

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 8 December 2005¹

I — Introduction

1. By this action for failure to fulfil obligations, the Commission of the European Communities is seeking a declaration that the Federal Republic of Germany has failed to comply with various obligations relating to the system of customs transit under cover of TIR carnets ('the TIR procedure'). The Commission alleges in particular that the Federal Republic of Germany has failed to enter correctly and to make available within the prescribed period Community own resources under that procedure, and that it has withheld from the Commission specific information regarding undischarged TIR carnets. The Commission also claims that the Federal Republic of Germany should be ordered to make available the own resources concerned, including the interest accrued thereon, and to forward specific data.

toms) own resources, as covered at the time material to these proceedings by Regulation (EEC, Euratom) No 1552/89 ('the regulation on own resources').² The regulation on own resources provides for two types of account entries for established entitlements of the Communities to own resources. As a general rule, established entitlements must be entered in the so-called A accounts, unless they are entitlements which must be entered in the so-called B accounts because, for instance, they 'have not yet been recovered and no security has been provided'. The type of account entry is crucial in that the amounts entered in the A accounts are to be credited to the Commission 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, whereas the — identical — time period for crediting the amounts entered in the B accounts to the Commission's account begins to run only as of when they are *recovered*.

2. This dispute concerns primarily the entry and making available of Community (cus-

¹ — Original language: German.

² — Council regulation of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155, p. 1).

3. This dispute also concerns the system of customs transit under cover of TIR carnets, which was established by the Customs Convention on the International Transport of Goods under Cover of TIR Carnets ('the TIR Convention'), signed in Geneva on 14 November 1975, to which inter alia the Federal Republic of Germany and the European Community are Contracting Parties.³

5. The facts of these proceedings are similar to those in the actions pending in Case C-377/03⁴ and Case C-378/03,⁵ which likewise concern the accounting entry and making available of own resources arising from the TIR procedure and in which I shall also be delivering Opinions.

II — Relevant legislation

A — Community law

1. The regulation on own resources

4. These proceedings in essence raise the question whether it was possible to enter entitlements arising from the TIR procedure in the B accounts instead of the A accounts, especially in the light of problems involving security for customs duties and taxes afforded by a system of guarantee introduced as part of the TIR system which, according to the German Government, had been on the verge of collapse since 1993. In those circumstances, the German authorities felt compelled temporarily to waive enforcement of the entitlements against the guaranteeing associations and to enter the amounts in question as unsecured entitlements in the B accounts.

6. Article 2(1) of the regulation on own resources provides as follows in respect of establishment of Community entitlement thereto:

'For the purpose of applying this Regulation, the Community's entitlement to the own resources referred to in Article 2(1)(a) and (b) of Decision 88/376/EEC, Euratom shall be established as soon as the amount due has been notified by the competent department of the Member State to the debtor. Notifica-

3 — That convention was approved by the European Community by Council Regulation (EEC) No 2112/78 of 25 July 1978 concerning the conclusion of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) of 14 November 1975 at Geneva (OJ 1978 L 252, p. 1).

4 — Case C-377/03 *Commission v Belgium* [2006] ECR I-9733.

5 — Case C-378/03 *Commission v Belgium* [2006] ECR I-9805.

tion 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.'

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 6(1) and (2)(a) and (b) of the regulation on own resources states the following with respect to accounting entries of own resources:

8. Article 10(1) of the regulation on own resources provides as follows in respect of the making available of own resources:

'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.

'After deduction of 10% by way of collection costs in accordance with Article 2(3) of Decision 88/376/EEC, Euratom, entry of the own resources referred to in Article 2(1)(a) and (b) of that Decision shall be made at the latest on the first working day following the 19th day of the second month following the month during which the entitlement was established in accordance with Article 2.

2. (a) Entitlements established in accordance with Article 2 shall, subject to point (b) of this paragraph, be entered in the accounts at the latest on the first working day after the 19th day of the second month following the month during which the entitlement was established.

(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 within the period laid down in point (a). Member

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

9. Article 17(1) and (2) of the regulation on own resources states: 2. The TIR procedure

(a) Overview of the TIR procedure

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

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 ECU 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.'

10. A transit procedure is a customs procedure which is intended to facilitate trade or the transit of goods within a given customs system or between different customs territories. Transit procedures are regarded as 'suspension systems', by which it is possible temporarily to waive recovery of customs duties, levies and excises payable on goods in transit to a third country or coming from a third country whilst those goods are being transported through a given customs territory. The TIR procedure is one of a number of — in many ways similar — varieties of transit procedure or systems for the transit of goods, which primarily include the Community transit procedure and the common transit procedure.

11. The legal basis for the TIR procedure, which forms part of the external transit procedures, comprises, in addition to the TIR Convention, Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code⁶ ('the implementing regulation'), which in turn is

6 — OJ 1993 L 253, p. 1.

based on the Community Customs Code⁷ ('the Customs Code') and essentially adopts and implements the procedure introduced by Article 451 et seq. of the TIR Convention.

12. Under the TIR Convention, goods carried in sealed road vehicles, combinations of vehicles or containers are to be subjected to a single examination at the customs office of departure, and not at any customs offices en route or at destination, unless an irregularity is suspected (Article 5). Furthermore, such goods are not to be subjected to the payment or deposit of import or export duties (Article 4). The TIR procedure assists in the monitoring, by customs authorities, of the transport of goods through the customs territory — for the purposes of the TIR Convention, the Community customs territory is considered to be a single customs territory — and seeks to ensure that the goods transported reach their destination identical and unchanged in quantity.

13. There are three components of the TIR procedure the principal purpose of which is to make it possible to meet those objectives: first, goods must be transported in vehicles

or containers which are equipped with specific security devices so that the goods cannot be substituted or removed en route (Articles 12 to 14 of the TIR Convention); secondly, the goods must be accompanied, for the duration of the transport operation, by a standard transit document — the TIR carnet — issued by the customs office of departure and used to check that the transport operation conforms to the rules (Article 3); thirdly, payment of customs duties and taxes, which the customs authorities may demand from transport undertakings, must be secured in part by the guarantees of national associations which have been approved to carry out that function by the authorities of the Contracting Parties (Article 3). Those guarantees are, for their part, covered by the International Road Transport Union (IRU) and by an insurance group established in Switzerland ('the International Insurance Pool' or 'pool of insurers').

14. The TIR carnets are printed by the IRU and issued by the guaranteeing associations to the transport undertakings, which record a range of information in the TIR carnets, in particular information on the goods transported. Each TIR carnet consists of a number of pages in duplicate. Once the goods in question have been presented at the customs office of destination, that is to say, at the customs office of exit from the Community customs territory, and once that office has notified that fact without reservation to the customs office of departure, that is to say, the customs office of entry into that customs territory, the TIR transport operation has been properly discharged.

⁷ — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

15. Where transport operations have not been properly discharged, the guarantee system laid down essentially in Article 8 of the TIR Convention comes into effect, the guaranteeing associations becoming liable, jointly and severally with the persons from whom the sums in question are directly due, for payment of the import and export duties falling due as a result of the irregularity established in connection with the TIR transport operation, up to a specific limit of cover per lorry consignment.

noted in connection with a TIR operation. It shall be liable, jointly and severally with the persons from whom the sums mentioned above are due, for payment of such sums.

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

(b) The relevant provisions of the TIR Convention

16. Chapter II of the TIR Convention, which governs the issue of TIR carnets and the liability of guaranteeing associations, includes the following provisions:

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

'Article 8

1. The guaranteeing association shall undertake to pay the import or export duties and taxes, together with any default interest, due under the customs laws and regulations of the country in which an irregularity has been

4. The liability of the guaranteeing association to the authorities of the country where the customs office of departure is situated shall commence at the time when the TIR carnet is accepted by the customs office. In the succeeding countries through which goods are transported under the TIR procedure, this liability shall commence at the time when the goods are imported or, where the TIR operation has been suspended under Article 26(1) and (2), at the time when the TIR carnet is accepted by the customs office where the TIR operation is resumed.

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

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

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

('Federal Decree') includes the following provisions, under point 3, relating to procedural security measures in transit procedures:

'Claims for payment of import duties under the Community transit procedure or the common transit procedure shall be deemed to be secured only if separate security has been provided for each transit operation and that security has not yet been released.

All other claims arising from the Community transit procedure, the common transit procedure or the TIR procedure shall be deemed to be unsecured ...'

III — Facts and procedure

B — National legislation

A — Crisis in the TIR system

17. The Decree adopted by the Federal Ministry of Finance on 11 September 1996

18. The German Government in particular has drawn the Court's attention to the factual context in which this action must be

considered, namely that of a marked crisis which has affected transit procedures applied in the Community, including the TIR procedure, since the beginning of the 1990s and in particular since the internal market came into operation on 1 January 1993, and which has led to the breakdown of the guarantee system forming the basis of the TIR procedure and thus — according to the German Government at any rate — to the 'virtual collapse' of the entire TIR system. The crisis was also the focus of a Committee of Inquiry set up by the European Parliament in December 1995 to look into alleged infringements or shortcomings of the Community transit system, which presented its report on 20 February 1997⁸ ('the Parliamentary Inquiry Report'). Although that report focuses specifically on the Community transit system, it also deals extensively with the TIR procedure.

19. The crisis — the actual severity of which, however, is the subject of disagreement between the parties to the proceedings — was caused by a spectacular increase in irregularities in the TIR procedure following the opening-up of the borders to the East, the creation of the internal market and a rise in organised crime, which in turn led to more frequent recourse to the International Insurance Pool, which increasingly refused to honour the security arising from the guarantee. According to the German Government and the Parliamentary Inquiry Report,

the central bodies under the TIR Convention — the TIR Administrative Committee and, especially, the Working Party on Customs Questions affecting Transport (WP.30), in which all the Contracting Parties, including the Commission, are represented — dealt time and again with the developments described.

20. The first reaction to these developments, in July 1993, was the creation, on the initiative of the IRU and the International Insurance Pool, of a separate TIR carnet for particularly sensitive goods, namely tobacco and alcohol, the guarantee for which was raised to USD 200 000. On 5 December 1994, however, the International Insurance Pool terminated the reinsurance contract, on the grounds that there had been a disproportionate increase in the risks involved, of which the insurers had been unaware, and that fraud had become a widespread and systematic phenomenon. That termination of the contract then became the subject-matter of arbitration proceedings.

21. The Federal Republic of Germany maintains that, given the insolvency of the German guaranteeing associations BDF⁹ and AIST¹⁰ and the fear that the guarantee system of the TIR procedure might collapse,

8 — PE 220.895/final.

9 — Bundesverband des deutschen Güterfernverkehrs.

10 — Arbeitsgemeinschaft zur Förderung und Entwicklung des internationalen Straßenverkehrs.

the German Government, by agreements of 31 July 1996 and 26 May 1997 ('the standstill agreements') waived the right to claim payment of the unpaid debts from the guaranteeing associations.

authorities to provide it with the content of those agreements and that of other similar agreements which might have been concluded with other guarantors, and also to inform it as to when and in what form the established, unrecovered own resources arising from the undischarged TIR carnets had been made available to the Commission.

B — Pre-litigation procedure and forms of order sought

22. In the course of inspections on traditional own resources it carried out in Germany from 24 to 28 November 1997, the Commission found that the German authorities had not properly discharged certain transit documents in connection with the customs transit system (509 TIR carnets dating from 1993, 1994 and 1995, involving approximately DEM 20 million in own resources). The customs offices had sent a request in due time for payment of the duties, prescribing a period for payment for the guaranteeing association, but no payment had been made and the German authorities had not claimed the amounts owing through legal proceedings. Recovery proceedings were suspended in the light of the standstill agreements. The German authorities considered the amounts in question to be unsecured within the meaning of the Federal Decree and therefore entered them in the B accounts.

23. By letter of 19 December 1997, the Commission therefore called on the German

24. By letter of 22 January 1998, the German authorities stated that, in the light of the increase in fraud marring transit operations under cover of TIR carnets, which had led to the cancellation of the reinsurance contract by the pool of insurers on 5 December 1994 and the suspension of payments by that pool to the German guaranteeing associations, which were reinsured through the IRU, the provisional waiver by the German authorities of their legal rights was necessary in order to avoid the bankruptcy of those associations and the consequent collapse of the TIR carnet system throughout the European Union. Moreover, arbitration proceedings were under way between the IRU and the pool of insurers with respect to the entitlements to be guaranteed. The claims arising from non-discharge of transit operations could be regarded as being secured within the meaning of the regulation only if the security provided related to individual operations and offered protection on a par with the actual risk.

25. By letter of 30 March 1998, the Commission reiterated its request that the own resources in question be made available to it;

the German authorities, by letter of 22 May 1998, replied that they could not comply with that request, *inter alia*, because to do so would impose an undue burden on the German budget.

26. By letter of 8 June 1998, the Commission again requested the German authorities to provide it with the information requested previously for the purpose of calculating the default interest owing pursuant to Article 11 of the regulation on own resources.

27. In their observations of 18 September 1998, the German authorities reiterated their previously expressed position.

28. By letter of 30 October 1998, the Commission requested the German Government to pay a certain amount by way of payment on account before the last day of the second month following the sending of that letter and also to indicate to it any other uncontested customs amounts relating to TIR carnets which had not been discharged by the German customs offices in the years 1994 to 1998 and had been processed in the same manner (entry in the B accounts instead of the A accounts).

29. In their reply of 4 March 1999, the German authorities indicated that they would not be complying with those requests.

30. In its letter of formal notice of 15 November 1999, the Commission reiterated its position, asserting that, contrary to the contentions of the German authorities, the matter did not concern general security provided for a number of claims, but rather security relating specifically to individual TIR carnets, which fully or largely covered the claims in most instances. Moreover, the Federal Republic of Germany had, as far as the contested TIR carnets dating from 1995 in particular were concerned, temporarily waived enforcement of its existing claims against the guaranteeing association on the condition that the association continued to be liable 'with an appropriate own share' and assigned its claims against the reinsurer by way of security. Consequently, the claims from 1995 and the subsequent years were also secured and should — at least partly — have been entered in the A accounts and made available, in so far as they had not been contested within the prescribed periods.

31. In their reply of 1 February 2000, the German authorities maintained and elaborated on their point of view, forwarding to the Commission the agreements concluded with the guaranteeing associations concerning the postponement of payment.

32. On 8 November 2000, the Commission issued a reasoned opinion to the Federal Republic of Germany. According to the Commission, contrary to the German authorities' view of the matter, the claims could

not be regarded as being challenged on account of the arbitration proceedings between the IRU and the pool of insurers. The principal claims had not been contested by the debtors. The refusal by the reinsurer to assume the guarantors' liability could not be viewed as being a challenge to the principal claims. Finally, the German authorities' provisional waiver of their claims concerned only the liability of the reinsurer behind the guaranteeing associations. The obligation of the debtors, and therefore the obligation of the Federal Republic of Germany, was not affected as regards the Community budget. Contrary to that Member State's contentions, Article 17(2) of the regulation on own resources was not applicable to the circumstances.

33. The Commission again requested the German authorities to make available immediately to the Commission, by way of payment on account, the amount of DEM 10 552 875, in order to avoid payment of additional default interest, to provide it with all the other unchallenged customs amounts which had been treated similarly in relation to the non-discharge of TIR carnets by the German customs offices beginning in 1994 until the amendment of the 1996 Federal Decree, and to make available immediately to the Commission the relevant own resources in order to avoid having to pay additional default interest.

34. The Federal Republic of Germany replied to the reasoned opinion by letter of 10 January 2001, in which it reiterated the

point of view it had expressed earlier and refuted the Commission's arguments.

35. In the light of the Germany authorities' failure to comply with the Commission's requests, the latter brought the present action, requesting the Court of Justice to declare that:

- (1) by failing properly to process certain transit documents (TIR carnets), with the result that the own resources arising therefrom were not correctly entered in the accounts or made available to the Commission within the prescribed periods; and
- (2) by failing to inform the Commission of all the other uncontested customs duties treated in the same way (entry in the B accounts instead of entry in the A accounts) in respect of the non-discharge of TIR carnets by the German customs authorities from 1994 until the amendment of the 1996 Decree of the Federal Minister for Finance (Decree of

11 September 1996, III B 1 — Z 0912 — IV — Assessment of the action
31/96);

the Federal Republic of Germany has failed to fulfil its obligations under the regulation on own resources, which was replaced, with effect from 31 May 2000, by 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).

The Commission also requests the Court to declare that:

- (3) the Federal Republic of Germany is obliged to credit immediately to the Commission's account the own resources which remain unpaid due to the failures to fulfil obligations referred to in the first and second paragraphs;
- (4) the Federal Republic of Germany is obliged to indicate, in respect of any amounts which may already have been transferred to the account, the due date of the claim, the amount owing and, as the case may be, the date of the transfer;
- (5) pursuant to Article 11 of the regulation on own resources, for the period up to 31 May 2000, and Article 11 of Regulation No 1150/2000, for the period subsequent to 31 May 2000, the Federal Republic of Germany is required to pay into the Community budget the interest owing in the event of late entry in the accounts;

and to:

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

A — Admissibility

1. Main arguments of the parties

36. The *German Government* states, first, that points 3, 4 and 5 of the forms of order sought, claiming that it should be obliged to credit forthwith to the Commission's account own resources which have not yet been transferred, to provide certain information with respect to any amounts already transferred and to pay the interest accrued as a result of the (allegedly) late transfer to the Community's account, are inadmissible. In its view, by seeking those forms of order, the Commission is merely submitting 'claims for payment' or 'requests for investigation'. In infringement proceedings, however, the role of the Court is limited simply to establishing whether a Treaty infringement has taken place. If so, it is then for the Member State concerned to take the measures necessary to comply with that finding. It also maintains that the fourth head of claim reverses the burden of proof for establishing that there has been an infringement, which should lie with the Commission.

37. The *Belgian Government*, which has intervened in these proceedings in support

of the Federal Republic of Germany, essentially shares the German Government's view.

38. The *Commission*, by contrast, argues that Article 228 EC does not prevent the Court from making appropriate declarations with a view to eliminating an infringement it has found. It observes that Article 11 of the regulation on own resources provides for a clear and unconditional obligation on the part of the Member State concerned to pay interest in the event of delay in entering own resources. With regard to the fourth head of claim, the Commission points out that it is to a large extent reliant on information supplied by the Member States for verifying whether Member States duly transfer own resources and that accordingly it does not have to bear the full burden of proof in such circumstances.

39. Finally, at the hearing, the Commission requested that the fifth head of claim be reworded to the effect that the Court declare that the Federal Republic of Germany had infringed Article 11 of the regulation on own resources by failing to credit the interest owing to the Community budget.

2. Assessment

40. First, it should be borne in mind that — as rightly pointed out by the German

Government — the purpose of an action under Article 226 EC is simply to obtain a declaration that a Member State has failed to fulfil its Community obligations.¹¹ Where there is a finding of infringement, Article 228 EC then expressly requires the Member State concerned to take the measures necessary to comply with the judgment.

41. The Court may, as the Commission has pointed out, make appropriate remarks in the grounds of the judgment with a view to eliminating an infringement it has found. However, unlike the Commission in the pre-litigation procedure, it cannot order the Member State concerned to take specific measures.¹²

42. In the circumstances of the present case, the purpose of the third, fourth and fifth heads of claim is to obtain an order that the Member State concerned credit own resources that have not yet been credited to the Community's account, to provide information regarding specific amounts and transfers and to pay interest.

43. Incidentally, in its reply, the Commission itself did not deny that the aforementioned

11 — See Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR 321, paragraph 27.

12 — See Case C-104/02 *Commission v Germany* [2005] ECR I-2689, paragraph 49.

forms of order sought extend beyond a request for a declaration from the Court; however, it has rejected as unsound the German Government's — accurate — view that the forms of order sought must be restricted to obtaining a declaration. The fact that, as the Commission has objected, the obligations on which those forms of order sought are based, such as the obligation to pay interest or the obligation of loyal cooperation, are specific and unconditional and that the Member State enjoys no discretion with regard to those obligations is irrelevant, since the sole power conferred on the Court by the EC Treaty is to declare a failure to comply with obligations under the Treaty in infringement proceedings.

to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission.¹⁴

44. The third, fourth and fifth forms of order sought must therefore be regarded as inadmissible in accordance with the Court's case-law.¹³

47. The proper conduct of that procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.¹⁵

45. It is necessary, however, to consider the rewording of the fifth form of order sought, as requested by the Commission at the hearing.

48. According to the settled case-law of the Court, the proceedings must in principle be based on the same complaints as those set out in the reasoned opinion and the letter of formal notice initiating the pre-litigation procedure.¹⁶

46. First, it is clear that, according to settled case-law, the purpose of the pre-litigation procedure provided for in Article 226 EC is

49. Admittedly, that requirement is not carried so far as to mean that in every case the statement of complaints in the letter of

14 — Case 293/85 *Commission v Belgium* [1988] ECR 305, paragraph 13; Case C-96/95 *Commission v Germany* [1997] ECR I-1653, paragraph 22; Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 10; and Case C-350/02 *Commission v Netherlands* [2004] ECR I-6213, paragraph 18.

15 — Case C-1/00 *Commission v France* [2001] ECR I-9989, paragraph 53; Case C-287/00 *Commission v Germany* [2002] ECR I-5811, paragraph 17; and Case C-350/02 *Commission v Netherlands*, cited in footnote 14, paragraph 19.

16 — See, inter alia, Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 23, and *Commission v Finland* [2003] ECR I-5727, paragraph 44.

13 — *Ibid.*, paragraph 51.

formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same. However, for a derogation to be allowed, it must neither extend nor alter the subject-matter of the dispute; at most it may restrict it.¹⁷

50. In that respect, according to the case-law of the Court of First Instance in actions for annulment and for damages, in which it has had to deal repeatedly with the specific circumstances of a subsequent rewording of the heads of claim set forth in the application, such rewording is permissible only on the condition 'that it serves merely to clarify the forms of order sought in the application or that the reworded forms of order sought do not go as far as their original version'.¹⁸

51. In my opinion, the rewording requested in this case goes beyond what would be considered permissible because, in rewording the fifth head of claim so as to seek a declaration from the Court, the Commission must no longer be considered simply to be clarifying that head of claim; on the contrary, it must be considered to be altering fundamentally the purpose of the action.

52. Bearing in mind the defendant Member State's right to defend itself, it must also be observed that the amendment in question was sought at a very late stage, indeed, only at the hearing. In its reply, the Commission again stated that it intended that head of claim to be construed as seeking payment of the default interest in question.

53. In my view, the rewording of point 5 of the forms of order sought, as requested by the Commission at the hearing, by which an inadmissible application for a declaration of obligation is reinterpreted as an admissible application for a declaration of infringement, must accordingly not be taken as the basis for the present proceedings.

54. In the light of the foregoing, this action must be declared inadmissible in so far as it concerns the crediting to the Community's account of untransferred own resources, the provision of information relating to certain amounts and transfers, and the payment of interest (points 3, 4 and 5 of the forms of order sought by the Commission).

55. Consequently, my examination of the present action below will be limited to assessing the pleas in law put forward in support of points 1 and 2 of the forms of order sought.

17 — See, inter alia, Case C-280/02 *Commission v France* [2004] ECR I-8573, paragraph 30, and *Commission v Finland*, cited in footnote 16, paragraph 44.

18 — See Case T-100/96 *Vicente-Núñez v Commission* [1998] ECR-SC I-A-591 and II-1779, paragraph 51, and Case T-177/03 *Strohm v Commission* [2005] ECR-SC I-A-147 and II-651, paragraph 21.

B — *Substance*

own resources are made available to the Commission, and, consequently, of a breach of the obligation of loyal cooperation.

1. Point 1 of the forms of order sought: irregularities affecting the processing of some TIR carnets, and incorrect accounting entries of own resources and failure to transfer them in due time

(a) Main arguments of the parties

56. Point 1 of the Commission's forms of order sought is based essentially on two complaints. First, the Commission objects that the German authorities waived their right to recovery (by judicial process) of the established claims at issue and entered into standstill agreements with the guaranteeing associations unilaterally and without consulting the Commission. Secondly, the Commission complains that the Federal Republic of Germany failed to enter correctly, and therefore to make available in due time, the own resources accruing to the Community from those procedures. It claims that those amounts should have been entered in the A accounts.

57. The Commission considers that there has been a failure to fulfil the obligations under the Community provisions on Community own resources, in particular an infringement of the obligation under Article 17 of the regulation on own resources to take all requisite measures to ensure that the

58. As regards the temporary waiver of collection of the claims, the *Commission* maintains that the German Government has failed to demonstrate that it acted in the interest of the Communities in order to prevent the collapse of the TIR system. As the Parliamentary Inquiry Report has also shown, no total collapse of the system of guarantee within the TIR system occurred. The German authorities should have at least consulted with the Commission and the other Member States before taking their decision temporarily to waive collection of the claims. That unilateral action by the German authorities is an infringement of the obligation of cooperation laid down in Article 10 EC, as is the ultimate compliance with the Commission's repeated request for notification of the details of the standstill agreements and of further agreements of that kind only at the stage of the letter of formal notice. Mere references to inquiries into the guaranteeing associations' insolvency are, in the absence of actual enforcement measures, insufficient to establish that there were grounds warranting a failure to recover claims pursuant to the second sentence of

Article 17(2) of the regulation on own resources. The action by the German authorities infringed Article 17(1) of the regulation on own resources, under which Member States are to take all requisite measures to ensure that the own resources are made available to the Commission.

59. In support of its view that the entitlements in question should have been entered as secured claims in the A accounts pursuant to Article 6(2)(a) of the regulation on own resources, the Commission states that the customs entitlements arising from the TIR procedure are secured by the TIR carnets and that the guaranteeing associations are jointly and severally liable in the event of irregularities. The purpose of the B accounts under Article 6(2)(b) of the regulation on own resources is not to protect the Member States and their budgets but, as is apparent from the recitals in the preamble to the regulation, to enable the Commission to monitor more closely the action taken by Member States to collect own resources. That objective would be rendered meaningless if each Member State was free to assess the quality of the relevant guarantees and to decide on its own, without consulting the Commission, in which accounts a secured claim should be entered.

60. The Commission adds that security for the purposes of the A accounts does not have

to be 'directly and immediately realisable'; it need be realisable only if, at the time when the security is provided, the insolvent debtor cannot ultimately discharge the customs debt.

61. The Commission argues that the German Government disputes only in a general and unsubstantiated manner that the security at issue in the present case was sufficient. Nor does it dispute that the security in question was in any event sufficient to cover at least part of the claims. Consequently, the security should have been entered in the A accounts, at least in so far as no other assessment was called for in view of the termination of the contract by the reinsurer. In principle, the decisive date is when the TIR procedure began and for which the security was provided.

62. The Commission states that, in any event, the claims arising before 1995 should have been entered in the A accounts and made available. As regards the claims arising in 1995 and thereafter, the German authorities' assertion that, even at that time, the claims should have been regarded as unsecured on account of the termination of the contract by the reinsurer should have prompted them not to permit the TIR procedure due to the lack of security. If they nevertheless allowed the procedure to go ahead without security and entered the claims in the B accounts, they also had to

bear the risk relating to collection of those claims. In the light of the standstill agreements, it must be assumed that there was at least partial security. Consequently, the claims arising as from 1995 and thereafter should have also been considered as secured claims and entered in the A accounts.

63. The Commission then mentions that Member States have the option under Article 8 of the TIR Convention to enforce their claims against the guaranteeing associations. It is irrelevant that the security carries only subsidiary liability. The present case concerns only definitively established claims, not contested claims. The Commission submits that the second sentence of Article 6(2)(b) of the regulation on own resources does not apply to the present case, involving security provided by a guarantor in respect of a claim, because it does not dispute the principal claim and only its ability to discharge the guarantee is in doubt.

64. The *German Government* takes the opposite view, that the customs authorities were correct in entering the payments in the B accounts, since as of 1993 the guarantors were no longer providing sufficient security. It is clear from the wording, scheme and purpose of the regulation on own resources that security which offers no guarantee that the guarantor will pay the amounts owed by it — that is to say, security existing 'only on

paper' — is not security for the purposes of Article 6(2)(b) of that regulation. Indeed, that provision and the recitals in the preamble to the regulation on own resources state expressly that only those secured claims for which it is certain that the security will in fact be able to be realised should be entered in the A accounts, which is not the case where there are insolvent guarantors (where it is well known that the guarantors have insufficient assets; according to a legal opinion drawn up in the pre-litigation procedure, the guarantors, who were no longer even able to service one twelfth of the State claims, were on the verge of bankruptcy) or cancelled (the International Insurance Pool refused to pay) or defective 'international guarantee chains'. Claims which have not been recovered, but are secured, are, in principle, among the '[establishment entitlements which] have not yet been recovered' (Article 6(2)(b) of the regulation on own resources. An exception (subject to strict interpretation) to that principle can be made only when the security turns out to be realisable without difficulty. Member States are not required to pay unsecured or insufficiently secured claims in advance.

65. The German Government submits that the Commission wrongly draws a distinction between the periods before and after 1995. It is inaccurate to maintain that the payment of own resources on the basis of security provided is contingent on commencement of the TIR operation. The cancellation of the reinsurance contract by the pool of insurers entailed the immediate and retroactive cessation of payments. Moreover, since the

security was auxiliary in nature, before the German authorities could bring legal action against the guaranteeing associations, that is, after 1994, they were obliged to initiate and complete the research procedure and fiscal procedures (Article 8(7) of the TIR Convention). Those procedures sometimes last a number of years.

66. The German Government adds that, contrary to the Commission's assertions, the German authorities could not have disallowed the TIR procedure after the reinsurance contract had been terminated (late 1994) without bringing East-West trade to a virtual standstill and unilaterally infringing an integral part of Community customs law (Article 91 of the Customs Code). A Member State may not, on its own initiative, require additional security without infringing the TIR Convention (Article 4) and the TIR decisions.

67. The German Government submits in the alternative that, even if the amounts concerned were 'secured claims', it was not obliged to make those amounts available to the Commission because it was *inter alia* for reasons of force majeure within the meaning of the first sentence of Article 17(2) of the regulation on own resources that they could not be recovered. The German authorities had in any event done everything they could to recover the outstanding claims (a test case

was brought against the guaranteeing associations and investigations were conducted into their actual assets).

68. Furthermore, the German Government denies the allegation that the German authorities failed to cooperate sufficiently with the Commission in investigating the facts, in particular as regards the content of the standstill agreements. The Commission was notified of the fundamental content of those agreements just a few weeks after they had been drawn up.

69. The *Belgian Government* considers the amounts in question to be 'challenged' within the meaning of Article 6(2)(b) of the regulation on own resources; since the guarantor is jointly and severally liable, it must be able to challenge the obligation to pay to the same extent as the principal debtor.

70. The Belgian Government adds that Member States must make customs duties available to the Commission only once they have actually been paid in full; they are accordingly not required, as the Commission maintains, to make available that part of the customs duties which is still covered by the guarantee. Accordingly, there has been no delay in making the amounts available.

71. Lastly, the Belgian Government submits that the Federal Republic of Germany has not infringed the principle of Community loyalty since, in concluding the standstill agreements, it avoided even greater damage to the TIR system. The Commission was, moreover, well aware of the payment problems faced by the guaranteeing associations.

as per the wording of the forms of order sought. The Court of Justice accordingly does not have to consider specifically whether the Federal Republic of Germany infringed rules of customs law or the TIR Convention. Any such infringements are relevant to this case only if they also entail infringements of the regulation on own resources or impede the making available of the own resources arising from customs revenue.

(b) Assessment

72. It should be noted, as a preliminary point, that the German Government does not dispute the facts underpinning these proceedings as established by the Commission, namely that the recovery procedure relating to TIR carnets dating from 1993, 1994 and 1995 was suspended or — because of the standstill agreements — was not even commenced and that the corresponding amounts were entered in the B accounts. What is disputed, however, is whether the Federal Republic of Germany thereby failed to comply with its Community obligations. Views also diverge as to the attendant circumstances concerning the operation of the TIR system and their relevance to these proceedings.

74. Thirdly, as the Commission has expressly stated, the present action concerns only claims arising from TIR procedures which have already been definitively established, that is, established entitlements within the meaning of Article 2(1) of the regulation on own resources. In the present case, it is not disputed that the claims have been established; rather, the dispute centres on the circumstances in which the equivalent of entitlements which have been established but not yet recovered are to be made available to the Community. That will also determine who must bear the risk of completion of the customs formalities by the authorities of the Member States and of recovery of the Communities' own resources entitlements.

73. Secondly, it must be observed that the pleas put forward by the Commission in these proceedings are confined to an infringement of the regulation on own resources,

75. I wish to comment also on the relationship between the regulation on own resources, which lays down the detailed rules

under which the Member States are to make available the own resources allocated to the Communities,¹⁹ and the rules on how the various own resources debts are incurred and collected — in this case customs duties — which are regulated primarily by the Community customs rules (therefore, primarily the Customs Code, the implementing regulation for the Customs Code and the TIR Convention) and national laws, regulations and administrative provisions.

76. According to the well-established case-law of the Court, referred to by the Commission on a number of occasions, there is an 'inseparable link between the obligation to establish the Communities' own resources, the obligation to credit them to the Commission's account within the prescribed time-limit and the obligation to pay default interest'.²⁰

77. However, that case-law on the 'inseparable link' pre-dates — in any event in the earliest judgment thereof — the version of the regulation on own resources which is material to the present case,²¹ by which the B accounts were first introduced, and the application of which is specifically in dispute in this case.

78. Until that version entered into force, accounting entries were not of any particular importance in terms of the obligation to credit established entitlements to the own resources account. The amounts corresponding to the established entitlements were — regardless of their actual collection — to be made available to the Commission within a prescribed period. Member States were freed from the obligation to make those amounts available only if, for reasons of force majeure, they could not be collected.²² Thus the Court held in a judgment delivered on 5 May 1977 'that the Member States are required not only to establish all own resources, but also to make available to the Communities all own resources so established, including any sums which may not have been collected, unless collection has been impossible for reasons of force majeure. Thus it continues to be the task of the Member States to undertake prosecutions and proceedings for the purpose of the recovery of own resources and to continue to take steps to that end in respect of persons liable for payment'.²³

79. That case-law bears out what Advocate General Geelhoed described in his Opinion of 10 March 2005, referred to by the parties to these proceedings, as 'a ring fence

19 — See the second recital in the preamble to the regulation on own resources.

20 — See, inter alia, Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461, paragraph 38, and Case C-104/02 *Commission v Germany*, cited in footnote 12, paragraph 69.

21 — See, for example, Case 303/84 *Commission v Germany* [1986] ECR 1171, paragraph 11, and Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraph 17.

22 — See Articles 7, 9 and 17(2) of Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ 1977 L 336, p. 1).

23 — Case 110/76 *Pretore di Cento* [1977] ECR 851, paragraphs 5 and 6.

separating the sphere of own resources from that of customs legislation'.²⁴

lapses pursuant to Article 17(2) of that regulation where collection could not be effected for reasons of force majeure and — in a shift away from Regulation No 2891/77 — if, after thorough assessment, it appears that recovery is impossible in the long term for reasons which cannot be attributed to the Member State concerned.

80. Considered from the angle of the distribution of risk between the Community and the Member States, this means that, in their obligation to make available to the Communities even the amounts corresponding to established entitlements which have not been collected, the Member States must in any event bear the financial consequences of difficulties or errors in the levying and collection of customs duties, unless they have not been collected for reasons of force majeure.

81. The introduction of the B accounts into the regulation on own resources clearly shifted that distribution of risk in favour of the Member States in that the obligation to make available certain established entitlements became subject to the recovery of the corresponding amounts. For entitlements shown in the B accounts, Article 10(1) of the regulation on own resources provides that the entry of the own resources must be done within a certain period *following recovery* of the amounts corresponding to those entitlements. As before, the obligation to make available the established claims

82. I add that, according to the version of the regulation on own resources which is material to the present proceedings, there is no obligation to credit the entitlements to be entered in the B accounts to the own resources account until the corresponding amounts have been recovered, irrespective of whether there has been force majeure and long-term impossibility as referred to in Article 17(2) of that regulation; accordingly, before that date, no obligation to pay default interest can arise. For those entitlements, it is necessary to place in context the 'inseparable link' between the obligations to establish the own resources, the obligation to credit them to the own resources account and the obligation to pay default interest.

83. The outcome of the present case thus turns decisively on which entitlements may be entered in the B accounts and thus are to be credited to the Community only after they have been recovered. As Article 6(2)(b) of the regulation on own resources expressly provides, these are, on the one hand, established entitlements which have not yet

²⁴ — Opinion of Advocate General Geelhoed in Case C-392/02 *Commission v Denmark* [2005] ECR I-9811, points 62 and 63 and footnote 24.

been recovered and for which no security has been provided and, on the other hand, (unrecovered²⁵) established entitlements for which security has indeed been provided but which have been challenged and might, upon settlement of the disputes which have arisen, be subject to change. Accordingly, recovered claims fall to be entered in the A accounts, along with unrecovered claims for which security has been provided and which have not been challenged.

principal claims concerned could be challenged by those actually providing the security, that is to say, the guaranteeing associations.

84. In the present case, the German Government has not argued before the Court that the claims in question were challenged; furthermore, the Commission confined its application to 'definitively established entitlements', which are not subject to challenge. Incidentally, I concur with the Commission that the challenge — as is perfectly clear from the wording of Article 6(2)(b) of the regulation on own resources — must relate to the entitlement itself and not to the security, thus signifying a challenge to the principal customs debt. At issue here, in any event, is the exercise against the guaranteeing associations of rights deriving from the security provided and, therefore, the realisation of the guarantees. It is therefore irrelevant in these proceedings whether, as the Belgian Government has submitted, the

85. Next, as to the question whether the relevant established entitlements resulting from the TIR procedure are secured claims within the meaning of Article 6(2)(b) of the regulation on own resources and should therefore have been entered in the A accounts, it must be observed that that provision requires only that 'security has been provided', without defining further what is meant by 'security'.

86. As to the interpretation of that provision, the Commission's line of argument to the effect that the purpose of the B accounts is not to safeguard the financial interests of the Member States but enable the Commission to monitor more closely the action taken by Member States to collect own resources does not hold any weight. Although reference is made to the latter objective in the third recital in the preamble to the regulation on own resources, that does not exclude the possibility that the Community legislature wished to take into account the Member States' financial risk, as I have explained above. In my view, that is clear precisely from the rules relating to the B accounts laid down in Article 10(1) of the regulation on own resources, which makes the link to the B accounts and under which

25 — It is clear, in my view, from Article 10(1) of the regulation on own resources, which makes the link between credit and recovery, that these too are unrecovered entitlements.

the entitlements entered in those accounts are to be credited only after they have been recovered.

87. Even after the B accounts were introduced, amounts not yet recovered must be made available to the Communities, but the 'security provided' is intended to reduce the risk of Member States ultimately having to pay the own resources that have been made available out of their own funds. In this respect, as the German Government has proposed, there is nothing to suggest that a derogation may not be made here from the general definition of 'security' contained in Article 3(a) of Commission Regulation (EEC) No 2220/85 of 22 July 1985,²⁶ as 'an assurance that a sum of money will be paid ... to a competent authority if a particular obligation is not met'. Traditional securities covered by that definition of course include guarantees whereby a guarantor generally undertakes, in various forms, to be responsible towards a creditor for covering the liabilities of a third party.

88. By agreeing to a guarantee under Article 8 of the TIR Convention, the content of which is, moreover, governed by Community law, and the guarantee contract, governed by German law, they concluded with the

Federal Republic of Germany,²⁷ guaranteeing associations undertake to pay the customs duties for the persons owing those amounts and are jointly and severally liable with those persons for the payment of those amounts; any action for payment must be brought in so far as possible first against the debtors of the customs duties. I see no logical reason why that guarantee for customs duties, even if it is a comprehensive rather than an individual guarantee, should not, as a matter of principle, be considered as security within the meaning of Article 6(2)(b) of the regulation on own resources.

89. The TIR procedure, by contrast, is concerned with a guarantee the amount of which is limited, which means, as the German Government has pointed out, that the amount of customs debt in question may exceed the amount of security provided. In my view, the entitlements concerned should, in that case, be entered in the A accounts only up to the level of security provided, that is to say, up to the amount covered by the guarantee. To me, this seems best to correspond to the abovementioned objective of introducing the B accounts and the rules on making available under Article 10(1) of the regulation on own resources, with a view to providing better security for the financial risk borne by Member States in respect of entitlements which have not yet been recovered and to establishing a closer link

²⁶ — Regulation of 22 July 1985 laying down common detailed rules for the application of the system of securities for agricultural products (OJ 1985 L 205, p. 5).

²⁷ — See Case C-78/01 *BGL* [2003] ECR I-9543, paragraph 45.

between the obligation to credit the own resources and their actual recovery. That objective is in fact expressed in Article 6(2)(b) of the regulation on own resources, in relation to challenged entitlements, in that reference is made to the possibility of their being subject to change upon settlement of the relevant dispute.

90. Accordingly, established entitlements arising from TIR carnets should, as a rule, be entered in the A accounts, at least up to the level corresponding to the ceiling of cover agreed in the TIR system, which is the level up to which the guaranteeing associations are liable for the customs debts, and be made available to the Communities within the period prescribed in the first subparagraph of Article 10(1) of the regulation on own resources.

91. That finding is not sufficient by itself, however, as it is based solely on the legal bases of the TIR procedure and, to a certain extent, reflects ideal circumstances within that procedure and the guarantee system provided for therein. In practice, in the 1990s, weaknesses in the system became ever more apparent, developing into the 'crisis' in the TIR system already outlined in the facts of the case.²⁸

28 — See above, point 20 et seq.

92. It is not possible, in my view, on the basis of the documents available to me, to make a definitive assessment of the precise scope, causes and effects of that crisis, especially as regards the effectiveness of the guarantee system in general and the solvency of the German guaranteeing associations in particular.

93. It can, however, be stated for the record, first, that the discretion enjoyed by Member States in that area is, as pointed out by the German Government, limited by the TIR Convention, to which the Community is also a party and which provides for a particular system of guarantee. Secondly, the Commission cannot be relieved of all responsibility for the smooth running of the TIR system, given its participation in the bodies responsible for implementing the TIR Convention. It is noteworthy in that regard that the Commission's (joint) responsibility for the development of the crisis in the transit system and TIR carnet system and for its inadequate management thereof are referred to repeatedly in the European Parliamentary Inquiry Report.²⁹

94. We should therefore refrain from attributing blame in a hasty and sweeping

29 — See, for example, the conclusions in the executive summary of the Report of the European Parliament Committee of Inquiry at point 1.1.5. See also the finding in point 9.2.3.4 on 'Commission inactivity': 'All in all, the Commission's performance until relatively recently was a depressingly familiar display in bureaucratic immobility. Its role in relation to transit has been wholly reactive rather than proactive.'

manner to the Member States, in this case the Federal Republic of Germany, for the weaknesses inherent in the TIR system, the problems encountered in recovery of customs debts and the risks associated with own resources.

imposed on the institutions pursuant to the Treaty are fulfilled.³² From that reasoning, the Court has, for example, inferred an obligation on the part of a Member State to take, in sincere cooperation with the Commission, the measures needed to ensure the application of the Community provisions relating to establishment of possible own resources.³³

95. I must nevertheless consider whether, in the way it responded to the crisis in the TIR carnet system and the consequences thereof — that is, deferring payment of the claims at issue and entering them in the B accounts — the Federal Republic of Germany infringed its obligations under Community law with regard to own resources.

97. The Court has also held, in relation to difficulties encountered when implementing a Commission decision relating to State aid, that the obligation of loyal cooperation implies that the Commission and the Member State concerned must work together in good faith with a view to overcoming those difficulties whilst fully observing the Treaty provisions. To that end, the Member State must refer the problems encountered for consideration by the Commission.³⁴ That principle can also be applied to difficulties encountered in other areas of Community law.

96. In accordance with a general principle, on which inter alia Article 10 EC³⁰ is based and which, in relation to own resources, is also to be found in the regulation on own resources,³¹ the Member States and the Community institutions are bound by reciprocal obligations of loyal cooperation. As the Court has consistently held, it is for the Member States to facilitate the achievement of the Commission's tasks, which consist in particular in ensuring that the provisions of the Treaty are applied and the obligations

98. Lastly, although the Court has acknowledged that a Member State may act in a field falling within the powers of the Community, such as a trustee of the common interest and, in the absence of appropriate action on the part of the competent Community institution, bring into force any interim, urgently needed conservation measures

30 — See, inter alia, Case 44/84 *Hurd* [1986] ECR 29, paragraph 38, and Joined Cases 358/85 and 51/86 *France v Parliament* [1988] ECR 4821, paragraph 34.

31 — In particular in Articles 17(1) and 18(2) of the regulation on own resources; see Case C-10/00 *Commission v Italy* [2002] ECR I-2357, paragraph 90.

32 — See, inter alia, Case C-408/97 *Commission v Netherlands* [2000] ECR I-6417, paragraph 16.

33 — Case C-10/00 *Commission v Italy*, cited in footnote 31, paragraph 89.

34 — See, inter alia, Case C-261/99 *Commission v France* [2001] ECR I-2537, paragraph 24; Case C-378/98 *Commission v Belgium* [2001] ECR I-5107, paragraph 31; and Case C-499/99 *Commission v Spain* [2002] ECR I-6031, paragraph 24.

which may be required by the situation; however, such measures must be taken in a process of cooperation between the Commission and the Member State concerned. In any event, national conservation measures introduced in spite of objections, reservations or conditions formulated by the Commission are unlawful.³⁵

99. In the light of that case-law, loyal cooperation in applying the provisions on the own resources in this case would in any event have required the Federal Republic of Germany to liaise with the Commission about the problems encountered in the TIR system, especially those involving the guarantee system, and to coordinate with it its approach to applying the Community rules on own resources. Instead, without consulting with the Commission — a discussion with the Commission was not held until afterwards and only at the latter's request, following the inspections it had carried out — the Federal Republic of Germany suspended the recovery procedure against the guarantors, concluded the standstill agreements and entered the relevant Community entitlements to own resources from then on in the B accounts, so that the corresponding amounts did not have to be credited — at least for the time being — to the Community.

100. Without it being necessary to consider further the extent to which the measures taken by the Federal Republic of Germany were necessary in view of the circumstances, or whether and, if so, to what extent, the entitlements resulting from the TIR procedure were in fact no longer secured, and whether, therefore, the amounts in question were not collected for reasons of force majeure or their recovery was impossible in the long term within the meaning of Article 17(2) of the regulation on own resources, it is therefore clear that, by its unilateral decision to defer payment of the established claims in question and to enter them in the B accounts, the Federal Republic of Germany in any event infringed its obligation, embodied in particular in Article 17(1) of the regulation on own resources, to take the requisite measures, in loyal cooperation with the Commission, to ensure that the Community own resources are made available to the Commission, as specified in the regulation on own resources.

101. Point 1 of the forms of order sought by the Commission is therefore well founded.

2. Point 2 of the forms of order sought: failure to inform the Commission of certain other uncontested entitlements which had received the same accounting treatment

35 — See Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, paragraphs 30 to 32 and 37, and Case 325/85 *Ireland v Commission* [1987] ECR 5041, paragraphs 15 and 16.

102. As part of its second plea in law, the Commission complains that the German

authorities failed to inform it of all other uncontested customs duties relating to TIR carnets not processed by German customs offices from 1994 until amendment of the Federal Decree in 1996, which had received similar treatment (to the inspected TIR carnets), that is to say, which had been entered in the B accounts.

right to information. In order to perform the tasks entrusted to it, the Commission is entitled to collect information only under the conditions laid down by the Council (Article 284 EC). The Council has not introduced any general rules on the provision of information or general rights to conduct investigations. Therefore, there is no general right to information as claimed by the Commission.

(a) Main arguments of the parties

103. The *Commission* observes that Member States have a special duty of cooperation as regards own resources, hence their responsibility for providing the Commission with the information necessary for it to be able to fulfil its obligations in monitoring the proper application of the own resources provisions. In the present case, the Commission takes the view that it may require the Federal Republic of Germany to provide the information needed to verify whether the persuasively demonstrated Treaty infringement actually exists and, if so, to what extent this has already been redressed. Member States, for their part, are obliged to organise their customs administrations in such a way that such requests for information can be carried out.

104. The *German Government* contends that the Commission does not have a general

(b) Assessment

105. According to settled case-law, Member States are required, on the basis of the principle of loyal cooperation, on which in particular Article 10 EC is based, to cooperate in good faith with the enquiries of the Commission pursuant to Article 226 EC, and to provide the Commission with all the information requested for that purpose.³⁶

106. As to the field of own resources in particular, the Court accordingly held in its judgment in Case C-10/00 *Commission v Italy* that there is an obligation — which has been given more specific expression in the provisions on verification of own resources — to take, in loyal cooperation with the

³⁶ — See, inter alia, Case 192/84 *Commission v Greece* [1985] ECR 3967, paragraph 19, and Case C-478/01 *Commission v Luxembourg* [2003] ECR I-2351, paragraph 24.

Commission, the measures needed to ensure the application of the Community provisions relating to establishment of own resources.³⁷

107. It follows from that obligation that where the Commission 'is largely dependent on the information provided by the Member State concerned, that Member State is required to make supporting documents and other relevant documentation available to the Commission under reasonable conditions, to enable it to verify whether, and, as the case may be, to what extent the amounts concerned relate to Communities' own resources'.³⁸

108. In this case, the Commission called on the German authorities on a number of occasions in the pre-litigation procedure specifically to inform it of all other uncontested customs duties relating to TIR carnets which had not been discharged by German customs offices over a certain period and which had been entered in the B accounts. Moreover, that request was not made in the form of a 'general request for information' but as a follow-up to the inspections conducted by the Commission which had revealed that a number of TIR carnets had received the same accounting treatment.

109. In the light of the cited case-law referred to above on the principle of loyal cooperation, as embodied in Article 18(2) of the regulation on own resources, which provides that Member States are to 'take all steps required to facilitate' inspection measures concerning the establishment and the making available of own resources, the Federal Republic of Germany should therefore have complied with the Commission's request for information.

110. Furthermore, the purpose of the rules on accounting of own resources laid down in Title II of the regulation on own resources is precisely to ensure transparency in the Member States' application of the rules on own resources and to enable the Commission, where the need arises, to verify such application, in which case the Member States are required to support the Commission to that end.³⁹

111. Accordingly, in failing to comply with the Commission's request for information, the Federal Republic of Germany failed to fulfil its obligations under the regulation on own resources.

112. Therefore, point 2 of the forms of order sought by the Commission is also well founded.

37 — See Case C-10/00 *Commission v Italy*, cited in footnote 31, paragraphs 88 to 90.

38 — See Case C-10/00 *Commission v Italy*, cited in footnote 31, paragraph 91.

39 — See, to that effect, the case-law of the Court cited above in footnote 31.

V — Costs

113. 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. Under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads of claim, the Court may order that the costs be shared or that the parties bear their own costs.

114. Since the Commission and the Federal Republic of Germany have both failed on some heads — points 1 and 2 of the forms of order sought should be upheld, but points 3, 4 and 5 of the forms of order sought are inadmissible — I propose that they should each be ordered to bear their own costs. The Kingdom of Belgium, which has intervened in the proceedings, is to bear its own costs pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure.

VI — Conclusion

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

(1) declare that:

- by failing properly to process certain transit documents (TIR carnets), by waiving, without prior consultation, the right to claim payment of Communities' entitlements arising therefrom and entering them in the B accounts, with the result that the own resources arising therefrom were not correctly entered in the accounts or made available to the Commission within the prescribed periods, and
- by failing to inform the Commission of all the other uncontested customs duties treated in the same way (entry in the B accounts instead of entry in

the A accounts) in respect of the non-discharge of TIR carnets by the German customs authorities from 1994 until the amendment of the Decree of the Federal Minister for Finance of 1996 (Decree of 11 September 1996, III B 1 — Z 0912 — 31/96),

the Federal Republic of Germany has failed to fulfil its obligations under 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, in particular its obligation to take the requisite measures, in loyal cooperation with the Commission, to ensure that the Communities' own resources are made available to the Commission;

- (2) dismiss the remainder of the application as inadmissible;
- (3) order the Commission, the Federal Republic of Germany and the Kingdom of Belgium to bear their own costs.