrangements, should be made concerning stocks in Spain and Portugal on 1 March 1986'.

14. The sixth recital in the preamble to the regulation states that 'quantities in excess of the carry-over stock ... which have not been exported before the date laid down and therefore have not been eliminated from the market must be considered as being disposed of on the Community internal market and being imported from third countries; ... under these conditions, provision should rightly be made for levying an amount equal to the import levy for the product in question in force on the final day of the time-limit laid down for export ...'

15. The eighth recital in the preamble to the regulation stipulates that 'for good management of the markets for sugar, provision must be made for the new Member States to provide notification of the level of their recorded stocks and of quantities considered as being disposed of on the internal market'.

16. Article 3 of Regulation No 579/86 provides as follows:

'1. The new Member States shall each undertake a survey of sugar ... stocks in free circulation in their respective territories at 00.00 hours on 1 March 1986.

2. For the application of paragraph 1, any person holding, in whatever capacity, a quantity of sugar ... of at least 3 000 kilograms ... in free circulation at 00.00 hours on 1 March 1986 must declare it to the competent authorities before 13 March 1986.

...'

17. Article 4 of Regulation No 579/86 provides:

'1. Where the quantity of the sugar ... stocks ... exceeds, for a new Member State, the quantity laid down for the latter ... that Member State shall ensure that a quantity equal to the difference between the quantity recorded and the quantity laid down is exported from the Community before 1 January 1987 [[8]] ... As regards Portugal, the recording of stocks and the determination of quantities of sugar to be exported in compliance with the first subparagraph shall be carried out separately for the autonomous regions of the Azores and Madeira on the one hand and for the other regions of Portugal on the other hand.'

2. In respect of the quantities to be exported pursuant to paragraph 1:

...

7 — Commission Regulation (EEC) No 579/86 **of 28 February 1986 laying down detailed rules relating to stocks of products in the sugar sector in Spain and Portugal on 1 March 1986** (OJ 1986 L 57, p. 21).

8 — Commission Regulation (EEC) No 3332/86 **of 31 October 1986 amending** Regulation (EEC) No 579/86 **laying down detailed rules relating to stocks of products in the sugar sector in Spain and Portugal on 1 March 1986** (OJ 1986 L 306, p. 37) amended that date in the case of Portugal to 1 July 1987.

(c) the product in question must be exported before 1 January 1987, from the territory of the new Member State where stocks have been recorded as provided for in paragraph 1 and the product must have left the geographical territory of the Community before that date.'[9]

18. In accordance with Article 5 of the regulation:

'1. The evidence of export ... must be provided, except in cases of force majeure, before 1 March 1987 [10] by the presentation of:

(a) export licences and certificates issued ... by the competent body in the new Member State concerned;

(b) the relevant document laid down in Articles 30 and 31 of Regulation (EEC) No 3183/80 [11] for the release of the security.

2. If the evidence referred to in paragraph 1 is not provided before 1 March 1987, the quantity in question shall be considered as being disposed of on the Community internal market.'

19. Article 7 of the regulation provides as follows:

'1. For the quantities which are considered as being disposed of on the internal market in accordance with Article 5(2), an amount shall be levied which is equal:

(a) in the case of sugar, per 100 kilograms, to the import levy in force on 31 December 1986 [12] for white sugar ...'

20. In accordance with Article 8(1) of Regulation No 579/86, '[t]he new Member States shall take all measures necessary for the application of this Regulation and shall lay down, in particular, all the control which prove necessary to conduct the survey provided for in Article 4(1).'

F – *Regulation No 1552/89*[13]

21. Article 2(1) of Regulation No 1552/89 provides that, '[f]or the purpose of applying this Regulation, the Community's entitlement to the own resources referred to in Article 2(1)(a) and (b) of Decision 88/376/EEC, Euratom shall be established as soon as the amount due has been notified by the competent department of the Member State to the debtor. Notification shall be given as soon as the debtor is known and the amount of entitlement can be calculated by the competent administrative authorities, in compliance with all the relevant Community provisions.'

22. In accordance with Article 11 of the same regulation, '[a]ny 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 ...'

9 — Regulation No 3332/86 again set 1 July 1987 as the date for Portugal.

10 — Regulation No 3332/86 set 1 September 1987 as the date for Portugal.

11 — Commission Regulation (EEC) No 3183/80 **of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products** (OJ 1980 L 338, p. 1).

12 — Regulation No 3332/86 set 30 June 1987 as the date for Portugal.

13 — **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).

23. Article 17 of Regulation No 1552/89 provides as follows:

‘1. Member States shall take all requisite measures to ensure that the amount[s] corresponding to the entitlements established ... 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 asses[s]ment of all the relevant circumstances of the individual case, it appears that recovery is impossible in the long term for reasons which cannot be attributed to them. These cases must be mentioned in the report provided for in paragraph 3 if the amounts exceed ECU 10 000 ... 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.

…’

II – **The pre-litigation procedure**

24. By letter of 26 June 2003, the Portuguese authorities requested from the Commission, under Article 17(2) of Regulation No 1150/2000,[14] the relevant exemption so that they did not have to make available to the Commission the amount of EUR 785 078.50 in respect of entitlements established in relation to surplus stocks of sugar for which no evidence of export had been provided within the period required by Regulation No 579/86. The Portuguese Republic claimed that the request for payment sent to the debtor on 25 October 1990 had been annulled by judgment of the Supremo Tribunal Administrativo (Supreme Administrative Court) of 8 May 2002,[15] which made recovery of the amount owed impossible.

25. After requesting additional information, the Commission refused that request on the grounds that more than three years had elapsed between the first possible date for entering the debt in the accounts and the effective date of commencement of the post-clearance recovery procedure. In addition, since it took the view that the Portuguese authorities had not established that the reasons for failure to recover the amount owed were not attributable to them, the Commission required the Portuguese authorities to make available to it, by 20 September 2004, the amount of EUR 785 078.50.

26. After a number of exchanges of correspondence, the Portuguese authorities revealed, by letter of 31 January 2006, that the Supremo Tribunal Administrativo had based its judgment on the view that the disputed levies did not constitute own resources, meaning that Article 17(2) of Regulation No 1150/2000 was not applicable, and therefore the Portuguese authorities requested that their application for exemption be invalidated.

27. The Commission refused that request by letter of 28 July 2006, in which it again called on the Portuguese authorities to place the disputed amount at its disposal immediately. Neither that request nor a subsequent request made by letter of 31 January 2007 received a reply.

14 — **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).

15 — During the proceedings which led to that judgment a reference was made for a preliminary ruling in Case C-30/00 *William Hinton & Sons* [2001] ECR I-7511, which was decided by order of the Court of 11 October 2001.

28. On 23 October 2007, the Commission sent the Portuguese authorities a letter of formal notice, expressing its disagreement with the view that the duties concerned did not constitute own resources and stating that, while there was no question of disregarding the judgment of the Supremo Tribunal Administrativo, that judgment affected only the relationship between the operator and the national authorities.

29. In the absence of a reply to that letter of formal notice, the Commission sent the national authorities a reasoned opinion by letter of 2 February 2009, which was followed, by letter of 28 October 2011, by a supplementary reasoned opinion. When the Portuguese Republic maintained its position, the Commission brought the present action.

III – **The action brought by the Commission**

30. The Commission claims that, since it did not transfer to the Union the amount of EUR 785 078.50 corresponding to levies on surplus stocks of non-exported sugar following the accession of Portugal to the European Communities, Portugal has failed to fulfil its obligations under Article 10 EC, Article 254 of the Act of Accession, Article 7 of Decision 85/257, Articles 4, 7 and 8 of Regulation No 579/86, Article 2 of Regulation No 1697/79, and Articles 2, 11 and 17 of Regulation No 1552/89.

31. The Commission maintains that the amount claimed constitutes the Communities' own resources within the meaning of Article 2(a) of Decision 85/257 on the grounds that it is revenue from 'other duties provided for within the framework of the common organisation of the markets in sugar', as a result of the special arrangements put in place for the Portuguese Republic at the time of its accession.

32. The Commission claims that, in accordance with Article 254 of the Act of Accession, stocks of products in free circulation in Portuguese territory on 1 March 1986, which in quantity exceeded what may be considered representative of normal carry-over stocks, should have been eliminated by and at the expense of the Portuguese Republic under Community procedures, the rules and time-limits of which were determined in Regulation No 3771/85 and Regulation No 579/86.

33. The Commission submits that, as far as their respective natures are concerned, there must be no confusion between, on the one hand, the amount of any costs associated with the export of surplus stocks and, on the other hand, the amount which the national authorities should have levied as a result of the fact that the surplus stocks were considered 'as being disposed of on the Community internal market and being imported from third countries', as stipulated in the sixth recital in the preamble to Regulation No 579/86. The latter amount constitutes the Communities' own resources, given that the Court confirmed that the two amounts were different in nature at paragraph 57 of the order in *William Hinton & Sons*.

34. As concerns the delay with which the Commission alleges the disputed debt was notified, the Commission claims in the application that a period of more than three years elapsed between the first possible date for entering the customs debt in the accounts — 16 October 1987 — and the actual date of the action for post-clearance recovery — 29 October 1990 — which meant that the time-limit laid down in Article 2(1) of Regulation No 1697/79 had been exceeded, as the Supremo Tribunal Administrativo acknowledged in its judgment of 8 May 2002; from this it is apparent, *a contrario*, that the debt could have been notified in a timely manner. Moreover, the Commission maintains that its stance was confirmed by the judgment of the Court in Case C-392/02. [16]

16 — Case C-392/02 *Commission* v *Denmark* [2005] ECR I-9811, paragraphs 60, 63, 67 and 68.

35. Accordingly, the Commission requests that the Court declare that the Portuguese Republic has failed to fulfil the obligations incumbent on it under Article 10 EC, Article 254 of the Act of Accession, Article 7 of Decision 85/257, Articles 4, 7 and 8 of Regulation No 579/86, Article 2 of Regulation No 1697/79, and Articles 2, 11 and 17 of Regulation No 1552/89. The Commission also requests that the Portuguese Republic be ordered to pay the costs.

IV – **The procedure before the Court of Justice**

36. The Court invited the Commission and the Portuguese Republic to focus their submissions at the hearing on four questions: (1) whether or not the charge provided for in Article 8(3)(c) of Regulation No 3771/85 constitutes the Communities' own resources; (2) whether, in the event that it is a duty provided for in the context of the common organisation of markets in the sugar sector, it falls within the scope of Regulation No 1697/79; (3) where appropriate, what would be the exact starting and finishing dates of the period of three years provided for in the second subparagraph of Article 2(1) of Regulation No 1697/79; (4) what, in the Commission's opinion, would be the exact dates of the period during which the Portuguese authorities did not act with the necessary diligence to notify the debt at issue.

37. The Portuguese Republic lodged a defence in which, as regards the nature of the disputed amount, it claims that, in the light of the Commission's uncertainties concerning the applicability of Regulation No 1697/79, the Court ruled in the order in *William Hinton & Sons* that in order for that regulation to apply the goods must have been declared under Article 3(2) of Regulation No 579/86, a matter which it was for the Supremo Tribunal Administrativo to establish. Otherwise, as stated at paragraph 38 of that order, the national court should apply the Portuguese provisions on recovery.

38. The Portuguese Republic submits that the Supremo Tribunal Administrativo did not determine whether that condition was satisfied but held that Regulation No 1697/79 was applicable by reference to Article 98 of the Customs Reform,[17] pursuant to which the post-clearance recovery of duties which are neither own resources nor residual duties is governed by the provisions of the Community legislation in force.

39. The Portuguese Republic takes the view that the Supremo Tribunal Administrativo committed an error. Nevertheless, for overriding constitutional reasons, it had no option but to comply with the judgment of 8 May 2002.

40. The Portuguese Republic argues that, since Article 17 of Regulation No 1150/2000 is applicable only when the Communities' own resources are involved, its original application for exemption should be treated as invalid.

41. In addition, the Portuguese Republic claims that in the general budgets of the Communities for the 1987, 1988 and 1989 fiscal years, the amount provided for in Article 7(1)(a) of Regulation No 579/86 was not credited against any article, given that, pursuant to Article 4 of the Financial Regulation of 21 December 1977,[18] revenue may be collected only by being credited against an article of the budget. Accordingly, even if this was a case of own resources, there would be a legal obstacle to their recovery.

42. Further, the Portuguese Republic claims that the revenue which had to be classified as own resources was stipulated in the Act of Accession, which excluded revenue derived from the amount provided for in Article 7(1)(a) of Regulation No 579/86.

17 — Reforma Aduaneira, approved by Decree-Law No 46311 of 27 April 1965.

18 — OJ 1977 L 356, p. 1.

43. The Portuguese Republic maintains that the classification of that amount as a levy was called into question by the Court in *Koninklijke Coöperatie Cosun* v *Commission*[19] and that if it were own resources then the same would apply to the charges levied under Article 6(3) of Regulation No 60/2004[20] and Article 12(3) of Regulation No 1832/2006,[21] which, however, are not classified as such.

44. Consequently, the Portuguese Republic submits that the amount at issue is based, on the one hand, on Article 8(3)(c) of Regulation No 3771/85 and, on the other hand, on Article 254 of the Act of Accession, which refers to the first and second recitals in the preamble to Regulation No 579/86.

45. In connection with the alleged delay in notifying the debt, the Portuguese Republic claims that its original application reflected the fact that it was impossible to recover the amount at issue because the Supremo Tribunal Administrativo had annulled the notice of assessment. In that regard, the Portuguese Republic states that the national authorities only became aware of the debt on 2 August 1990 and that they were not authorised to effect post-clearance recovery of the debt until 9 October 1990, the date on which it was discovered that the information declared by the company concerned was presented incorrectly.

46. In the light of the foregoing, the Portuguese Republic requests that the action be dismissed and that the Commission be ordered to pay the costs.

47. The parties essentially maintained their respective positions in the reply and the rejoinder.

V – **Assessment**

48. The focus of interest in this action is the question of the legal nature of the duties on surplus stocks of non-exported sugar following the accession of Portugal.

49. In order to resolve that question, it is necessary to examine the legislative framework governing the treatment of such surplus stocks.

A – *Surplus stocks of sugar at the time of Portugal's accession*

50. Under the Act of Accession (Article 254), Portugal was required to eliminate, at its own expense, 'stock[s] of products in free circulation in [its] territory on 1 March 1986 which in quantity [exceeded] what may be considered representative of a normal carry-over stock'; in other words, surplus quantities or *surplus stocks*.

51. With a view to the application of that requirement in the agricultural products sector, Regulation No 3771/85 laid down the general rules for the application of Article 254 of the Act of Accession. In accordance with those rules, '[p]roducts shall be considered as being in free circulation in Portuguese territory where ... they are ... imported into Portugal, in respect of which import formalities have been completed and on which customs duties and equivalent charges have been collected in Portugal' (Article 3).

19 — Case C-68/05 P [2006] ECR I-10367.

20 — Commission Regulation (EC) No 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ 2004 L 9, p. 8).

21 — Commission Regulation (EC) No 1832/2006 **of 13 December 2006 laying down transitional measures in the sugar sector by reason of the accession of Bulgaria and Romania** (OJ 2006 L 354, p. 8).

52. For the purposes of its application, Article 8 of Regulation No 3771/85 referred to the procedures laid down in the regulation on the establishment of a common organisation of the market in oils and fats or in the regulations on the common organisation of the agricultural markets, stipulating that the detailed rules for application of the regulation could provide for 'the collection of a charge in cases where a party concerned does not comply with the procedures for disposing of surplus products'.

53. Regulation No 579/86 laying down detailed rules relating to stocks of products in the sugar sector in Portugal on 1 March 1986 was adopted pursuant to Article 8 of Regulation No 3771/85. The following are the relevant rules:

(a) Portugal was required to undertake a survey of sugar stocks in free circulation in its territory on 1 March 1986 (Article 3(1)). To that end, anyone holding more than 3 000 kg of sugar had to declare it to the competent authorities before 13 March 1986 (Article 3(2));

(b) in the event that the quantities laid down for Portugal in Article 2 of the regulation were exceeded, Article 4 provided that Portugal had to ensure that the surplus stocks were exported from the Community before 1 July 1987;

(c) evidence of export had to be provided before 1 September 1987, in accordance with Article 5(1) of the regulation;

(d) if that evidence was not provided, the surplus stock was to be considered as being disposed of on the Community internal market (Article 5(2));

(e) Article 7 provided that, for surplus stocks which were considered as being disposed of on the internal market, an amount would be levied which was equal to the import levy in force on 30 June 1987 for white sugar, increased or reduced by the accession compensatory amount in force on that date for white sugar for Portugal.

54. The Commission takes the view that the latter amount constitutes the Communities' 'own resources'. Portugal disputes this, giving reasons which, in my opinion, are not persuasive.

B – *The concept of 'own resources'*

55. Initially, the Communities were financed by means of financial contributions from the Member States. However, the Treaty of Rome provided for the establishment of a system of own resources, composed primarily of revenue accruing from the common customs tariff (Article 201 EEC).

56. The replacement of the financing model based on national contributions with a system of own resources was formally adopted in 1970,[22] although both models coexisted in practice until 1980. Even today, financial contributions continue to operate as a system of financing for some extra-budgetary instruments.[23] Yet, financing by means of own resources is a matter of principle in so far as it is a condition for the affirmation of the Union's own separate personality.

22 — Council Decision 70/243 ECSC, EEC, Euratom of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ, English Special Edition 1970(I) p. 224).

23 — For example, the European Development Fund (EDF), which is the result of a Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed on 23 June 2000. Certain research programmes may also be financed by financial contributions (Article 18(1)(a) of **the Financial Regulation applicable to the general budget of the European Communities** (Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 (OJ 2002 L 248, p. 1)).

57. None of the Treaties contain a definition of own resources. The Commission has defined own resources, in terms which are not disputed by academic writers, as 'tax revenue allocated irrevocably to the Community to finance its budget and accruing to it automatically without the need for any subsequent decision by the national authorities'. [24]

58. The revenue in question is composed of the following items: [25]

(a) so-called 'traditional or natural own resources', namely: customs duties, agricultural levies and duties established by the Communities within the framework of the common agricultural policy (including the charges provided for in the context of the common organisation of the markets in the sugar sector);

(b) a percentage applied to the uniform VAT base;

(c) an 'additional resource' based on gross national income (GNI).

59. To that revenue must be added revenue derived from the tax on the salaries, wages and emoluments of officials and other servants of the European Union and revenue accruing from the administrative operations or economic activities of the institutions. However, the bulk of own resources is composed of the items referred to above.

60. 'Traditional own resources' obtained in a Member State must be deposited in an account held for that purpose by the Commission with the national treasury. [26] Strictly speaking, since those resources belong to the Communities from the outset, they should not be included in national budgets as either expenditure or revenue. In practice, however, many Member States enter such revenue in their budgets, although it is always recorded as incoming and outgoing revenue. Nevertheless, that creates the impression that payment of such revenue to the Communities is conditional on a national decision, which is not consistent with its status as revenue to which the Union is exclusively entitled.

C – *The nature of the duties at issue*

61. I shall identify the reasons which militate in favour of classification of the duties as the Union's own resources and as the Member States' resources, respectively, and I shall set out my position in that regard.

1. Reasons in favour of classification of the duties as own resources

62. Initially, the duties on surplus stocks of sugar were regarded as levies having equivalent effect to customs duties and, as such, as 'own resources'. The order in *William Hinton & Sons* [27] repeatedly uses the term 'levy' to refer to those duties.

24 — European Commission, *European Union Public Finance*, Publications Office of the European Union, Luxembourg, 2002, p. 101.

25 — This composition has been retained since 1970 in successive decisions on own resources. The most recent of these is Council Decision 2007/436/EC, Euratom **of 7 June 2007** (OJ 2007 L 163, p. 17). On the development of the system of own resources, see, for example, Waldhoff, Ch., 'Art. 311(3)', in Calliess, Ch. and Ruffert, M. (eds.), *EUV/AEUV Kommentar*, 4th ed., Verlag C.H. Beck, Munich, 2011.

26 — The deposit must be made in the month following the 'establishment of the entitlement'. The entitlement is 'established' when the corresponding debt has been determined by the competent department of the Member State. The Union is dependent on the national collection departments.

27 — As stated, this was a reference for a preliminary ruling from the Supremo Tribunal Administrativo, made in the course of proceedings in which it was held that the debt claimed from the holder of the surplus stocks of sugar was time-barred.

63. However, the Portuguese Republic takes the view that that approach was abandoned by the Court of Justice in *Koninklijke Coöperatie Cosun* v *Commission*. Admittedly, in adopting the view of the General Court, the Court of Justice observed in that judgment that a charge of the kind at issue in the present case 'is not levied by reason of the crossing of the external frontiers of the Community of a quantity of C sugar, but, on the contrary, because ... the conditions and time-limits laid down ... were not complied with when it was exported'. [28] To my mind, it is rather open to question whether the judgment cited is relevant to the present case, since it follows from it only that duties on surplus stocks of sugar are not export or import duties, without leading to the conclusion that those duties cannot be own resources on other bases.

64. In any event, the Commission has taken the view since 2006 that the duties at issue merit classification as 'duties provided for within the framework of the common organisation of the markets in sugar', within the meaning of Article 2 of Decision 2000/597.

65. To my mind, it is difficult not to agree with the Commission's view, even though that is only because the wording of Article 2 of Decision 2000/597 is sufficiently broad to encompass the duty at issue. This is so regardless of the fact that while, admittedly, in accordance with the judgment in *Koninklijke Coöperatie Cosun* v *Commission*, it is not an export duty or import duty in the strict sense, the fact remains that, in accordance with the Union legislation applicable to the case, it performs an *equivalent function* to that kind of duty.

66. As the Commission has pointed out, the sixth recital in the preamble to Regulation No 579/86 states that 'quantities in excess of the carry-over stock ... which have not been exported before the date laid down and therefore have not been eliminated from the market *must be considered* as being disposed of on the Community internal market and *being imported from third countries*; ... under these conditions, provision should rightly be made for *levying an amount equal to the import levy for the product in question* in force on the final day of the time-limit laid down for export ...' [29]

67. It is relatively clear that that amount will be the Union's own resources on the basis that it is equivalent to an import levy.

68. If the foregoing is not accepted, then, in my opinion, it would be difficult to conclude that the amount in question also does not constitute own resources as 'duties provided for within the framework of the common organisation of the markets in sugar', within the meaning of Decision 2000/597.

69. The eighth recital in the preamble to Regulation No 579/86 states that 'for *good management of the markets for sugar*, provision must be made for the new Member States to provide notification of the level of their recorded stocks and of quantities considered as being disposed of on the internal market'. [30] Such verification is necessary in order to establish whether Portugal exceeded the quantity allocated to it in Regulation No 579/86 and, if that was the case, in accordance with Article 4 of the regulation, the Portuguese Republic had to ensure that the surplus stocks were exported from the Community before 1 January 1987.

70. Accordingly, it is a question of a measure aimed at guaranteeing the stability of the market in sugar by preventing the distortion which could be caused by the presence of surplus quantities on the occasion of the accession of a new Member State. Since, if the surplus stocks were not eliminated by being exported, it would cause an imbalance on the market, Regulation No 579/86 seeks to correct that imbalance by applying to those surplus stocks a charge equivalent to the duty which it would have had to pay if the quantities in question had been imported.

28 — *Koninklijke Coöperatie Cosun* v *Commission*, paragraph 41.

29 — Emphasis added.

30 — Emphasis added.

71. Furthermore, Regulation No 579/86 has a clear connection with Regulation No 2670/81,[31] Article 3(1) of which lays down the charge to be imposed in respect of quantities which 'have been *disposed of on the internal market*',[32] while Article 7(1) of Regulation No 579/86 refers to 'the quantities which are *considered as being disposed of on the internal market*'.[33] However, it is difficult to understand why Portugal expressly accepts[34] that the charges levied under Article 3(1) of Regulation No 2670/81 constitute revenue accruing from 'other duties provided for within the framework of the common organisation of the markets in sugar', within the meaning of Article 2 of Decision 85/257, but does not accept that the same may be said of the charges levied in accordance with Article 7(1) of Regulation No 579/86.[35]

72. Accordingly, since the charge in question is, on the one hand, a charge which has a function equivalent to an import duty and, on the other hand, a measure aimed at better management of the market in sugar, it may reasonably be maintained that, on either of those bases, that charge constitutes own resources. However, it is still necessary to analyse the arguments put forward against that view.

2. Reasons against classification as own resources

73. As the Commission states, in addition to the Act of Accession, one of the legal bases for Regulation No 579/86 laying down detailed rules relating to stocks of products in the sugar sector in Spain and Portugal on 1 March 1986 is Regulation No 3771/85 on stocks of agricultural products in Portugal. Admittedly, that does not mean that Regulation No 579/86 refers to 'duties provided for within the framework of the common organisation of the markets in sugar', in other words, to own resources within the meaning of Decision 85/257. Moreover, Regulation No 579/86 is simply a regulation implementing Regulation No 3771/85, the sole legal basis for which is the Act of Accession and not Regulation No 1785/81 on the common organisation of the markets in the sugar sector.[36]

74. To my mind, the foregoing does not detract from the fact that the duties at issue must be regarded as the Communities' own resources.

75. As stated above,[37] the duties at issue are aimed at ensuring the stability of the markets in sugar and, in that connection, they are intended to operate 'within the framework of the common organisation of the markets in sugar'. Admittedly, Regulation No 1785/81 is the provision which governs 'the common organisation of the markets in the sugar sector', as its title indicates, but that does not mean that that regulation forms the necessary legal basis for every provision intended to govern those markets.

76. In fact, Decision 85/257 refers to 'duties provided for within the framework of the common organisation of the markets in sugar'. While it is true that that framework is the one established by Regulation No 1785/81, the duties which operate within it may be provided for in other provisions. That is the case, for example, of Regulation No 3771/85 on stocks of agricultural products in Portugal.

31 — Commission Regulation (EEC) No 2670/81 **of 14 September 1981 laying down detailed implementing rules in respect of sugar production in excess of the quota** (OJ 1981 L 262, p. 14).

32 — Emphasis added.

33 — Emphasis added.

34 — Paragraph 2 of its rejoinder.

35 — In support of its different view, Portugal refers, in paragraph 3 of its rejoinder, to the reply to the Commission's reasoned opinion. In that reply, however, there is no reference at all to Regulation No 2670/81.

36 — OJ 1981 L 177, p. 4.

37 — Points 69 and 70.

77. In addition, regard must be had to the provisions of the Act of Accession, Article 254 of which provides that surplus stocks must be eliminated 'under Community procedures to be specified', given that the objective of Regulation No 3771/85 is to lay down such procedures. Moreover, under Article 371(1) of the Act of Accession, '[t]he Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources ... shall be applied in accordance with Articles 372 to 375'. Further, in accordance with the first paragraph of Article 372, '[t]he revenue designated as "agricultural levies" referred to in the first paragraph of Article 2(a) of the Decision of 21 April 1970 shall also include *the revenue from any amount recorded on import in trade between Portugal and the other Member States and between Portugal and third countries* under Articles 233 to 345, 210(3) and 213'.[38]

78. Consequently, it must be concluded that the Act of Accession not only constitutes a sufficient legal basis for Regulation No 3771/85 (and, derivatively, for Regulation No 579/86 which implemented it), but is also the very basis on which the duties at issue must be regarded as own resources (since, as has been seen, they are equivalent to an import duty).

79. The Portuguese Government puts forward another argument against classification of the duties at issue as own resources, based on the fact that those duties are not provided for in the Union budgets. In that connection, it should be pointed out that budgetary measures which define own resources, on the one hand, and the taxes and duties established by the legislature in the exercise of a specific legislative competence, on the other, must not be confused.[39] As the Commission observes, the levying of the amount owed is not conditional on its allocation to a heading in the budget of the Communities but rather it suffices if it is provided for in a specific legislative act; in the present case, that act is Regulation No 579/86. Moreover, Decision 85/257 (on own resources and, as such, a budgetary provision) provides in Article 7 that the Member States must make those resources available to the Commission. There is a clear budgetary link here.

80. Lastly, the Portuguese Republic argues that if the duty at issue is own resources then so are the charges levied under Article 6(3) of Regulation No 60/2004 and Article 12(3) of Regulation No 1832/2006,[40] which, however, are not classified as such. Both provisions provide that duties on surplus stocks are to be assigned to the national budget of the new Member State. However, Article 7 of Regulation No 60/2004 then stipulates that where no proof of elimination from the market is provided, 'the new Member State is charged an amount equal to the quantity not eliminated ... This amount *will be assigned to the Community budget* ... [[41]] and will be taken into account for the calculation of the production levies for the marketing year 2004/2005.'[42] As the Commission states, therefore, this is none other than a two-stage levying system which always concludes with an entry as revenue in the Community budget.

81. To conclude this section on the legal classification of the charge at issue, there is, to my mind, an additional element in support of the argument that, in any event, the charge must be considered to be own resources.

82. That element is the subject-matter of the order of the Court in *William Hinton & Sons* which was made as a result of a reference for a preliminary ruling in proceedings brought by the Portuguese authorities to recover the duty owed on non-exported surplus stocks. Since, in that order, it was presumed that the amount at issue was claimed on the basis that it was own resources, due regard for

38 — Emphasis added.

39 — To that effect, see the order of the Court in Case C-154/12 *Isera & Scaldis Sugar and Others* [2013] ECR, paragraph 31 and the case-law cited. Inghelram, J, Commentary on Article 310 TFEU, in Lenz, C.O., and Borchardt, K.-D., *EU-Verträge Kommmentar*, Bundesanzeiger Verlag, 6th ed., Cologne, 2013.

40 — L**aying down transitional measures in the sugar sector by reason of the accessions of** 2004 and 2007.

41 — Emphasis added.

42 — Article 13 of Regulation No 1832/2006 has similar wording.

the principles of legal certainty and legitimate expectations should prevent the resolution of the present case on the basis of considerations which are not just different from but also conflict with those originally relied on by the Court. That is all quite apart from the fact that, as pointed out, the change in the case-law which took place subsequently in *Koninklije Coöperatie Cosun* v *Commission* may be subject to some doubts.

83. To my mind, therefore, and as a first interim conclusion, the amount at issue is a duty which must be regarded as the Union's own resources.

D – *The applicability of Regulation No 1697/79*

84. Once it has been established that the duty at issue constitutes own resources, it is necessary to determine whether the case falls within the scope of Regulation No 1697/79, which governs the recovery of import or export duties and in accordance with which such recovery must be effected within a period of three years.

85. Although there may be a number of doubts concerning the applicability of Regulation No 1697/79 — since, as pointed out, the charge at issue cannot be regarded as an import charge — I believe that it is beyond question that the regulation is fully applicable to the present case. The first reason is because, as we have seen, it was presumed in the order in *William Hinton & Sons* that the charge concerned was a levy and, therefore, own resources, while the Court left to the Supremo Tribunal Administrativo the task of establishing whether or not the goods subject to the payment had been declared in accordance with Regulation No 579/86 and stated that, if they had not, the national legislation should be applied rather than Regulation No 1697/79.[43] The second and overriding reason is because the Supremo Tribunal Administrativo itself held, in its judgment of 8 May 2002,[44] that that regulation was applicable to the case as a result of a reference made in national law.[45]

86. In the latter connection, the fact that the Supremo Tribunal Administrativo may have erred in finding that the duty at issue was not own resources, as the Portuguese Government asserts, is irrelevant. The first reason is because it is clear that, ultimately, the only legal classification which matters in that regard is that of the Court of Justice. The second and decisive reason is because the Supremo Tribunal Administrativo clearly held that the provision applicable to the present case was Regulation No 1697/79.

87. Accordingly, the application to the case of Regulation No 1697/79 should not pose any major problems as an issue already determined by the Supremo Tribunal Administrativo and, indirectly, by the Court of Justice. That is the tenor of my second interim conclusion.

E – *The conduct of the Portuguese authorities*

88. Lastly, since this is a case of own resources and Regulation No 1697/79 is applicable, the last question to answer is whether the finding by the Supremo Tribunal Administrativo that the debt is time-barred — and, consequently, that it is not possible to place the amount owed at the disposal of the Commission — is the result of negligent conduct on the part of the Portuguese Republic.

43 — Order in *William Hinton & Sons*, paragraph 38.

44 — Page 15 of the copy attached to the Commission's application.

45 — Specifically, Article 98 of the Customs Reform.

89. The Commission maintains that payment of the debt at issue could have been demanded with effect from 16 October 1987, the date on which it was entered in the accounts. Therefore, in accordance with Article 2 of Regulation No 1697/79, the time-limit for demanding payment of the debt expired three years later, that is on 16 October 1990. However, the Portuguese authorities did not take action until 29 October 1990, which, in the Commission's view, amounted to negligence leading to a failure by the Portuguese authorities to fulfil their obligations vis-à-vis the Union.

90. For its part, the Portuguese Republic claimed in its rejoinder [46] that the debt at issue was extinguished on 1 September 1987, while at the hearing it claimed that the debt was extinguished on 17 September 1987. In any event, the Portuguese Republic has maintained throughout the proceedings that it only became aware of the debt on 2 August 1990 and that it was unable to take action to recover it until 9 October 1990.

91. In the most favourable scenario for the Portuguese Republic, and in accordance with the judgment of the Supremo Tribunal Administrativo, the time-limit for demanding payment of the debt at issue could not be later than 16 October 1987, the date on which, according to the national court, the assessment of the amount of the duties levied on the debtor was recorded. That being so, under Article 2 of Regulation No 1697/79, the debt became time-barred on 16 October 1990, while the action for recovery of the duties which had not been levied by the Portuguese authorities did not take place until 29 October 1990.

92. As the Commission maintained, citing, inter alia, *Commission* v *Denmark*, Member States are required to establish the Communities' own resources as soon as their own authorities are in a position to calculate the amount of duties. Accepting, as the Portuguese Republic claims, that in the present case that was only possible on 2 August 1990, the question is whether the national authorities did everything that could reasonably be required to ensure that the amount owed was notified on an earlier date, so that, while complying with all the necessary formalities for levying it, payment of that amount could have been demanded before the time-limit of three years laid down in Article 2 of Regulation No 1697/79 expired, as was the case.

93. According to the account of the facts provided by the Portuguese authorities in their defence, [47] on 30 October 1987 the debtor company paid the amount of EUR 552 511.20 demanded by the Funchal customs office by letter of 16 October 1987. On 26 June 1990, the Funchal customs office demanded from the company an additional amount of EUR 23 419.63 as a result of an incorrectly applied deduction. That amount was paid on 20 February 1991. On 26 September 1990, a further additional payment was demanded in respect of VAT and, finally, on 25 October 1990, a demand was made for the amount at issue in these proceedings, which was amended on 26 November 1990.

94. It is of particular importance that the debt initially claimed from the company was notified on 16 October 1987 and that the correction of that amount, resulting in the increase which is at issue in these proceedings, did not take place until 25 October 1990 and was, according to the defence, [48] based on the outcome of an inspection by the Secretary of State for Food as a result of certain alleged inconsistencies in the allocation of the amounts to be paid by the holders of sugar in the autonomous region of Madeira and by the Instituto do Vinho da Madeira. However, the Portuguese Republic did not state the date on which that inspection was carried out, nor did it explain when the inconsistencies which gave rise to it were identified. The fact is that the results of that inspection came to light only three years after the debtor had been ordered to pay the duties demanded by the Funchal customs office.

46 — Paragraphs 34 and 35.

47 — Paragraphs 6 to 12.

48 — Paragraphs 9 and 10.

95. As was established at the hearing, the number of holders of surplus stocks of sugar in the autonomous region of Madeira was not so high that it made it impossible or very difficult to undertake minimal checks of the surplus quantities declared by them. In any event, the Portuguese Republic has not established that that was not the case, from which it follows, in my view, that the period of three years which elapsed between assessment of the duties and the action taken by the national authorities by means of an inspection is not justifiable and is, therefore, evidence of negligence; that translates into the failure to fulfil obligations alleged by the Commission, with which, as a final interim conclusion, I can only agree.

VI – **Costs**

96. Pursuant to Article 184(1) and Article 138(1) of the Rules of Procedure, I propose that the Court order the Portuguese Republic to pay the costs.

VII – **Conclusion**

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

— declare that, in refusing to make available to the Commission the amount of EUR 785 078.50 corresponding to levies on surplus stocks of non-exported sugar following its accession to the Communities, the Portuguese Republic has failed to fulfil its obligations under Article 10 EC, Article 254 of the Act of Accession, Article 7 of Decision 85/257, Articles 4, 7 and 8 of Regulation No 579/86, Article 2 of Regulation No 1697/79, and Articles 2, 11 and 17 of Regulation No 1552/89;

— order the Portuguese Republic to pay the costs.