Case C-539/09

European Commission

v

Federal Republic of Germany

(Failure of a Member State to fulfil obligations – Court of Auditors' declared intention to carry out audits in a Member State – Member State's objection – Powers of the Court of Auditors – Article 248 EC – Audit of the cooperation of the national administrative authorities in the field of value added tax – Regulation (EC) No 1798/2003 – Community revenue – Own resources accruing from value added tax)

Summary of the Judgment

Tax provisions – Harmonisation of laws – Common system for the exchange of information – Administrative cooperation in the field of value added tax – Court of Auditors' audit powers – Scope

(Art. 248(1) to (3) EC; Council Regulation No 1798/2003)

A Member State that objects to the Court of Auditors of the European Union's conducting of audits in that Member State concerning administrative cooperation under Regulation No 1798/2003 on administrative cooperation in the field of value added tax and the provisions for its implementation fails to fulfil its obligations under Article 248(1) to (3) EC.

Article 248 EC, which explains how the Court of Auditors is required to perform its task of carrying out audits provides that it is to examine the accounts of all revenue and expenditure of the Community, the legality and regularity of that revenue and expenditure, and whether the financial management has been sound. Article 248(3) EC empowers the Court of Auditors to carry out audits based on records and, if necessary, on the spot, including in the Member States.

The system of own resources established pursuant to the Treaty is designed, as regards resources accruing from value added tax, to create an obligation on the part of the Member States to make available to the Community as own resources a proportion of the amounts which they collect as that tax. In so far as they are intended to combat value added tax fraud and avoidance, the mechanisms of cooperation to which the Member States are subject by virtue of Regulation No 1798/2003 are themselves capable of having a direct and fundamental impact on the effective collection of value added tax revenue and, therefore, on the availability to the Community budget of resources accruing from value added tax. Thus, the effective application by a Member State of the rules on cooperation established by Regulation No 1798/2003 is likely to determine not only that Member State's ability to take effective measures to prevent tax evasion and tax avoidance in its own territory but also the ability of the other Member States to take such measures in their own territories, especially where the correct application of value added tax in those other Member States depends on the information held by that Member State.

The audit by the Court of Auditors in relation to administrative cooperation under Regulation No 1798/2003 did therefore deal with Community revenue from the aspect of its legality and its sound financial management, and thus had a direct link with the powers conferred on the Court of Auditors by Article 248 EC.

(see paras 59-61, 71, 77, 79, 81, operative part 1)

JUDGMENT OF THE COURT (Grand Chamber)

15 November 2011 (*)

(Failure of a Member State to fulfil obligations – Court of Auditors' declared intention to carry out audits in a Member State – Member State's objection – Powers of the Court of Auditors – Article 248 EC – Audit of the cooperation of the national administrative authorities in the field of value added tax – Regulation (EC) No 1798/2003 – Community revenue – Own resources accruing from value added tax)

In Case C?539/09,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 21 December 2009,

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

applicant,

supported by:

European Parliament, represented by R. Passos and E. Waldherr, acting as Agents,

Court of Auditors of the European Union, represented initially by R. Crowe, and subsequently by T. Kennedy and B. Schäfer, acting as Agents,

interveners,

v

Federal Republic of Germany, represented by C. Blaschke and N. Graf Vitzthum, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.?C. Bonichot, J. Malenovský and M. Safjan, Presidents of Chambers, K. Schiemann (Rapporteur), G. Arestis, A. Borg Barthet, M. Ileši?, C. Toader and J.?J. Kasel, Judges,

Advocate General: V. Trstenjak,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 15 March 2011,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2011,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that, by objecting to the conduct by the Court of Auditors of the European Union of audits in Germany concerning administrative cooperation under Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax (OJ 2003 L 264, p. 1) and the provisions for its implementation, the Federal Republic of Germany has failed to fulfil its obligations under Article 248(1) to (3) EC, Articles 140(2) and 142(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) and Article 10 EC.

Legal context

2 Regulation No 1605/2002 was adopted on the basis of Articles 279 EC and 183 AE. Article 140(1) and (2) of that regulation provides:

‘1. The examination by the Court of Auditors of whether all revenue has been received and all expenditure incurred in a lawful and proper manner shall have regard to the provisions of the Treaties, the budget, this Regulation, the implementing rules and all other acts adopted pursuant to the Treaties.

2. In the performance of its task, the Court of Auditors shall be entitled to consult, in the manner provided for in Article 142, all documents and information relating to the financial management of departments or bodies with regard to operations financed or co-financed by the Communities. It shall have the power to make enquiries of any official responsible for a revenue or expenditure operation and to use any of the auditing procedures appropriate to the aforementioned departments or bodies. The audit in the Member States shall be carried out in conjunction with the national audit institutions or, where they do not have the necessary powers, with the national departments responsible. The Court of Auditors and the national audit bodies of the Member States shall cooperate in a spirit of trust while maintaining their independence.

...’

3 Article 142(1) of Regulation No 1605/2002 provides:

‘The Commission, the other institutions, the bodies administering revenue or expenditure on the Communities’ behalf and the final beneficiaries of payments from the budget shall afford the Court of Auditors all the facilities and give it all the information which the Court of Auditors considers necessary for the performance of its task. They shall place at the disposal of the Court of Auditors

all documents concerning the award and performance of contracts financed by the Community budget and all accounts of cash or materials, all accounting records or supporting documents, and also administrative documents relating thereto, all documents relating to revenue and expenditure, all inventories, all organisation charts of departments, which the Court of Auditors considers necessary for auditing the budgetary and financial outturn report on the basis of records or on the spot and, for the same purposes, all documents and data created or stored on a magnetic medium.

The other services and internal audit bodies of the national administrations concerned shall afford the Court of Auditors all the facilities which it considers necessary for the performance of its task.

The first subparagraph shall also apply to natural or legal persons receiving payments from the Community budget.'

4 Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42) was adopted on the basis of Articles 269 EC and 173 AE and provides, in Article 2(1)(c) and (d):

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

...

(c) the application of a uniform rate valid for all Member States to the harmonised [value added tax ("VAT")] assessment bases determined according to Community rules. The assessment base to be taken into account for this purpose shall not exceed 50% of [gross national product ("GNP")] for each Member State, as defined in paragraph 7;

(d) the application of a rate – to be determined pursuant to the budgetary procedure in the light of the total of all other revenue – to the sum of all the Member States' GNPs.

5 Article 8(2) of Decision 2000/597 provides:

'Without prejudice to the auditing of the accounts and to checks that they are lawful and regular as laid down in Article 248 of the EC Treaty and Article 160C of the Euratom Treaty, such auditing and checks being mainly concerned with the reliability and effectiveness of national systems and procedures for determining the base for own resources accruing from VAT and GNP and without prejudice to the inspection arrangements made pursuant to Article 279(c) of the EC Treaty and Article 183 point (c) of the Euratom Treaty, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, adopt the provisions necessary to apply this Decision and to make possible the inspection of the collection, the making available to the Commission and payment of the revenue referred to in Articles 2 and 5.'

6 Decision 2000/597 was replaced by Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), which took effect on 1 January 2007. Under Article 2(1)(b) and (c) of that decision, own resources entered in the general budget of the European Union continue to include, inter alia, revenue deriving from the application of a uniform rate valid for all Member States to the harmonised VAT assessment bases determined according to Community rules and revenue deriving from the application of a uniform rate – to be determined pursuant to the budgetary procedure in the light of the total of all other revenue – to the sum of all the Member States' gross national income ('GNI').

7 Article 2(1) of Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the

definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ 1989 L 155, p. 9) provides:

‘The VAT resources base shall be determined from the taxable transactions referred to in Article 2 of [Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; “the Sixth VAT Directive”)] ...’

8 According to Article 3 of Regulation No 1553/89:

‘For a given calendar year, and without prejudice to Articles 5 and 6, the VAT resources base shall be calculated by dividing the total net VAT revenue collected by a Member State during that year by the rate at which VAT is levied during that same year.

If more than one VAT rate is applied in a Member State, the VAT resources base shall be calculated by dividing the total net VAT revenue collected by the weighted average rate of VAT. …’

9 The first two recitals in the preamble to Regulation No 1798/2003 state:

‘(1) Tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of the conditions of competition. They therefore affect the operation of the internal market.

(2) Combating [VAT] evasion calls for close cooperation between the administrative authorities in each Member State responsible for the application of the provisions in that field.’

10 Article 1(1) of Regulation No 1798/2003 provides:

‘This Regulation lays down the conditions under which the administrative authorities in the Member States responsible for the application of the laws on VAT on supplies of goods and services, intra-Community acquisition of goods and importation of goods are to cooperate with each other and with the Commission to ensure compliance with those laws.

To that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help them to effect a correct assessment of VAT.

This Regulation also lays down rules and procedures for the exchange of certain information by electronic means, in particular as regards VAT on intra?Community transactions.

…’

11 Article 3(2) of Regulation No 1798/2003 provides:

‘Each Member State shall designate a single central liaison office to which principal responsibility shall be delegated for contacts with other Member States in the field of administrative cooperation. ...’

12 In Chapter II, entitled ‘Exchange of information on request’, of Regulation No 1798/2003, Article 5 provides:

‘1. At the request of the requesting authority, the requested authority shall communicate the information referred to in Article 1, including any information relating to a specific case or cases.

2. For the purpose of forwarding the information referred to in paragraph 1, the requested authority shall arrange for the conduct of any administrative enquiries necessary to obtain such information.

3. The request referred to in paragraph 1 may contain a reasoned request for a specific administrative enquiry. ...

...’

13 Chapter IV of Regulation No 1798/2003, entitled ‘Exchange of information without prior request’, provides for the automatic exchange of certain information.

14 The provisions of Chapter V of that regulation provide for each Member State to establish an electronic database in which a variety of information relating to intra?Community transactions must be stored and processed, as well as an electronic database containing a register of persons to whom VAT numbers have been issued in that Member State. Those provisions also define the conditions under which the competent authority of each Member State may obtain access to that information.

15 The purpose of Commission Regulation (EC) No 1925/2004 of 29 October 2004 laying down detailed rules for implementing certain provisions of Regulation No 1798/2003 (OJ 2004 L 331, p. 13) is, inter alia, to specify the categories of information to be exchanged without prior request, as well as the frequency with which those exchanges are to be made, and to lay down the arrangements for the provision of information communicated pursuant to Regulation No 1798/2003 by electronic means.

The facts of the dispute and the pre-litigation procedure

16 By letter of 26 June 2006, the Court of Auditors informed the German Federal Court of Auditors of its intention to come to Germany for the period from 10 to 13 October 2006 in order to carry out, pursuant to Article 248 EC, an audit relating to the own resources accruing from VAT (‘VAT resources’) and concerning the cooperation between the administrative authorities of the Member States in the field of VAT in accordance with Regulation No 1798/2003. The stated purpose was to check whether the Federal Republic of Germany had established the administrative and organisational structures necessary for such administrative cooperation and, moreover, to examine how that cooperation was put into practice in cases of requests for information under Article 5 of that regulation.

17 That audit was to be carried out primarily at the central liaison office and, if appropriate, at the other national departments involved in administrative cooperation. In the same letter, the Court of Auditors asked the German Federal Court of Auditors to indicate whether it intended to take part in that audit in accordance with Article 248(3) EC.

18 By letter of 7 September 2006, the Court of Auditors sent the German Federal Court of Auditors a document containing further details of the proposed audit mission schedule and requested certain information to be sent in advance. The German Federal Court of Auditors was requested to forward that schedule and the request for prior information to the central liaison office.

19 According to that schedule, the audit mission was to cover the organisation, equipment and

working methods of the central liaison office, the submission or receipt of requests for information and their processing, the exchange of information without prior request and the storage and exchange of information on intra-Community transactions by means of the electronic VAT Information Exchange System database ('VIES'), referred to in Chapter V of Regulation No 1798/2003. The schedule also provided for examination of the legal obstacles hampering administrative cooperation and of the legal measures adopted to overcome them, as well as of any other measures adopted to improve such cooperation and to prevent fraud, such as coordination with anti-fraud authorities, bilateral agreements on exchange of information, cancellation of VAT numbers, the presence of officials of the requesting authority during audits carried out by the requested authority and the simultaneous audits in different Member States provided for by Articles 11 and 12 of Regulation No 1798/2003, or recourse to the possibilities available under the Fiscalis programme (see Decision No 2235/2002/EC of the European Parliament and of the Council of 3 December 2002 adopting a Community programme to improve the operation of taxation systems in the internal market (Fiscalis programme 2003-2007) (OJ 2002 L 341, p. 1)).

20 By letter of 18 September 2006, the German Federal Court of Auditors stated that it would take part in that audit.

21 In view of the failure of the central liaison office to send the documents requested for the purposes of the audit to the Court of Auditors and to confirm the proposed date, the Court of Auditors informed the German Federal Court of Auditors, by letter of 5 October 2006, that the mission would be postponed to the period from 14 to 17 November 2006.

22 The central liaison office having again failed to confirm the new dates, the Court of Auditors proposed, by letter of 9 November 2006 to the German Federal Ministry of Finance, that the planned audit be carried out in the period from 4 to 7 December 2006. The Court of Auditors stated in its letter that such audits had already taken place in seven other Member States and emphasised that the purpose was not to check taxable transactions, including the VAT assessment, but to ensure that requests for information sent and/or received in the context of VIES were being processed efficiently and correctly.

23 By letter of 4 December 2006, the Federal Ministry of Finance objected to the conduct of the audit in Germany, stating that it had no valid legal basis.

24 Having been informed by the Court of Auditors of that refusal, and taking the view that the latter was entitled to carry out the proposed audit and that the Federal Republic of Germany had failed to comply with its obligations by objecting to the conduct of the audit in Germany, the Commission sent a letter of formal notice to the Federal Republic of Germany on 23 September 2008 inviting it, in accordance with Article 226 EC, to submit its observations. The Federal Republic of Germany replied to that request by letter of 23 December 2008.

25 On 23 March 2009, the Commission issued a reasoned opinion requesting that the Federal Republic of Germany take the measures necessary to comply with its obligations within two months of its receipt.

26 As it was not satisfied with the response which the Federal Republic of Germany sent on 22 May 2009, the Commission decided to bring the present action.

The action

Arguments of the parties

Arguments concerning the power of the Court of Auditors in relation to the audit of revenue

27 According to the Commission, it is clear from Article 248 EC that the Court of Auditors' task, as an independent external auditor, is to check whether financial transactions relating to the collection and use of Community funds have been correctly recorded and shown, executed in a lawful and regular manner and managed with due regard for economy, efficiency and effectiveness, and to make recommendations for improvements in the Community's financial management.

28 Having regard to the essential nature of that task and with a view to safeguarding the effectiveness of that provision, the Court of Auditors' audit powers should be given a broad interpretation and cover all fields and all actors having a direct link with the revenue or expenditure of the Community.

29 The collection of VAT revenue has such a link with the VAT resources of the Community. In fact, revenue from that tax collected in accordance with the Sixth VAT Directive provides a starting value for the calculation of the amount of those resources.

30 Although it does not directly regulate the collection of Community revenue, Regulation No 1798/2003 determines the lawfulness and regularity of the VAT resources, since the cooperation established by that regulation is intended to ensure that VAT is correctly assessed, enabling the Community to deal with those resources effectively.

31 It is apparent, moreover, from the first subparagraph of Article 248(3) EC and from the third and fourth sentences of the first subparagraph of Article 140(2) and the second subparagraph of Article 142(1) of Regulation No 1605/2002, as well as, more generally, from the duty to cooperate in good faith expressed in Article 10 EC, that where audits have to be carried out in the Member States, the Member States must offer the Court of Auditors their full support in the performance of its task. By objecting to the Court of Auditors' conduct of the audit at issue in Germany, the Federal Republic of Germany failed to comply with its obligations in that regard.

32 The Parliament submits that the independence of the Court of Auditors, enshrined in Article 247(2) and (4) EC, and the general power conferred on it by Article 248(4) EC to submit observations and special reports on its own initiative, mean that the Court of Auditors is free to determine the subject-matter of its audits in the context of the control of Community finances, and that that freedom cannot be conditioned by secondary legislation.

33 A narrow interpretation of the powers of the Court of Auditors would be particularly difficult to justify given that its work provides valuable assistance both to the budgetary authority and to the Community legislature, as evidenced, so far as the audit at issue is concerned, by the content of the ensuing Court of Auditors' special report No 8/2007 (OJ 2008 C 20, p. 1). Furthermore, since the Court of Auditors has only audit and advisory powers, the question of the legal basis of its activities does not arise in the same way as it does in relation to a legislative act of the Community.

34 VAT evasion and avoidance and the distortions to which these give rise between the Member States affect the general equilibrium of the system of own resources, since any reduction in VAT resources has to be offset by an increase in own resources based on GNI. Since the quality of the cooperation introduced by Regulation No 1798/2003 has to enable tax evasion to be detected and since the collection of additional VAT revenue thus increases the base from which the VAT resources are calculated, compliance with that regulation does indeed determine both the lawfulness and the regularity of Community revenue.

35 The Court of Auditors submits that, since its task and its powers are conferred on it by Articles 246 EC and 248 EC, it is free to define its audit policy in line with primary law and subject to the interpretation of the Court of Justice, without, in particular, secondary law being able to limit those powers or to derogate from them.

36 Its audit power covers compliance with any provision falling within the scope of Community law that has a bearing on the Community's expenditure or revenue, so that it may provide, by means of the annual and special reports which it submits to the Parliament and to the Council, a basis for debate in the context of the discharge procedure and for the quest for improvements. The Court of Auditors is, specifically, entitled in relation to special reports to choose a subject or area falling within the scope of its powers, in respect of which it expects to be able to make proposals for improvement as regards the economy, efficiency and effectiveness of the Community measures concerned.

37 The interpretation put forward by the German Government, restricting the power of the Court of Auditors to a limited type of financial audit and precluding it from conducting performance audits on the basis of criteria founded on the legislation and on the principles of sound financial management, would render Article 248(2) EC redundant inasmuch as that provision refers to the sound management of revenue and expenditure.

38 It follows from the foregoing that, for the purposes of ensuring the effective collection of VAT revenue and the resultant sound financial management of VAT resources and, moreover, of enabling the Court of Auditors to make possible recommendations, the Court of Auditors is entitled to examine whether the system of cooperation provided for by Regulation No 1798/2003 is operating correctly and effectively.

39 The fear expressed by the German Government – that the Court of Auditors would seek to review the economic policy of the Member States in so far as that policy contributes to the creation of GNI which itself underpins the calculation of an own resource of the European Union – is unfounded since, unlike in the field of VAT, in which the obligations arising under Community law apply to the Member States in relation to the collection of revenue, no such obligations exist as regards the manner in which the Member States must devise and conduct their economic policy.

40 As regards the German Government's argument concerning breach of the principle of subsidiarity, the Commission, the Parliament and the Court of Auditors take the view that that principle applies to the exercise of legislative powers but not with regard to audit or advisory powers such as those of the Court of Auditors. In addition, the Commission and the Court of Auditors emphasise that the latter's powers relate to the whole of the Community's revenue and expenditure and thus fall within an exclusive competence assigned to it by the Treaty, inter alia, with a view to giving guidance to the budgetary authority of the Community in the context of monitoring the execution of the budget, so that those powers do not fall within the notion of shared competence and cannot be affected by the fact that the national authorities are also entitled to carry out certain checks.

41 According to the Commission, the cross-border nature of the cooperation established by Regulation No 1798/2003 justifies, on any view, the intervention of the Court of Auditors, whose power, unlike that of national bodies, extends to all the Member States. Furthermore, the common system of own resources requires a centralised approach to ensuring that each Member State duly contributes to the financing of the Community budget.

42 According to the German Government the powers of the Court of Auditors are entirely circumscribed by the Treaty even when what are under consideration are their audit rather than decision-making powers and even when they relate to the drawing up of special reports. Article 248(1) to (3) EC indicates that those powers concern solely the accounts, the legality and regularity of the revenue and expenditure of the Community.

43 The cooperation in respect of the collection of VAT revenue organised by Regulation No 1798/2003 has no direct or sufficient link to Community revenue. VAT revenue actually falls within the national budget and must be distinguished from VAT resources which, alone, constitute Community revenue.

44 As is apparent from Article 2(1)(c) of Decision 2000/597 and Article 2 et seq. of Regulation No 1553/89, the amount of VAT revenue actually collected is simply a form of fixed unit of account from which the amount of VAT resources is established after a separate calculation involving various extrapolations, corrections or set-offs.

45 Nor can the fact that a reduction in VAT revenue entails further recourse to own resources based on the GNI of the Member States suffice to justify extending the Court of Auditors' audit powers to such revenue.

46 As Article 8(2) of Decision 2000/597 confirms, only the correct determination by the Member States of VAT revenue collected and the accuracy of the calculations made on that basis to determine the amount of VAT resources can fall within the competence of the Court of Auditors. This is not the case, by contrast, as regards national tax authority structures and the procedures for the collection of VAT applied by those authorities, which fall within the competence of the Member States alone. The power to audit those structures and procedures can therefore only be a matter for the competent national bodies.

47 To decide otherwise would be tantamount to admitting, as regards own resources calculated on the basis of GNP, that the audit power of the Court of Auditors also covers the economic policies of the Member States.

48 In the alternative, the German Government further contends that the principle of subsidiarity must also lead to the conclusion that checks of VAT collection transactions and, therefore, of administrative cooperation in that field, fall not within the competence of the Court of Auditors but within that of national courts of auditors. An audit of the cross-border situations referred to by Regulation No 1798/2003 could easily be carried out in a joint action by such courts.

Arguments concerning the power of the Court of Auditors in relation to the audit of expenditure

49 In its reply, the Commission submits that the implementation of Regulation No 1798/2003 entailed expenditure from the European Union budget, and therefore the audit at issue is justified also in the light of the Court of Auditors' power in relation to the audit of expenditure. This proposition is also defended by the Court of Auditors which notes, in particular, that it is apparent from the mission schedule sent to the German authorities, described in paragraph 19 of the present judgment, that the planned audit concerned the storage and exchange of information by

means of both the CCN/CSI network and the VIES network, both of which attract Community financing under the Fiscalis programme.

50 The German Government contends that this line of argument is inadmissible since it was not included in the application and cannot therefore be put forward by the Commission at the stage of the reply. Since the defendant State was deprived of the possibility of replying to those arguments in its defence, the first subparagraph of Article 42(2) of the Rules of Procedure of the Court of Justice rules out any such extension of the subject-matter of the action. It follows, moreover, from Article 93(4) of those rules that, as an intervener, the Court of Auditors cannot make good any partial inadmissibility of the action that is linked to an omission on the part of the applicant.

51 On the substance, the German Government contends that the audit announced by the Court of Auditors and, in consequence, the objection thereto by the Federal Republic of Germany were completely unconnected to an audit of Community expenditure. In addition, a wish to audit expenditure cannot justify the audit at issue as a whole, since it also concerns a number of matters the financing of which falls within the budget of the Member States alone.

52 The Commission submits that the Court should reject the plea of inadmissibility raised by the German Government. First, the arguments at issue were put forward during the pre-litigation procedure, so that the Federal Republic of Germany's rights of defence are secure. Second, those arguments do not have the effect of extending the subject-matter of the action. Both the Commission and the Court of Auditors maintain, moreover, that an intervener remains free to rely on arguments which have not been put forward by the party that it supports.

Findings of the Court

53 As a preliminary point, it must be observed that the Federal Republic of Germany's objection to the audit mission planned by the Court of Auditors dates from the end of 2006. Furthermore, and as is apparent from the Court's settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period prescribed in the Commission's reasoned opinion. In the present proceedings, that period expired during the month of May 2009.

54 It follows from the foregoing that the provisions of the Treaties on the basis of which the failure alleged by the Commission must be assessed are those preceding the entry into force of the Treaty of Lisbon.

55 Having clarified that aspect, the Court must consider, first of all, the alleged failure of the Federal Republic of Germany to fulfil its obligations under Article 248(1) to (3) EC.

56 It must be borne in mind in that regard that the Treaties set up a system for distributing powers among the Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community (Case C?70/88 *Parliament* v *Council* [1990] ECR I?2041, paragraph 21).

57 Furthermore, as is apparent from Article 7(1) EC, the Court of Auditors, which was given the status of an institution under the Treaty of Maastricht, must, like the other institutions, act within the limits of the powers conferred upon it by the EC Treaty.

58 The task of the Court of Auditors is expressed initially in very general terms in Article 246 EC, which provides that the Court of Auditors is to carry out the audit.

59 Article 248 EC, which details that task and explains how the Court of Auditors is required to

perform it, provides in particular, in paragraph 1, that the Court of Auditors is to examine the accounts of all revenue and expenditure of the Community and that it is to provide the Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions, a statement which may be supplemented by specific assessments for each major area of Community activity.

60 Article 248(2) EC provides, inter alia, that the Court of Auditors is to examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound, reporting, in doing so, in particular on any cases of irregularity.

61 Article 248(3) EC empowers the Court of Auditors to carry out audits based on records and, if necessary, on the spot, including in the Member States in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments.

62 Article 248(4) EC provides, inter alia, that the Court of Auditors is to draw up an annual report which it is to forward to the other institutions and which is published in the *Official Journal of the European Union*, together with the replies of those institutions to the observations of the Court of Auditors. The latter may also, at any time, submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Community. As the Court of Justice has already stated, that provision is intended to contribute to improving the financial management of the Community by providing for reports to be transmitted to the institutions and for the latter to respond to them (Case C?315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I?5281, paragraph 27). Such reports are intended to give guidance to the budgetary authority required to discharge the accounts and, more generally, to all public bodies capable of contributing to the filling or correction of any lacunae or dysfunction observed by the Court of Auditors in those areas.

63 In this instance, the audit planned by the Court of Auditors was designed, in essence, to ensure that the structures and mechanisms of administrative cooperation provided for by Regulation No 1798/2003 in relation to VAT were in place and functioning properly; the findings were subsequently to serve to enable any recommendations for improved effectiveness of those structures and mechanisms to be drawn up in a special report.

64 In that regard, it must be borne in mind that, as is apparent from Article 269 EC, without prejudice to other revenue, the budget is to be financed wholly from own resources.

65 At the time of the German authorities' objection to the conduct of the audit at issue, the system of own resources of the European Communities was established by Decision 2000/597. According to Article 2(1) of that decision, those own resources include, inter alia, revenue from the application of a uniform rate to the harmonised VAT assessment bases determined according to Community rules. That remains the case under Article 2 of Decision 2007/436, in force when the period set in the reasoned opinion issued by the Commission expired.

66 Under Article 2(1) of Regulation No 1553/89, the VAT resources base is to be determined from the taxable transactions referred to in Article 2 of the Sixth VAT Directive. That directive has been replaced, since 1 January 2007, by Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

67 Without prejudice to various adjustments provided for by Regulation No 1553/89, Article 3 of that regulation provides that the VAT resources base is to be calculated by dividing the total net VAT revenue collected by a Member State during that year by the rate at which VAT is levied during that same year; a weighted average rate of VAT is used for the purposes of that division if

more than one VAT rate is applied in a Member State.

68 Those adjustments include, in particular, that resulting from the clarification contained in the third indent of Article 2(2) of Regulation No 1553/89, according to which, for the purposes of applying Article 2(1), transactions which Member States continue to exempt pursuant to Article 28(3)(b) of the Sixth VAT Directive are to be taken into account for determining VAT resources. In that regard, the second indent of Article 6(2) of Regulation No 1553/89 provides inter alia that, for the purposes of applying the third indent of Article 2(2) of that regulation, Member States are to calculate the VAT resources base as if these transactions were taxed, in order to place those States on an equal footing with the other Member States which have not chosen to exempt a particular sector (see Case C?251/88 *Commission* v *Germany* [1990] ECR I?2107, paragraph 14).

69 In those various respects, it is certainly true that revenue accruing from payments of VAT remains, for the most part, national tax revenue that is entered in the budget of the Member States, so that only a small percentage of that revenue will be added to the Community budget as own resources (see, to that effect, Case C?414/97 *Commission* v *Spain* [1999] ECR I?5585, paragraph 23).

70 Similarly, it is the case, as the German Government has contended, that the calculation of the amount of VAT resources is not simply a percentage of VAT revenue actually collected, but that such a calculation involves various adjustments in line, in particular, with the objectives recalled in paragraph 68 of the present judgment.

71 Such findings do not, however, alter the fact that the system of own resources established pursuant to the Treaty is designed, as regards VAT resources, to create an obligation on the part of the Member States to make available to the Community as own resources a proportion of the amounts which they collect as VAT (see, to that effect, Case C?30/89 *Commission* v *France* [1990] ECR I?691, paragraph 23). Nor do those findings alter the fact that the Member States are required – for the purposes of ensuring an effective levy of that VAT revenue and of being able, to the extent required by Decisions 2000/597 or 2007/436 and Regulation No 1553/89, to make the corresponding VAT resources available to the Community budget – to respect the various rules of Community law relating to that levy, such as those contained in the Sixth VAT Directive and the VAT Directive, and indeed Regulation No 1798/2003. The situation is, in that regard, appreciably different from that of own resources based on the GNI of the Member States.

72 There is thus a direct link between, on the one hand, the collection of VAT revenue in compliance with the Community law applicable and, on the other, the availability to the Community budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second.

73 In that respect, the Court of Justice has held, in particular, that where a Member State has failed to make a type of transaction subject to VAT, contrary to the requirements of the Sixth VAT Directive, such an infringement is also liable to result in a failure by that Member State to fulfil its obligation to make available to the Commission, as VAT resources, the amounts corresponding to the tax which should have been levied on those transactions (see, in particular, Case C?276/97 *Commission* v *France* [2000] ECR I?6251, paragraphs 49, 56, 61 and 70; Case C?358/97 *Commission* v *Ireland* [2000] ECR I?6301, paragraphs 58, 65, 69 and 78; and Case C?359/97 *Commission* v *United Kingdom* [2000] ECR I?6355, paragraphs 70, 77 and 87).

74 Similarly, having observed that it follows from Articles 2 and 22 of the Sixth VAT Directive and from Article 10 EC that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory, and stated that, under the common system of VAT, Member States are required to ensure compliance

with the obligations to which taxable persons are subject and that they enjoy in that respect a certain measure of latitude, inter alia, as to how they use the means at their disposal, the Court of Justice has added that that latitude is nevertheless limited, in particular, by the obligation to ensure effective collection of the Community's own resources (Case C?132/06 *Commission* v *Italy* [2008] ECR I?5457, paragraphs 37 to 39).

75 The Council's aims in adopting the Sixth VAT Directive include, moreover – as is apparent in particular from the 11th recital in the preamble to that directive, since reproduced in recital 35 in the VAT Directive – that of ensuring that the Community's own resources are collected in a uniform manner in all the Member States (see Case C?326/99 *'Goed Wonen'* [2001] ECR I?6831, paragraph 47 and the case-law cited).

76 Furthermore, it must also be observed that any reduction in VAT resources must be offset by means of a reduction in expenditure or an increase in GNI-based own resources, which is likely to affect the general equilibrium of the system of own resources intended to cover Community expenditure.

77 As regards, specifically, Regulation No 1798/2003, it must be noted that in so far as they are intended to combat VAT fraud and avoidance in all the Member States, the mechanisms of cooperation to which the Member States are subject by virtue of that regulation are themselves capable of having a direct and fundamental impact on the effective collection of VAT revenue and, therefore, on the availability to the Community budget of VAT resources.

78 In that regard, it must be pointed out that a significant proportion of VAT fraud arises in connection with genuine or claimed intra-Community trade and, moreover, that the Court of Justice has previously held that the mutual assistance of and administrative cooperation between the tax authorities of the Member States concerned is of fundamental importance for the purposes, inter alia, of ensuring that intra-Community acquisitions do not escape payment of VAT (see, to that effect, Case C?285/09 *R* [2010] ECR I?0000, paragraph 52).

79 In addition, it must be pointed out that the effective application by a Member State of the rules on cooperation established by Regulation No 1798/2003 is likely to determine not only that Member State's ability to take effective measures to prevent tax evasion and tax avoidance in its own territory but also the ability of the other Member States to take such measures in their own territories, especially where the correct application of VAT in those other Member States depends on the information which that Member State holds or which it can much more readily obtain.

80 It follows from the foregoing that cooperation between national authorities such as that established by Regulation No 1798/2003 is, if carried out effectively and in accordance with the provisions of that regulation, such as to contribute to a reduction in fraud and to the effective collection of VAT revenue and, to a corresponding extent, to the maintenance of VAT resources at the level required under the various Community legislative acts applicable, and thus to the preservation of the general equilibrium of own resources.

81 That being the case, the Court of Auditors had the power to carry out the planned audit at issue, in so far as that audit was to relate to administrative cooperation under Regulation No 1798/2003, therefore dealing with Community revenue from the aspect of its legality and its sound financial management, and thus had a direct link with the powers conferred on the Court of Auditors by Article 248 EC.

82 Contrary to the German Government's contention, such a finding, since it is dictated by Article 248 EC, cannot be called into question inter alia by the statement contained in Article 8(2) of Decision 2000/597, according to which that provision is without prejudice to the auditing of the

accounts and to checks that they are lawful and regular as laid down in Article 248 EC, auditing and checks which are mainly concerned with the reliability and effectiveness of national systems and procedures for determining the base for VAT resources. It must be noted, moreover, that that statement has since been omitted in Article 8(2) of Decision 2007/436.

83 Furthermore, since, as is apparent from paragraph 81 of the present judgment, the planned audit at issue as a whole falls within the competence of the Court of Auditors in relation to the audit of revenue, it is not necessary for the Court of Justice to consider whether and to what extent (if any) that audit was equally capable of being justified by reference to the power of the Court of Auditors in relation to the audit of expenditure nor, therefore, to address the issue of the admissibility of the associated arguments of the Commission and the Court of Auditors.

84 Nor, moreover, is it necessary to adjudicate in the present case on the question whether and to what extent (if any) the principle of subsidiarity pleaded in the alternative by the Federal Republic of Germany in its defence could be called upon in relation to audits for the purposes of deciding between the interventions of the Court of Auditors and national audit bodies. It is sufficient, in that respect, to note that even on the assumption that the principle of subsidiarity must apply in this instance, the cross-border dimension of the administrative cooperation in relation to VAT established by Regulation No 1798/2003 would in any event lead to the conclusion that the audit at issue is consistent with that principle. Since such an audit is intended to ensure that cooperation involving the authorities of all the Member States is functioning properly, proper functioning on which depends partly the ability of each authority to combat tax evasion and tax avoidance effectively in its own territory, that audit will necessarily be better carried out centrally at Community level by the Court of Auditors since, in particular, the scope of the Court of Auditors' power, unlike that of the national courts of auditors, extends to all of the Member States.

85 Since it follows from all of the foregoing that the Court of Auditors had the power, under the provisions of Article 248 EC, to carry out an audit such as the audit at issue, it must be held that, by objecting to the conduct of that audit in Germany, the Federal Republic of Germany has failed to comply with its obligations under that article, in particular paragraph 3.

86 It follows that that part of the Commission's action must be upheld.

87 As regards, in the second place, the infringement of Article 10 EC upon which the Commission also relies, it is sufficient, by contrast, to point out that there are no grounds for holding that there has been a failure to fulfil the general obligations contained in that article that is separate from the established failure to fulfil the more specific obligations by which the Federal Republic of Germany was bound under Article 248 EC (see, to that effect, Case C?334/08 *Commission* v *Italy* [2010] ECR I?0000, paragraph 75 and the case-law cited). As has just been observed, Article 248(3) EC expressly provides that audits within the competence of the Court of Auditors under paragraphs 1 and 2 of that article may, if necessary, take place on the spot in the Member States, such audits being carried out in liaison with national audit bodies or with the competent national departments called upon in such cases to cooperate with the Court of Auditors in a spirit of trust.

88 The Commission requests the Court of Justice, in the third place, to declare that the Federal Republic of Germany has failed to fulfil its obligations under Articles 140(2) and 142(1) of Regulation No 1605/2002.

89 In that regard, it is sufficient to note that the Commission, on whom the burden of proof of the failure it alleges lies, has not attempted to explain how the failure of which it accuses the Federal Republic of Germany in regard to those two provisions may be distinguished from the failure which it seeks to have established in relation to Article 248(1) to (3) EC, or, moreover, in

what respect the stance taken by the Federal Republic of Germany is likely, having regard to the precise choice of wording in Articles 140(2) and 142(1), to constitute a breach of those provisions.

90 It follows that that part of the Commission's action must be dismissed.

91 In the light of all the of foregoing it must be held that, by objecting to the conduct by the Court of Auditors of the European Union of audits in Germany concerning administrative cooperation under Regulation No 1798/2003 and the provisions for its implementation, the Federal Republic of Germany has failed to fulfil its obligations under Article 248(1) to (3) EC.

Costs

92 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked that the Federal Republic of Germany be ordered to pay the costs and the latter has been essentially unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Parliament and the Court of Auditors, interveners, are to bear their own costs.

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

1. **Declares that, by objecting to the conduct by the Court of Auditors of the European Union of audits in Germany concerning administrative cooperation under Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and the provisions for its implementation, the Federal Republic of Germany has failed to fulfil its obligations under Article 248(1) to (3) EC;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Federal Republic of Germany to pay the costs;**

4. **Orders the European Parliament and the Court of Auditors of the European Union to bear their own costs.**

[Signatures]

* Language of the case: German.