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TRIBUNAL DE JUSTICIA DE LAS COMUNIDADES EUROPEAS
SOUDNÍ DVŮR EVROPSKÝCH SPOLEČENSTVÍ
DE EUROPÆISKE FÆLLESSKABERS DOMSTOL
GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFTEN
EUROOPA ÜHENDUSTE KOHUS
ΔΙΚΑΣΤΗΡΙΟ ΤΩΝ ΕΥΡΩΠΑΪΚΩΝ ΚΟΙΝΟΤΗΤΩΝ
COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES
CÚIRT BHREITHIÚNAIS NA gCÓMHPHOBAL EORPACH
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Advocate General's Opinion in Joined Cases C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06

Commission v. Finland, Sweden, Germany, Italy, Greece, Denmark and Italy

**THE ADVOCATE GENERAL PROPOSES THAT THE COURT OF JUSTICE
DECLARE THAT SIX STATES HAVE INFRINGED COMMUNITY LAW BY FAILING
TO PAY CUSTOMS DUTIES ON IMPORTS OF DEFENCE AND DUAL-USE
EQUIPMENT**

*Finland, Sweden, Germany, Italy, Greece and Denmark have infringed their obligations under
the EC Treaty and the Community Customs Code*

Under the Treaty, the budget of the European Communities is to be financed wholly from own resources, without prejudice to other revenue. Thus, the budget of the European Communities is funded by agricultural levies, customs duties, VAT and the 'Gross National Product' own resource (GNP).

As regards customs duties, the customs union was created at Community level on 1 July 1968. The customs union established a common customs duty applicable throughout the Community vis-à-vis non-member countries. In accordance with Community law, Member States must credit the Community's own resources account with amounts collected in the form of customs duties on imports of goods.

By the six actions, the Commission claims that the Court of Justice should declare that Finland, Sweden, Germany, Italy, Greece and Denmark have infringed their obligations under the Community Customs Code¹ and under various Community regulations² by failing to credit the Community own resources account with the amounts corresponding to the customs duties on imports of defence equipment. Additionally, in one of the two actions against Italy (Case C-387/05) and the action against Sweden (C-294/05), the Commission's complaint also relates to

¹ Recently replaced by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 establishing the 'Modernised Customs Code' (OJ 2008 L 145, p. 1), Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) applies.

² 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) and 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).

imports of dual-use equipment. In any event, the Commission claims that the infringement took place between 1 January 1998 and 31 December 2002, since with effect from 1 January 2003 customs duties on certain weapons and military equipment were suspended pursuant to Regulation No 150/2003³.

Advocate General Dámaso Ruiz-Jarabo takes the view that, by failing to pay the customs duties relating to the importation of defence and dual-use equipment over that period, the defendant States have failed to comply with their customs and financing obligations under Community law.

Mr Ruiz-Jarabo states that imports of defence and dual-use equipment are not exempt from the Common Customs Tariff and that there are no special rules. Furthermore, with respect to those of the defendant States which have made a number of one-off temporary transfers in various amounts, the Advocate General explains that those payments must not be construed as full and final settlements. In that regard, Mr Ruiz-Jarabo states that the Member States are under an obligation to credit the Community own resources account as soon as their customs authorities are in a position to calculate the amounts due and to determine the debtor. The fragile stability of the Community financing system calls for a precise definition of the establishment, the collection and the making available of own resources, and for the compliance of the Member States, because, if any State does not abide by those rules, the shortfall is remedied by exacting compensation from the other States.

Having noted the failure to pay customs duties, Advocate General Ruiz-Jarabo analyses whether such non-payment may nevertheless be justified.

First, the Advocate General examines whether the States may rely on Article 296 of the EC Treaty as grounds for derogation from the Community rules on customs duties. Under that provision, 'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security'. It also authorises any Member State to take such measures as it considers necessary for the protection of the essential interests of its security.

As a preliminary point, in his analysis of Article 296 of the EC Treaty, the Advocate General explains that, for the purposes of applying that provision, each State has exclusive competence when it comes to determining the interests which it regards as 'essential interests of its security'. However, Mr Ruiz-Jarabo takes the view that the Court of Justice has jurisdiction to review the conditions for the application of that provision. In particular, the Court of Justice can check whether the application and invocation of that provision is consistent with the principle of proportionality and that it constitutes an appropriate and necessary means of achieving the aim pursued. Starting from that premiss, the Advocate General examines whether or not the conditions for the application of Article 296 of the EC Treaty are satisfied in the present case.

Thus, with respect to the argument put forward by the defendant States that the payment of those customs duties would cause them financial damage which would weaken defence procurement and, by extension, their military capacity and national security, the Advocate General takes the view that that explanation seeks to harness Article 296 of the Treaty to something other than its true purpose, so that in fact it would serve purely industrial or economic ends, which under no circumstances justify a derogation from the Treaty rules on financing and the customs union.

³ Council Regulation of 21 January 2003 suspending import duties on certain weapons and military equipment (OJ 2003 L 25, p. 1).

Still on the subject of reliance on Article 296 of the EC Treaty, but as regards the claim that the security of those States would be impaired because of the porosity of the customs procedure – which does not ensure that the information provided by Member States to the Commission for the calculation of the respective total amounts remains confidential – the Advocate General considers that the defendant States have not shown that the customs procedures in force fail to safeguard the confidentiality of the information transmitted. Moreover, Mr Ruiz-Jarabo points out that, in the initial phase of the customs procedure, the Member States simply notify the Commission of the total amounts arising from all imports over the relevant period, without providing any details likely to compromise national security. Accordingly, there is no reason to invoke Article 296 of the EC Treaty as regards the initial phase. The next stage of the customs procedure involves checks, to be carried out by the Commission, of the payment made, so at this stage additional information may be required. Although it is true that at that stage the Member States must provide the Commission with the information needed to check the correctness of the own resources credited, that does not mean, in the opinion of the Advocate General, that the Member States cannot decide, on a case-by-case basis and by way of exception, that it is appropriate to restrict that information to certain parts of a particular document or to refuse to disclose it at all. In fact, those options are more in keeping with the principle of proportionality than a wholesale derogation from the customs system for imports of defence or dual-use equipment.

Consequently, in the view of the Advocate General, reliance on Article 296 of the EC Treaty is inappropriate and disproportionate in relation to the objectives pursued.

Secondly, the Advocate General dismisses the idea that the payment of customs duties is precluded by the confidentiality clauses inserted in contracts with arms suppliers or in treaties with non-member countries. In the Advocate General's view, no agreement can be so confidential that it impedes the fulfilment of customs obligations.

Thirdly, contrary to the contentions of most of the defendant States, Mr Ruiz-Jarabo dismisses the argument that the Commission's position in these actions is in breach of the principle of the protection of legitimate expectations. In his opinion, the Commission did not lead those Member States to believe that their conduct was lawful because of the length of the negotiations between the Commission and the States concerned (in some cases they date back to the 1980s). In the same way, the Advocate General states that the Commission made it quite clear that it had no wish to forgo the customs duties which should have been credited and reserved the right to take appropriate action in that regard. Furthermore, Regulation No 150/2003 does not make any provision for the retroactive suspension of customs duties.

In the light of all the foregoing, the Advocate General considers that the failure to pay the customs duties at issue cannot be justified.

Therefore, the Advocate General proposes that the Court of Justice should declare that Finland, Sweden, Germany, Italy, Greece and Denmark have failed to fulfil their obligations under Community law, by failing to calculate own resources in connection with imports of defence equipment (and, in the case of Sweden and Italy, in connection with imports of dual-use equipment) and by failing to pay the related default interest, and by failing to make the amounts concerned available to the Commission within the prescribed time-limits.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: DE, EN, ES, FR, EL, IT

The full text of the Opinion may be found on the Court's internet site
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-284/05>

It can usually be consulted after midday (CET) on the day of delivery.

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