Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 6 February 2019 [1]

Case C-391/17

European Commission
v

United Kingdom of Great Britain and Northern Ireland

(Failure of a Member State to fulfil its obligations — Own resources — Decision 91/482/EEC — Association of the Overseas Countries and Territories with the European Union — Importations of aluminium from Anguilla — Trans-shipment — EXP certificates incorrectly issued by the customs authorities of an Overseas Country or Territory —Uncollected customs duties by the Member State of importation — Financial liability of the Member State with which an OCT has a special relationship —Compensation for loss to the EU's own resources incurred in another Member State)

I. Introduction

1. The European Commission seeks a declaration that the United Kingdom has failed to fulfil its obligations under the principle of sincere cooperation, embodied in Article 5 EC. [2] That is on the basis that it did not compensate the loss of an amount of own resources which should have been made available to the EU's budget. That amount relates to customs duties that were not collected upon importation of aluminium consignments originally coming from third States into Italy. That amount would have been collected had the customs authorities of Anguilla, an Overseas Country or Territory (OCT) of the United Kingdom, not issued the relevant export certificates for re-exportation to the European Union during the period 1998 to 2000 in breach of Article 101(2) of Decision 91/482/EEC. [3] The Commission is of the view that the United Kingdom is responsible under EU law for this loss of own resources, which has been caused by the United Kingdom's OCT. It claims that, under the obligation of sincere cooperation, that Member State must now make available to the EU budget the amount of customs duties that were not collected by another Member State (Italy), including the interest accrued.

2. By a parallel action in Case C-395/17, *Commission* v *Kingdom of the Netherlands*, for which I shall deliver a separate Opinion, the Commission is seeking a similar declaration and compensation of losses of own resources. That case concerns alleged failures of the customs authorities of Curaçao and Aruba, two OCTs of the Kingdom of the Netherlands.

1 Original language: English.

2 Which later became Article 10 EC and is now Article 4(3) TEU.

3 Council Decision of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1) ('the OCT Decision').

3. The technical and complex nature of the claim, which must be re-read several times in order to grasp what the Commission is requesting, should not disguise the fact that much more lies beneath the surface. The actions are not what they seem. Shrouded in a mist of the technicalities of customs rules, a complex set of facts of a singular case, and a rather rich procedural history, the clarity of which is indeed reminiscent of *Twin Peaks*, lies a structural and constitutional issue of considerable significance. Can the Commission, by an Article 258 TFEU infringement procedure, seek a declaration that a Member State (the United Kingdom) has infringed the duty of sincere cooperation by not compensating the loss to the EU budget that occurred in another Member State (Italy) due to an alleged breach of EU law committed by its OCT (Anguilla) in the (rather distant) past? Can the Commission request compensation for damage caused to the European Union as a remedy in that infringement claim? If such an action is indeed admissible under Article 258 TFEU, what is the evidentiary burden that the Commission must satisfy for such an action to prosper?

II. Legal framework

A. The system of own resources

4. Regulation (EEC, Euratom) No 1552/89,[4] as amended by Regulation (EEC, Euratom) No 1355/96[5] ('Regulation 1552/89'), is applicable to the facts of this case.

5. According to Article 2 of Regulation 1552/89:

'1. 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 conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor.

1a. The date of the establishment referred to in paragraph 1 shall be the date of entry in the accounting ledgers provided for by the customs regulations.

…

1b. In disputed cases, the competent administrative authorities shall be deemed, for the purposes of the establishment referred to in paragraph 1, to be in a position to calculate the amount of the entitlement no later than when the first administrative decision is taken notifying the debtor of the debt or when judicial proceedings are bought if this occurs first.

The date of the establishment referred to in paragraph 1 shall be the date of the decision or of the calculation to be made following the abovementioned commencing of judicial proceedings.'

6. Article 6(1) and (2) of Regulation No 1552/89 states that:

'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.

…

4 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).

5 Council Regulation of 8 July 1996 amending Regulation No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1996 L 175, p. 3).

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 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. According to Article 10(1) of Regulation No 1552/89: '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.

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.'

8. Article 11 of Regulation No 1552/89 reads as follows: 'Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by two percentage points. This rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

9. Article 17(1) and (2) of Regulation No 1552/89 states that:

'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. Regulation (EC, Euratom) No 1150/2000[6] replaced Regulation No 1552/89. Article 2(1), (2) and (3), Article 6(1) and (3)(a) and (b), Article 10(1) and Article 11 of that regulation essentially correspond to the provisions of Regulation No 1552/89 cited above. Article 17 of Regulation No 1552/89 was replaced by Article 17 of Regulation No 1150/2000, and amended by Regulation (EC, Euratom) No 2028/2004.[7]

B. OCT Decision

11. Article 101(2) of the OCT Decision, applicable *ratione temporis* in the present case, states:

'Products not originating in the OCT but which are in free circulation in an OCT and are re-exported as such to the Community shall be accepted for import into the Community free of customs duties and taxes having equivalent effect providing that they:

– have paid, in the OCT concerned, customs duties or taxes having equivalent effect of a level equal to, or higher than, the customs duties applicable in the Community on import of these same products originating in third countries eligible for the most-favoured-nation clause,

– have not been the subject of an exemption from, or a refund of, in whole or in part, customs duties or taxes having equivalent effect,

– are accompanied by an export certificate.'

III. Facts and pre-litigation procedure

12. Anguilla is one of the 'Overseas Countries and Territories of the United Kingdom' listed in Annex II to the EC Treaty, to which Part Four of that Treaty applies. The OCT Decision also applied to that territory at the relevant time.

13. In 1998, a trans-shipment scheme was set up in Anguilla, in order to benefit from Article 101(2) of the OCT Decision. Aluminium from third countries was imported into Anguilla. The local 6% customs duty was paid by importers in Anguilla. An Anguilla-based company, Corbis Trading (Anguilla) Limited ('Corbis'), as import agent, paid an 'export shipping allowance' to the consignee companies to route the cargo via Anguilla. This payment was then submitted by Corbis to the Government of Anguilla for payment as a disbursement. The Anguillan authorities then issued EXP certificates for the aluminium to be re-exported to the European Union.

14. The United Kingdom's Foreign and Commonwealth Office ('the FCO') had concerns about the legality of the operation. It formally asked the Commissioners for Her Majesty's Revenue and Customs ('HMRC') to conduct an investigation. That investigation took place in November 1998. HMRC concluded that the requirements for the issue of EXP certificates under Article 101(2) of the OCT Decision had not been met. The Unit for the Coordination of Fraud Prevention ('UCLAF')[8] was notified of the outcome of the investigation on 25 November 1998.

6 Council Regulation 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).

7 Council Regulation of 16 November 2004 amending Regulation No 1150/2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources (OJ 2004 L 352, p. 1).

8 This unit was succeeded initially by the Task Force for Coordination of Fraud Prevention, and subsequently by the European Anti-Fraud Office (OLAF). See Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 20).

15. Later in 1998, Corbis changed its invoicing practice. The invoices issued by Corbis to the Government of Anguilla stated that they were issued for 'services rendered' by Corbis. They no longer referred to 'export shipping allowance'.

16. On 6 January 1999, HMRC wrote to the Commission to inform it that HMRC no longer wished to draw the attention of UCLAF or other Member States to export certificates issued by Anguilla. Following a motion of the Anguilla House of Assembly of 22 January 1999, any product trans-shipped through Anguilla to the European Union pursuant to the OCT Decision had to be subject to a rate of duty equivalent to that set out in the EU's tariff for that product.

17. On 18 February 1999, UCLAF issued a communication (AM 10/1999) under Article 45 of Regulation (EC) No 515/97.[9] It stated that about 50% of the sums collected by Anguilla by way of customs duties were reimbursed as 'export shipping allowances' and other expenses. UCLAF concluded that these payments were linked to the collection of customs duties. UCLAF therefore recommended to the Member States' customs authorities 'that all EXP certificates issued by the authorities in Anguilla be rejected and that customs duties for future importations equivalent to the full 6% be taken on deposit or in the form of a guarantee until such time as these doubts are removed'.

18. Between March 1999 and June 2000, aluminium originating from third countries that had first been imported into Anguilla was re-exported from Anguilla and imported into Italy.

19. On 28May 2003, OLAF published a Joint Mission Report which stated that the economic incentive paid to importers by way of the export shipping allowance was of 25 United States dollars (USD) per tonne of aluminium.

20. On 28 December 2004, in response to a request by Italy, the Commission adopted Decision REC 03/2004. On 17 March 2003, that Member State had claimed the payment of duties from an Italian company that on 1 April 1999 had imported aluminium bars into Italy accompanied by EXP certificates issued by Anguilla. That company had applied for the waiving of entry in the accounts or, in the alternative, remission of the import duties concerned. In its decision, the Commission concluded that to the waiving of post-clearance entry in the accounts of import duties was justified in that particular case, pursuant to Article 220(2)(b) of the Customs Code.[10] The Commission stated that cases comparable to that under consideration in Decision REC 03/2004 should be treated in the same way, provided the circumstances were similar in fact and in law.[11]

21. On 26 May 2006, in response to a request by the Netherlands, the Commission adopted Decision REM 03/2004. In 1998, a German company had shipped aluminium from Canada and imported it into the European Union via Saint Pierre and Miquelon (an OCT under French sovereignty). On 20 December 2000, the Netherlands authorities claimed the payment of duties from that firm which, in turn, asked for remission under Article 239 of the Customs Code.[12] The Commission decided that this

9 Council Regulation of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1).

10 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1). Under Article 220(2)(b) of that regulation, post-clearance entry in the accounts is waived where the amount of duties legally owed failed to be entered in the accounts due to an error on the part of the customs authorities that could not reasonably have been detected by the person liable for payment. The latter must have acted in good faith and complied with all the provisions laid down by the legislation in force concerning the customs declaration.

11 In particular, the decision of the Commission requires 'that persons concerned must in no way have been involved in the shipment of the goods from the country of export, via Anguilla, to the point of entry in the Community customs territory. They must have purchased the goods under a DDP (delivered duty paid) contract. They must not have been involved as the importer of the goods into the Community or as the importer's representative. Lastly, they must not be deemed related persons to their supplier, the exporter to Anguilla, persons involved in the shipment of the goods from the country of export to the Community or the Government of Anguilla. …'.

12 According to that provision, import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238 resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.

was a special situation within the meaning of that provision and that it was appropriate to grant the remission of the import duties. The Commission stated that repayment or remission requests regarding imports into the EU from Saint Pierre and Miquelon, Anguilla and the Netherlands Antilles that were comparable in fact and in law would be treated similarly.

22. Italian authorities informed the Commission by letters of 28 September 2006 and of 28 September 2007 that they had taken several decisions to remit duties on the basis of Decisions REC 03/2004 and REM 03/2004, respectively. The Commission requested additional information in July 2009, which was provided in a reply dated 4 September 2009.

23. By letter of 8 July 2010, referring to the information received from Italy, the Commission first requested the United Kingdom to make available EUR 2 619 504.01, stating that any delay in making the amount owed to own resources available would give rise to interest. The United Kingdom replied by letter of 17 September 2010, pointing to the absence of documentary evidence. By letter of 27 September 2010, the Commission provided the United Kingdom authorities with further information and presented a breakdown of the cases concerned based on the Italian customs authorities' letter of 4 September 2009. Further correspondence between the Commission and the United Kingdom took place up until November 2011.

24. On 27 September 2013, the Commission sent a letter of formal notice, requesting that EUR 2 670 001.29 be made available. The United Kingdom replied by letter of 21 November 2013, denying any responsibility or infringement of EU law.

25. On 17 October 2014, the Commission sent a reasoned opinion. The United Kingdom replied by letter of 17 December 2014, maintaining its position.

26. By letter of 30 October 2015, the Commission requested the Italian authorities to provide it with the details of the customs declarations that had given rise to the total amounts claimed from the United Kingdom. Those declarations, together with the export certificates, were sent by a note dated 23 December 2015. On the basis of those documents, the Commission established that the amount to be claimed from the United Kingdom was in fact EUR 1 500 342.31, since the remaining amounts previously claimed related to imports where export certificates had been issued by OCTs other than Anguilla (namely, Saint Pierre and Miquelon).

27. As the United Kingdom did not make the requested payment, the Commission commenced the present legal proceedings.

IV. The procedure before the Court and the forms of order sought by the parties

28. By an application lodged on 30 June 2017, the Commission claims that the Court should:

– declare that the [United Kingdom] has failed to fulfil its obligations under Article 5 (subsequently Article 10) of the Treaty establishing the European Community (now Article 4(3) TEU) by not compensating the loss of an amount of own resources which should have been established and made available to the Union's budget under Articles 2, 6, 10, 11 and 17 of Regulation No 1552/89 (now Articles 2, 6, 10, 12 and 13 of Regulation (EU, Euratom) No 609/2014)[13] had export certificates not been issued in breach of Article 101(2) of Decision 91/482 for the imports of aluminium from Anguilla in 1999-2000,

– order the United Kingdom to pay the costs.

13 Council Regulation of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements (OJ 2014 L 168, p. 39)

29. The United Kingdom contends that the Court should:

– dismiss the action as unfounded,

– order the Commission to pay the costs.

30. By decision of the President of the Court of 30 November 2017, the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by the United Kingdom.

31. Both the Commission and the Government of the United Kingdom presented oral argument at the hearing held on 2 October 2018, in which the Government of the Netherlands also participated.

V. Assessment

32. This Opinion is structured as follows. I will first seek to unpack the exact nature of the claim made by the Commission (A). Second, I will examine whether and under what conditions it may be possible to launch an infringement action on the basis of a failure to compensate for damage caused to the European Union by a breach of EU law attributable to a Member State (B). Third, since I will in principle affirm the existence of such a possibility, I will then examine whether the conditions for an obligation to provide compensation are fulfilled in the present case (C), concluding that they are not. I will therefore suggest that the Commission's action be dismissed as unfounded.

A. Three in One? The exact nature of the claim

33. The Commission seeks a declaration that the United Kingdom has failed to fulfil its obligations under Article 5 EC by not compensating the loss of an amount of own resources which should have been established and made available to the EU budget under Articles 2, 6, 10, 11 and 17 of Regulation No 1552/89 had export certificates not been issued in breach of Article 101(2) of the OCT Decision for the imports of aluminium from Anguilla from 1999 to 2000.

34. This case presents a singular degree of complexity. This is not so much because it relates to the EU overseas countries and territories, but rather due to the way in which the Commission has pleaded this case and structured its arguments. Seeking to unpack the claim made by the Commission, it becomes clear that there are, in fact, multiple propositions disguised as a single claim.

35. First, the Commission claims that EXP certificates were wrongly issued by the authorities of Anguilla, in breach of Article 101(2) of the OCT Decision. In submitting this argument, the Commission is not being explicit as to whether that breach of EU law was directly attributable to the United Kingdom on the basis that the Anguillan were customs authorities of that Member State ('the original breach').

36. Second, the Commission puts forward that the United Kingdom is responsible for the breach in question because it has not taken all the appropriate measures to prevent and follow up on the 'original breach'. Thus, this represents, in a way, an alternative argument to the first one. As there is no specific legal basis in the OCT Decision for such a proposition, the Commission identifies a breach of the principle of sincere cooperation in this regard ('the intermediate breach').

37. Third, the outer layer of the Commission's action is the argument that the United Kingdom has failed to comply with the ensuing obligation to compensate the EU budget for the loss incurred in Italy caused by the previously mentioned breaches of EU law. In view of the absence of any express legal basis for this kind of obligation, that duty follows, according to the Commission, again from the principle of sincere cooperation ('the main breach').

38. Such a 'three-in-one' cascading structure of the claim advanced by the Commission resembles a Russian doll: the outer (third) layer of the alleged breaches of EU law is inextricably linked to and based on the previous ones. However, having identified the individual layers of the arguments does not in fact solve the problem, but rather further increases the complexity of this case. This is due to the fact that the different layers of alleged infringements are subject to quite different regimes regarding: (i) the obligation breached and the nature of the illegality, (ii) how that breach is to be established in terms of procedure (and evidence), and (iii) the nature of the consequences of the statement of illegality and the available remedies.

39. Concerning the nature of (i), the obligations breached, this infringement action conflates (a) a breach of the OCT Decision, (b) the alleged failure by the United Kingdom to prevent and remedy the misapplication of that decision by its OCT, and (c) a failure to fulfil the obligation to compensate the loss caused to the EU budget. In view of the distinct lack of clarity as to the legal basis of such obligations and their exact addressees, all those alleged breaches of EU law are bundled together by reference to the principle of sincere cooperation, as if that principle could mitigate or even eliminate the need to identify, for each of those layers, precisely which provisions of EU law have been breached and by whom.

40. With regard to (ii), the procedure to be followed, the Commission has brought an infringement action pursuant to Article 258 TFEU, seeking a declaration of a failure to fulfil obligations on the basis of not the non-compensation of a loss to the EU budget (and thereby implicitly endorsing the illegality of the previous two layers of alleged failures as well). However, the nature of each of the procedures (and the evidence and type of proof required) are quite different: the rather objective regime of Article 258 TFEU, seeking a declaration as to the structural failure of a Member State to be remedied for the future, becomes mixed up with elements of an essentially individual and individualised claim for compensation of the EU budget of specific sums by way of damages. All that is couched in terms of analogous application of specific provisions for establishing the loss incurred in another Member State (Italy) as the result of the application by that Member State of the rules of the Customs Code and of the system of own resources.

41. In terms of (iii), namely the available remedies, by its action, the Commission nominally seeks the declaration of a failure to fulfil obligations under Article 5 EC. However, the obligation that has allegedly been breached consists in not having compensated a *specific amount* of money that has previously been quantified and requested by the Commission. Here again, the Commission is requesting, in one fell swoop, a declaration of infringement that encompasses a statement of two other (and different) breaches of EU law, as well the confirmation of an obligation to compensate with an exact sum of money.

42. At this stage, I must admit to being exceedingly puzzled by such a mix-and-match approach to procedure(s) and remedies. What the Commission is actually asking for is a brand new remedy, using the procedural comfort of an infringement action, further enhanced by an analogous application of rules from a specific system of EU law.[14] That would mean having to produce very little actual evidence with regard to the exact sum of money requested, in order to obtain three declarations of infringement in one action, two of them merely on the basis of the duty of sincere cooperation, but without any identified legal basis within the more conservative meaning of the word.

14 As will be further outlined below in Section B.3 (points 74 to 84) of this Opinion, the combination of the provisions of the system of own resources and the Customs Code indeed creates a regime of objective, (quasi-)strict liability for customs debt. However, in the present case, it only applies to the *Member State of importation*. To take the same standard of liability and automatically apply it to *another Member State* is one of the many novel arguments submitted by the Commission in the present case.

43. I must admit that I also find it extremely difficult to assess in one go arguments actually belonging to three different procedures, which require the analysis of different substantive obligations, and the application of different procedural rules and requirements as to the nature of evidence. And all that, while nonchalantly glossing over the absence of clear obligations and legal bases for the alleged infringements with the invocation, or rather incantation, of the duty of sincere cooperation.

44. What then could and should be examined by the Court in the present case? My suggestion would be to unstack the Russian doll. As a matter of basic logic, any outcome must be based on the existence of the original illegality. If that original breach has not been established, any following action depending on that original breach becomes moot. Thus, in the present case, the key question remains: Were the EXP certificates issued in breach of the OCT Decision? Did that infringement cause a loss in the form of missing own resources and if so, in what amount? Indeed, if such answers connected to the original breach cannot be established, there is no basis to claim any further breach of EU law in these proceedings (be it at the level of the 'intermediate breach' — failure to prevent something that was apparently not illegal in the first place — or the logically subsequent 'main breach' — the obligation to compensate the EU budget).

45. That being, in my view, the crux of this case, it is nonetheless necessary to clarify a preliminary matter. The Commission asks the Court to declare that the United Kingdom has infringed the principle of sincere cooperation by not compensating the loss suffered by the EU budget due to a loss incurred in another Member State. The Commission has calculated that loss to be EUR 1 500 342.31. However, the infringement procedure has been used and primarily understood to date as a procedure for prospectively remedying ongoing infringements of EU law by the Member States, and not, as essentially requested in the present case, to obtain a retrospective declaration of a breach [15] coupled with a request for compensation, namely, an exact and specific sum of money.

46. By its nature, therefore, the Commission's action embodies a claim for compensation of damage allegedly caused to the EU budget by a Member State, brought as an Article 258 TFEU infringement claim. It must therefore be established whether such a claim is possible in the light of the wording, purpose and overall scheme of the infringement procedure. Should that prove not to be the case, the present action would have to be dismissed as inadmissible.

B. Claiming compensation for damages in an infringement action?

47. In my view, it cannot be ruled out that a Member State could be found in breach of EU law for failure to compensate for losses it has caused to the EU budget. In other words, I see nothing in the text, purpose or system of the infringement procedure that would preclude the Commission from claiming compensation under Article 258 TFEU (1). If such an action is brought, however, the existence of actual damage caused to the European Union by specific infringements(s) of EU law attributable to a Member State must be established to a standard that is appropriate for an action for damages (2), and it must also respect the difference between such an action and the specific rules applicable in the field of traditional own resources (3).

15 Certainly, based on the 'layer' of alleged breach which one chooses, it could be suggested that the Commission's claim is *prospective*, because the United Kingdom has still not paid the sum requested by the Commission. But such an argument brings the discussion right back to the rather convoluted nature of what exactly is Commission claiming.

1. General considerations

48. Even though they have not expressly claimed that the case is inadmissible, the United Kingdom and the Kingdom of the Netherlands have opposed the possibility for a Member State to be held financially liable for losses caused to the EU budget by its OCTs. One of the main arguments adduced by those Member States is that such financial liability does not have any explicit legal basis. Indeed, neither the Customs Code, nor the system of own resources nor any other provision of secondary or primary law contains any express provision on the financial liability of a Member State for loss caused to the EU budget incurred in another Member State.

49. The lack of clear legal basis for a claim aiming to hold Member States accountable for losses in circumstances such as those in the present case cannot be denied. However, before any such (alleged or real) *material* lacuna is addressed, a more general *procedural* question that underlies the very nature of the action in these proceedings needs to be addressed: is it possible to seek, through Article 258 TFEU, a declaration of a failure to fulfil obligations due to lack of compensation for losses caused by a Member State through a breach of EU law?

50. The issue of the liability of the Member States towards the European Union is not unheard of. At least theoretically it has been contemplated by the Court when stating that 'in the face of both a delay in the performance of an obligation and a definite refusal, a judgment by the Court under [infringement proceedings] may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards Member States, the Community or private parties'.[16] The possibility of using infringement proceedings as the basis of a claim for compensation on behalf of the European Union against a Member State has also been discussed in the legal scholarship.[17]

51. Articles 258 to 260 TFEU make up a framework to allow the detection and sanctioning of infringements of EU law committed by the Member States. Article 258 TFEU refers only to the failure by the Member State to 'fulfil an obligation under the Treaties'. In other words, the Treaty is silent as to the exact nature of remedy to an infringement that may be requested by the Commission. In view of this silence, I do not see why an action for compensation brought by the Commission in the name of the European Union against a Member State under Article 258 TFEU should be excluded, there being rather compelling systemic arguments to admit such a possibility.

52. First, looking at the wording of the Treaties, there is nothing in Articles 258 to 260 TFEU — or any other Treaty provision for that matter — precluding the possibility of assessing the existence and breach of such an obligation to compensate through infringement proceedings. An action of that kind would fit within the purpose and procedural limitations of infringement procedures, since it would seek a declaration from the Court that a Member State has failed to fulfil an obligation to compensate and it would not, indeed, amount to an order to pay.[18]

16 Judgment of 7 February 1973, *Commission* v *Italy* (39/72, EU:C:1973:13, paragraph 11). See also judgment of 30 May 1991, *Commission* v *Germany* (C-361/88, EU:C:1991:224, paragraph 31); of 30 May 1991, *Commission* v *Germany* (C-59/89, EU:C:1991:225, paragraph 35); or of 14 June 2001, *Commission* v *Italy* (C-207/00, EU:C:2001:340, paragraph 28). This reasoning has been consistently held with regard to the possibility to initiate infringement proceedings, even if the failure in question has been remedied after the time limit prescribed by the reasoned opinion of the Commission.

17 See, for example, Ehlermann, C.D.,'Die Verfolgung von Vertragsverletzungen der Mitgliedstaaten durch die Kommission', in *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit. Festschrift zum 70. Geburgstag von H. Kutscher*, 1981, pp. 135 to 153, at p. 151; Schwarze, J., 'Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen', *Europarecht* 1983 (1), pp. 1 to 39 at p. 24; and Wyatt, D., 'New Legal Order, or Old?', *European Law Review* 1982 (7), pp. 147 to 166, at p. 160 et seq.

18 See, by analogy, judgment of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraph 33), being mindful of the fact that such actions are precluded in infringement proceedings: see judgments of 14 April 2005, *Commission* v *Germany* (C-104/02, EU:C:2005:219, paragraphs 49), and of 5 October 2006, *Commission* v *Germany* (C-105/02, EU:C:2006:637, paragraphs 44 and 45).

53. Second, on a systemic level, it would be hardly contested that the duty to compensate for potential losses caused to the European Union is the more specific expression of the general obligation to make good any wrong, the latter being a guiding principle of any system of public, private and international law. [19]

54. In EU law, Article 340 TFEU states that the Union shall 'in accordance with the general principles common to the laws of the Member States' make good any damage caused by its institutions or officials. The case-law of the Court has furthermore recognised, drawing from the general principles common to the Member States and relying on the duty of sincere cooperation, [20] the principle of State liability for damages caused to individuals as a result of breaches of EU law to be inherent in the system of the Treaties. [21]

55. I think it is vital, however, with regard to the latter statement, to clearly underline one key difference. The statement that the absence of an explicit legal (procedural or material) basis is not a sufficient enough reason to rule out the existence of an obligation to compensate was clearly made with regard to the *establishing of the principle* of Member States' liability for damage caused to individuals (systemic level). It was not made with regard to the duty of stating a *clear legal obligation in the individual case* that is supposed to give rise to State liability (specific case level). [22]

56. Third, the possibility to hold Member States financially liable for breaches of EU law towards the Union could also be seen as filling a certain vacuum in the system of responsibility for breaches of EU law. Indeed, the other possibilities in the constellation of liability for breaches of EU law have already been provided for. Liability of the European Union is ensured through Article 340 TFEU. Member States could also, in theory, make use of that legal basis to commence proceedings for damages against the Union. [23] Liability of Member States towards individuals is ensured through the principle of State liability mentioned above. Finally, individual liability of physical and legal persons for infringements of EU law is subject to national rules of civil liability. [24]

57. The only remaining scenario is thus indeed the liability of a Member State for damages caused to the European Union by the breach of EU law. It could however be argued that there is no lacuna in this regard, as that system of liability may be covered by the general system of State liability of the Member States. [25] According to such an approach, the European Union should sue in the courts of that Member State, for (State?) liability of that Member State, in the same way as individuals.

19 See, in international law, for example, Chorzów Factory, Permanent Court of International Justice, Judgment No 13 of 13 September 1928, *PCJR Reports*, Series A, No 17, p. 4.

20 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 36).

21 In particular, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 29) according to which the liability of the Community 'is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused'.

22 Thus, for example, in a (textbook) case of a failure to transpose a directive, which could have caused damage to individuals, the clear legal obligation infringed by a Member State in that individual case would be, at least, the final/closing provision of the directive in question, stating the transposition deadline, potentially coupled with the obligation flowing from Article 288 TFEU and perhaps even the duty of sincere cooperation. There would be, however, no doubt that there is a rather specific obligation to transpose the directive by a given date.

23 As noted by Lenaerts, K., Maselis, I., and Gutman, K., *EU Procedural Law*, Oxford University Press 2014, p. 495. The Opinion of Advocate General Kokott in *Slovakia* v *Commission* and *Romania* v *Commission* (C-593/15 P and C-599/15 P, EU:C:2017:441, point 108) also points out that possibility. Claims for compensation seem to have been put forward in the past (at least by State entities), but to my knowledge have apparently never reached the stage of a judgment. See, for example, order of 16 November 1998, *Netherlands Antilles* v *Council and Commission* (T-163/97 and T-179/97, EU:T:1998:260).

24 With the logical exception of the personal liability of EU's civil servants towards the European Union also provided for in Article 340 TFEU.

25 Since according to Article 274 TFEU, 'save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'.

58. Although such a scenario could be conceivable for cases concerning civil liability of a Member State outside of its (public law) duties and obligations as a Member of the Union towards the EU,[26] it would make little or rather no sense in cases like the present one, which are effectively institutional and constitutional disputes between the European Union and its Members, which simply have certain monetary implications for the Member State. The latter types of cases are indeed the inherent domain of the EU Courts. Moreover, it is also true that, formally speaking, the action was brought by the Commission as an infringement action under Article 258 TFEU, for which the Court certainly has jurisdiction.

59. Moreover, it might be added that an infringement action based on the failure of Member States to compensate losses caused by them seems to fit well in the overall scheme and context of Articles 258 to 260 TFEU. In particular, such a possibility is in line with the ultimate objective of infringement proceedings, which is to 'achieve the practical elimination of infringements and the *consequences* thereof', past and future.[27]

60. Eventually, the possibility to ask not only for the declaration of an infringement of the Treaty, but also for the declaration of a failure to compensate because of that specific breach of the Treaty, would also add to the coherence of the system. Indeed, it is quite true that a more 'traditional' infringement action aimed at the underlying breach of EU law giving rise to the damage[28] would, in the particular constellation of the present and similar cases, not make much sense, for two reasons.

61. On the one hand, a 'two-in-one' procedure would be more effective in cases where the damage has been caused by an event or practice, which has already come to an end at the time when the reasoned opinion is issued. In those situations a declaration of an infringement that is limited to the breach of the material obligation (in this case, the original or the intermediate breaches) would serve little purpose. This is particularly the case in the specific field of own resources, where claiming the material breach of EU law separately from its financial consequences does not make much sense.[29] This often makes it necessary, in the specific cases in this field, to launch actions in which the consequences of the breach of EU law constitute from the outset the very subject of the infringement. But that again is entirely logical, and clearly connected with structure of such a case: an infringement action for not compensating a loss, such as the one in the present case, is functionally equivalent to an infringement action for failure to make own resources that are owed by a Member State available.

26 Similar to cases launched by the Commission before the national courts essentially claiming civil law damages against private parties. See, for example, judgment of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684).

27 See, for example, judgment of 16 October 2012, *Hungary* v *Slovakia* (C-364/10, EU:C:2012:630, paragraph 68). Emphasis added.

28 Be it either the 'original' or the 'intermediate' breaches referred to in points 35 and 36 of this Opinion.

29 Judgment of 5 October 2006, *Commission* v *Belgium* (C-377/03, EU:C:2006:638, paragraph 36). The Court has found that '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'.

62. On the other hand, it is true that Article 260(1) TFEU entails the obligation of the Member State to take all the necessary measures to comply with a judgment of the Court that has found an infringement. Those measures could eventually include the obligation to compensate the ensuing losses.[30] However, it is also true that the nature of those measures to be taken by the Member States in order to put an end to their failure to fulfil EU obligations cannot be prescribed by the Court,[31] and remain to be determined by the Member State.[32] Therefore, the issue about the existence of an obligation to compensate the loss would still be outstanding.

63. Formally speaking, it is also true that a subsequent action on the basis of Article 260(2) TFEU could offer the possibility to check whether a Member State has fulfilled its duties under a previous judgment, including an obligation to compensate for losses. That suggestion, however, disregards the logic of an action for failure to compensate the EU budget for losses caused to the latter by a Member State, in which the establishment and quantification of losses is, as in any other compensation/damages action, a part of the decision on *the merits* of the case. Such an assessment is very different from any potential *subsequent examination* as to whether a previous judgment has been *complied with* or not (as a matter of *enforcement*),[33] as is the case of assessment under Article 260 TFEU. Moreover, if the issue of compensation for losses would arise only as a matter of improper implementation of a judgment of the Court, the Member State would be confronted for the first time with the issue of compensation for losses to the European Union at this stage, while at the same time facing sanctions that may flow from the application of that article (which do not aim, in any case, at the compensation of damage or losses).

64. Finally, from a broader consideration of the EU system of available legal avenues, if it is admitted that Member States cannot contest the validity of letters of formal notice which, as in the present case, request a Member State to make available a sum under the concept of own resources lost in another Member State,[34] Member States must be entitled to challenge the merits of such an obligation before the EU Courts in the framework of infringement proceedings.[35] Therefore, at the stage of the Article 258 TFEU infringement procedure, all the alleged breaches of EU law, including the original, underlying ones, must be open to legal review.

2. Elements to be established

65. Thus, I do not see anything, either in the text of the Treaties or the Treaties as a whole, that would preclude, per se, the Commission from asking for a 'two-in-one' approach within the Article 258 TFEU procedure. That would namely be for the *declaration of illegality* of certain behaviour attributable to a Member State and, simultaneously, for the *declaration of the failure to comply with the obligation to compensate* for losses to the EU budget arising from that illegality.

30 Whether Article 260(1) TFEU requires compensation of damages as a measure to be adopted in any case has been debated. See Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Luxembourg* (C-299/01, EU:C:2002:243, point 23 et seq.); Opinion of Advocate General Mischo in Joined Cases *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:221, point 57 et seq.). In any case, compensation for damages does not per se entail the elimination of the breach of EU law. See, for example, judgment of 9 December 1997, *Commission* v *France* (C-265/95, EU:C:1997:595, paragraph 60).

31 See judgments of 14 April 2005, *Commission* v *Germany* (C-104/02, EU:C:2005:219, paragraphs 49), and of 5 October 2006, *Commission* v *Germany* (C-105/02, EU:C:2006:637, paragraphs 44 and 45). See also judgment of 2 October 2008, *Commission* v *Greece* (C-36/08, not published, EU:C:2008:536, paragraphs 8 and 9).

32 To that effect, see judgment of 18 July 2007, *Commission* v *Germany* (C-503/04, EU:C:2007:432, paragraph 15). See also Opinion of Advocate General Trstenjak in *Commission* v *Germany* (C-503/04, EU:C:2007:190, point 41).

33 Judgment of 12 July 2005, *Commission* v *France* (C-304/02, EU:C:2005:444, paragraph 92).

34 Judgment of 25 October 2017, *Slovakia* v *Commission* (C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 75 et seq.).

35 See extensively on this discussion, Opinion of Advocate General Kokott *in Slovakia* v *Commission* and *Romania* v *Commission* (C-593/15 P and C-599/15 P, EU:C:2017:441, point 101 et seq.)

66. However, if such a claim is brought, the nature of such an Article 258 TFEU action changes. Such an action is no longer the 'traditional' abstract declaration of failure by a Member State. It is a specific case of illegality that is said to have caused a very specific amount of damage to the EU budget. It basically becomes an action for damages allegedly caused by a Member State to the European Union.

67. Thus, if the Commission is asking, on behalf of the European Union, for a declaration of failure to compensate a specific amount of damages for a specific breach of EU law attributable to a Member State that occurred in the past, then that claim shall be subject to the standards and evidence applicable for an action for non-contractual liability.

68. The conditions for a claim for damages for breaches of EU law have converged over the years,[36] and rightly so. If the Commission is actually asking for a declaration of the Member State's liability, even if the formal vehicle for bringing such an action is still Article 258 TFEU, I see no reason why those conditions should diverge again. Thus, in general, for extra-contractual liability in EU law to be triggered, there needs to be a breach of a rule of EU law intended to confer rights. That breach of EU law must, moreover, be sufficiently serious. Damage must be established. There must be a direct causal link between the breach of the obligation on the author of the act and the damage sustained by the injured party.

69. That is why, in my view, the arguments submitted in the framework of an infringement action, on the basis of a failure to compensate for losses caused by a breach of EU law, ought to meet those requirements. The 'two-in-one' nature of those proceedings makes them particularly prone to confusion as to the legal requirements that correspond to both stages. In particular, there is a risk that the features of infringement procedures are selectively plugged into the assessment of the breach of EU law, arguably giving rise to the obligation to compensate.

70. First, infringement actions are objective in nature: the mere failure to comply with an EU obligation is in itself sufficient to constitute a breach.[37] Subjective elements such as fault, or negligence do not play any role in the assessment of the breach.[38] By contrast, this is not the case when it comes to establishing whether a breach of EU law gives rise to an obligation to compensate. Not every illegality automatically gives rise to liability. A sufficiently serious breach must exist in order to trigger an obligation to compensate for losses. This entails a manifest and serious disregard by the Member State for the limits to its discretion.[39] Factors to be taken into account when assessing that condition include 'the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or [EU] authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by [an EU] institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to [EU] law'.[40]

36 Judgment of 4 July 2000, *Bergaderm and Goupil* v *Commission* (C-352/98 P, EU:C:2000:361, paragraph 39 et seq.). See for more recent examples, judgments of 4 April 2017, *European Ombudsman* v *Staelen* (C-337/15 P, EU:C:2017:256, paragraph 31), regarding the regime of liability of the EU; and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 94), regarding the principle of State liability for damage caused to individuals.

37 See, for example, judgment of 14 November 2002, *Commission* v *United Kingdom* (C-140/00, EU:C:2002:653, paragraph 34); or of 30 January 2003, *Commission* v *Denmark* (C-226/01, EU:C:2003:60, paragraph 32); or of 13 July 2006, *Commission* v *Portugal* (C-61/05, EU:C:2006:467, paragraph 32).

38 See, for example, judgment of 16 September 2004, *Commission* v *Spain* (C-227/01, EU:C:2004:528, paragraph 58), or of 4 March 2010, *Commission* v *Italy* (C--297/08, EU:C:2010:115, paragraph 82).

39 See, for example, judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 105). With regard to the responsibility of the European Union see, for example judgment of 4 April 2017, *European Ombudsman* v *Staelen* (C-337/15 P, EU:C:2017:256, paragraph 37).

40 Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 56).

71. Second, in bringing a 'traditional' claim under Article 258 TFEU, the Commission does not need to show that there is a specific interest in bringing an action: infringement proceedings are not intended to protect the Commission's own rights.[41] By contrast, when claiming the right to be compensated for a determined amount that came about as the result of a specific breach of EU law, it is necessary to establish the existence of a specific entitlement of the European Union[42] and the correlating and clearly defined obligation on the part of the Member States that would have been breached and caused that specific damage for which compensation is requested.

72. Third, within the infringement procedure, it is for the Commission to prove the alleged failure of the Member State to fulfil its obligations by presenting to the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled, without relying on mere presumptions.[43] However, as the main objective of an Article 258 TFEU action is to bring Member States into compliance with EU law,[44] the lack of or existence of damage or adverse effects is irrelevant.[45] Again, by contrast, when it comes to the Commission asking for the compensation of an exact amount of damages, it is necessary not only to establish the illegality, but also to establish the damage and the direct causal link between the illegality and that damage.[46] Indeed, it is for the party seeking to establish the existence of liability to adduce conclusive proof as to the existence and extent of the damage it alleges, and whether there is a sufficiently direct causal nexus between the conduct objected to and the damage alleged.[47]

73. Thus, the overall conclusion is remarkably simple: if a claimant is effectively asking for the compensation of damage, that claimant must establish the damage under the standards applicable under EU law for that type of claim in general. Part of the confusion permeating the present case is caused by the fact that the Commission is asking for the declaration of 'triple illegality' and the ensuing payment of an exact amount of compensation while maintaining that this is all subject to the procedural requirements of Article 258 TFEU proceedings, overall remaining at an abstract level and not having to provide evidence as to the specific damage, without being obliged to quantify the precise amount of compensation required and a causal nexus between that amount and the alleged illegalities.

3. The own resources system

74. Finally, the last element to be clarified is what significance arises, in a case like the present one, from the fact that the compensation requested (and one of the illegalities alleged) relate to the specific field of EU own resources.

41 See, for example, judgment of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178 paragraphs 43 and 44).

42 Certainly, neither the European Union nor the Commission acting on its behalf can be said to be endowed with 'individual rights'. However, that condition can also be seen (and naturally adapted) to require the identification of the legal provision that would have entitled the claimant to require certain behaviour from the respondent and the breach of which is said to have given rise to the damage. On the requirement that the rule of EU law must give rights to individuals, see, for example, judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraph 106).

43 See, for example, judgments of 4 October 2007, *Commission* v *Italy* (C-179/06, EU:C:2007:578, paragraph 37), and of 10 September 2009, *Commission* v *Greece* (C-416/07, EU:C:2009:528, paragraph 32).

44 See, for example, judgment of 6 December 2007, *Commission* v *Germany* (C-456/05, EU:C:2007:755, paragraph 25).

45 See, for example, judgments of 5 March 1998, *Commission* v *France* (C-175/97, EU:C:1998:89, paragraph 14); and of 5 October 2006, *Commission* v *Belgium* (C-377/03, EU:C:2006:638, paragraph 38).

46 Judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 117).

47 See, in the field of the extra-contractual liability of the Union, for example judgment of 7 June 2018, *Equipolymers and Others* v *Council* (C-363/17 P, not published, EU:C:2018:402, paragraph 37 and the case-law cited).

75. Under the system of own resources, Member States are required to establish the EU's own resources as soon as their customs authorities are in a position to calculate the amount of duties arising from a customs debt and to determine the debtor regardless of whether the criteria for the application of Article 220(2)(b) of the Customs Code are met.[48] It is only the fulfilment of the conditions laid down in Article 17(2) of Regulation No 1552/89 (*force majeure* or where there are irrecoverable amounts for reasons that are not attributable to the Member State) which enables a Member State to discharge itself from that obligation.[49]

76. The argument advanced by the Commission in the context of the present proceedings essentially boils down to suggesting that this regime should also be applicable to the United Kingdom, and/or to Anguilla, which is under the control of that Member State.

77. I find that approach highly questionable. The Commission is simply asking for an *ex post* application of a very specific regime *by a double analogy*: not only shifting it from the moment that the customs debt normally occurs (at *the moment* of entry into the territory of the Union) but also making that regime applicable to a Member State other than the one on which the burden normally lies (that is, *the Member State* through the territory of which the imports effectively took place).

78. I do not think that such an analogy is possible. First of all, the cases cited by the Commission in support of that proposition all refer to situations in which a Member State had failed to comply with its own obligations under the own resources regime.[50] In other words, it was unquestionably the duty of the Member State in question, who was also the Member State of importation, to make the amount of own resources owed available. However, this case is not about the obligations imposed on the United Kingdom by the specific provisions on EU own resources.[51] This case is about an obligation to compensate, based on the principle of sincere cooperation with regard to losses incurred in *another* Member State.

79. By its action, the Commission seeks to apply that case-law to a situation outside the obligations laid down both in the Customs Code and in Regulation No 1552/89.[52] It seeks to attribute to the United Kingdom the losses of own resources incurred in Italy through the application of Article 220(2)(b) and Article 239 of the Customs Code, arguably[53] having in mind that Italy could not recover duties for reasons that cannot be made attributable to it, within the meaning of Article 17(2) of Regulation No 1522/98.

80. This presents a double problem. First, the obligation provided for by EU law for one Member State is essentially shifted to another. Second, this also means automatically, and with no further verification, imposing on a Member State the obligation to pay sums determined by another Member State.

48 Judgment of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraph 68).

49 Ibid.

50 The Commission cites, in particular, judgments of 16 May 1991, *Commission* v *Netherlands* (C-96/89, EU:C:1991:213, paragraph 37); of 15 June 2000, *Commission* v *Germany* (C-348/97, EU:C:2000:317, paragraph 64); of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraph 60); and of 17 March 2011, *Commission* v *Portugal* (C-23/10, not published, EU:C:2011:160, paragraph 60).

51 See by contrast, Opinion of Advocate General Geelhoed in *Commission* v *Denmark* (C-392/02, EU:C:2005:142, points 46 and 47).

52 This is not the first time that the Commission has made such an argument. See the facts underlying judgment of 25 October 2017, *Romania* v *Commission* (C-599/15 P, EU:C:2017:801).

53 'Arguably' because the Commission has not made that argument explicitly in its submissions. However, there might also be speculation as to what that argument would have been if, in fact, Italy were able to recover the duties in question: then would no such 'subsidiary' responsibility of the United Kingdom come into existence? Or could the Commission then turn against the United Kingdom irrespective of whether the sums were recoverable in Italy? What if the lack of recovery was partially for reasons attributable to Italy?

81. In its reasoning on this point, the Commission seems to be overlooking the fact that an eventual obligation of compensation of losses incurred in another Member State is not governed by the specific rules of the own resources regulation. As the case finds itself outside the scope of the obligations explicitly established by the system of own resources, the general rules regarding the establishment of damage must apply. In this context, the Commission cannot simply refer to the rules of EU law in the field of own resources, applicable to a different situation, in order to make losses (and their quantification) automatically attributable to another Member State.

82. I do understand the difficulties of evidentiary burden that might arise for the Commission in establishing such a claim, especially if that claim is to be seen as relating to Member State liability, as suggested in the previous section. Indeed, the application of the conditions of the Customs Code under which customs duties can be remitted or not collected,[54] as well as the triggering of Article 17(2) of Regulation No 1552/89,[55] depend greatly on the assessment of the Member State which ought to have established the own resources at issue.

83. Thus, at the end of the day, if the Commission wishes to launch a claim for compensation against another Member State, it will be obliged in that case to rely on the information provided by the Member State where the losses were incurred.[56] It will then be for the Commission to enquire about and verify such information, in order to fulfil the requirements mentioned above.[57] What, in my view, is not however possible, is to automatically apply the results of the objective system of own resources created by one Member State to another Member State, to which neither the obligations of the Customs Code nor the own resources system apply in a given case.

84. In sum, imposing on one Member State the estimates made by another on both the comparability of decisions on remission or waiving collection of customs duties, and the self-assessment of the definitive impossibility to recover own resources, together with a potentially questionable level of documentary evidence establishing the amount of debts in question, not only lacks any legal basis, but also entails significant risks for the smooth functioning of the system of own resources flowing from the collection of customs, because it disrespects its logic and the attribution of obligations and responsibility within that system. Finally, it would also pose serious issues with regard to the respect of the rights of the defence of the Member State in question, since the assessment and estimates made by the original Member State would in fact never be challengeable.

C. Application to the present case

85. The Commission claims that the United Kingdom has failed to fulfil its obligations under the principle of sincere cooperation. That has occurred because it has not compensated the loss of an amount of own resources, which should have been established and made available to the Union's budget under Regulation No 1552/89, had EXP certificates not been issued in breach of Article 101(2) of the OCT Decision for imports of aluminium from Anguilla from 1999 to 2000.

54 See order of 21 April 2016, *Makro autoservicio mayorista and Vestel Iberia* v *Commission* (C-264/15 P and C-265/15 P, not published, EU:C:2016:301, paragraph 47) .

55 See order of 14 September 2015, *Romania* v *Commission* (T-784/14, not published, EU:T:2015:659, paragraphs 27 to 29) (that judgment has been upheld in the judgment of 25 October 2017, *Romania* v *Commission* (C-599/15 P, EU:C:2017:801)).

56 According to settled case-law, Article 10 EC makes it clear that the Member States are required to cooperate in good faith with the enquiries of the Commission pursuant to infringement actions, and to provide the Commission with all the information requested for that purpose (see, for example, judgment of 6 March 2003, *Commission* v *Luxembourg* (C-478/01, EU:C:2003:134, paragraph 24)). In my view, this is also valid when the infringement proceedings concern other Member States.

57 Section B(2) of the present Opinion.

86. In order to establish whether there was indeed a failure to comply with the obligation to compensate losses of own resources, as claimed by the Commission, it is necessary to ascertain whether such an obligation to compensate existed in the first place, the breach of which was sufficiently serious (1), which would then cause specific and quantifiable damage (2), and whether there was a causal link between the illegality and the ensuing damage.

87. In my view, the action of the Commission does not fulfil those requirements. The Commission has not demonstrated the unlawful nature of the EXP certificates at the origin of the dispute, let alone the seriousness of the breach attributed to the United Kingdom consisting in not preventing or controlling the issuance of those certificates (1). Moreover, there are also clear shortcomings regarding the establishment and quantification of the damage (2).

1. Illegality (amounting to a sufficiently serious breach)

88. The Commission argues that it is established that EXP certificates were wrongly issued by the customs authorities in Anguilla. The United Kingdom failed to take the appropriate measures to prevent this from occurring. The responsibility of the United Kingdom emanates from the sovereignty it has over Anguilla. The Commission emphasises that the United Kingdom has certain powers over Anguilla under that Member State's constitutional law, but that that Member State took insufficient action. Inter alia, the fact that the FCO asked HMRC to conduct an investigation demonstrates that the United Kingdom was empowered to take action. Moreover, even though the FCO was not unaware of the situation in February 1998, the United Kingdom only informed UCLAF in November 1998. Had the United Kingdom acted promptly when UCLAF issued the mutual assistance communication in February 1999, the losses could have been prevented. Appropriate action by the United Kingdom would have led to intervention to prevent a loss of own resources.

89. The United Kingdom has opposed the arguments of the Commission. It first disputes that the EXP certificates were wrongly issued in Anguilla. The arrangements between the Government of Anguilla and Corbis were modified in December 1998. Thus, invoices issued after that date no longer referred to export shipping allowances. The United Kingdom took a number of measures: there was an investigation by HMRC and, a report was subsequently adopted on 19 November 1998. Full details of the findings were passed to UCLAF six days after that date. The relevant imports of aluminium were made on and after 1 April 1999, and by that time the United Kingdom's report had already been issued and the mutual assistance communication of UCLAF had been in circulation six weeks before that. The change in invoicing practices dispelled any remaining doubts on the part of the United Kingdom.

90. Furthermore, as to the procedural dimension, the United Kingdom claims that the partnership procedure of Article 7(7) of Annex III to the OCT Decision was invoked by the Government of Anguilla, which then held tripartite meetings with the Commission and Italian authorities. The Commission should have followed the measures prescribed by the OCT Decision to address the errors, including the dispute resolution procedure of Article 235 of the OCT Decision or by adopting safeguard measures. Having in mind the, at the time, unresolved dispute regarding the interpretation of the concept of 'refund of customs duties' between the Government of Anguilla and the Commission, it would not have been appropriate for the United Kingdom to take any further action.

(a) The main obligation, breach of which must be established

91. The application of the Commission is not clear regarding the issue of whether *the breach of the OCT Decision* should be attributable directly to the United Kingdom. Despite some points in its action rather suggesting the contrary,[58] the Commission does not seem to claim explicitly that the customs authorities of Anguilla are to be considered as British authorities, and that the illegal issuance of EXP certificates is *directly attributable* to the United Kingdom. Indeed, in its reply to the statement in intervention submitted by the Government of the Netherlands in the present case, the Commission has clarified that it is not its contention that the alleged infringements rest on the premiss that Anguilla is an integral part of the United Kingdom. When asked explicitly for clarification about this point at the hearing, the Commission confirmed that it was not the purpose of its action to determine who had breached the OCT Decision.

92. Without wishing to sound too much like a legal formalist, I find it rather difficult to deal with the issue of duty to compensate without being explicitly told *who* is supposed to be liable (subject of liability) and exactly *what for* (the legal obligation violated). The fact that this uncertainty is wrapped up in the apparently all-encompassing duty of sincere cooperation does nothing, in my mind, to reduce that lack of clarity.

93. However, I also understand why the Commission might have wished to remain vague on this issue. The complex legal nature of the relationship of OCTs with EU law does not make it easy for the Commission to argue this case. Indeed, according to Article 355(2) TFEU, Part Four of the Treaty, on the basis of which the OCT decision is adopted, establishes 'special arrangements for association' which apply to OCTs. This unclear constitutional setting has been interpreted as giving rise to a 'hybrid status'.[59] On the one hand, OCTs cannot be considered as part of the European Union (for purposes related to free movement of goods and application of customs rules, among others)[60] and, failing an explicit reference, the general provisions of the Treaty do not apply to OCTs.[61] On the other hand, the law of the OCTs is not a separate legal system, shielded from the general system of EU law.[62] This entails the applicability of general principles and provisions of the Treaties which are necessary for its operative functioning as part of EU law,[63] or which define their scope by reference to the subjects to which they apply.[64]

94. In this framework, the issue of responsibility for the administrative actions of OCTs is particularly complex, having in mind in particular, that the OCT Decision establishes specific avenues to tackle disputes and disagreements emerging within its scope. First, at the general level, a partnership mechanism is established.[65] Second, in the particular system of preferential trade, there is a system for

58 Moreover, at the hearing, the Commission referred to the judgment of 12 December 1990, *Commission* v *France* (C-263/88, EU:C:1990:454). The Commission also referred to the case-law according to which a Member State 'may not plead situations in its internal legal order' in order to justify a failure to comply with EU obligations. See, for example, judgment of 16 December 2004, *Commission* v *Austria* (C-358/03, EU:C:2004:824, paragraph 13).

59 See, for an extensive analysis, Opinion of Advocate General Cruz Villalón in *Prunus* (C-384/09, EU:C:2010:759, point 23 et seq.).

60 For example, judgments of 11 February 1999, *Antillean Rice Mills and Others* v *Commission* (C-390/95 P, EU:C:1999:66, paragraph 36); of 21 September 1999, *DADI and Douane-Agenten* (C-106/97, EU:C:1999:433, paragraphs 37 and 38); and of 8 February 2000, *Emesa Sugar* (C-17/98, EU:C:2000:70, paragraph 29).

61 See, for example with regard to free movement of goods, judgments of 12 February 1992, *Leplat* (C-260/90, EU:C:1992:66, paragraph 10); of 22 November 2001 *Netherlands* v *Council* (C-110/97, EU:C:2001:620, paragraph 49); and of 28 January 1999, *van der Kooy* (C-181/97, EU:C:1999:32, paragraph 37). With regard to free movement of capital provisions, judgments of 5 May 2011, *Prunus and Polonium* (C-384/09, EU:C:2011:276, paragraphs 29 to 31), and of 5 June 2014, *X and TBG* (C-24/12 and C-27/12, EU:C:2014:1385, paragraph 45). Regarding secondary law adopted on the basis of Article 114 TFEU, judgment of 21 December 2016, *TDC* (C-327/15, EU:C:2016:974, paragraphs 77 and 78). Regarding elections to the European Parliament, judgment of 12 September 2006, *Eman and Sevinger* (C-300/04, EU:C.2006:545; paragraph 46).

62 Opinion of Advocate General Cruz Villalón in *Prunus* (C-384/09, EU:C:2010:759, point 33).

63 See, for example, judgment of 12 December 1990, *Kaefer and Procacci* (C-100/89 and C-101/89, EU:C:1990:456), admitting the possibility of the courts of OCTs to refer questions for a preliminary ruling.

64 See judgment of 12 September 2006, *Eman and Sevinger* (C-300/04, EU:C:2006:545, paragraphs 27 to 29), declaring that persons who have the nationality of a Member State residing in an OCT may rely on EU citizenship rights.

65 See Articles 234 to 236 of the OCT Decision.

administrative cooperation in the field of customs, with specific obligations regarding verification imposed on OCTs and on the Member State *of importation*.[66] Specific competences are allocated to the OCT's administrative authorities on the one hand, and to the concerned Member State, on the other.

95. It is in this specific context that the Commission has chosen not to attribute the breach of the OCT Decision (through the issuing of incorrect EXP certificates) to the United Kingdom *directly*. The breach which the Commission attributes to the United Kingdom as the basis of its financial liability to compensate for the losses at issue is that of the failure to take the appropriate measures *to prevent, and follow up on*, the infringement of the OCT Decision by the Anguillan customs authorities.

96. In my view, contrary to the arguments of the United Kingdom, there can be little doubt that Member States which have special relationships with OCTs have an obligation to take all the appropriate measures to prevent and to follow up on violations of EU law which may arise from the behaviour of the OCT authorities in the framework of the association regime. That overall obligation indeed follows from the constitutional principle of sincere cooperation.[67] As a general principle governing the mutual relationship between the European Union and the Member States, it must apply whenever EU law applies, as is the case within the context of the OCT Decision. It could not be otherwise, having in mind, above all, that it was upon the initiative of that Member State that that OCT was listed in Annex II to which Article 355(2) TFEU refers, and that the Member State having special relationship with the OCT retains overall sovereignty over them. Furthermore, the United Kingdom itself raises the relevance of Article 4 TEU when it comes to recognising the duty of the European Union, as established in its second paragraph, to respect the national identity of the Member States.[68] It would be therefore rather contradictory to claim that that provision applies with regard to Part Four of the TFEU and the OCT Decision and that the principle of sincere cooperation, enshrined in paragraph 3 of the very same provision, is off limits.

97. The obligation to take all appropriate measures, general or specific, to ensure fulfilment of the obligations resulting from the OCT Decision binds the United Kingdom. That *overall responsibility* then logically stretches to all the obligations imposed on the OCT. That is so even when there is no express provision in that decision that would explicitly impose a duty to monitor (or rather to double-check) the customs authorities of OCTs in the issuance of EXP certificates.

98. The United Kingdom has advanced constitutional arguments against that overall responsibility, by claiming that under the United Kingdom's constitutional arrangements, it has no power whatsoever either to generally legislate for Anguilla or to control individual administrative decisions issued by those authorities. In spite of those arguments, it might be simply noted that the facts of this case which, to that extent, have not been challenged (above, points 14, 16, and also 89), show a different reality. It was the United Kingdom authorities that first carried out investigations in Anguilla, on the basis of which the practice of the Anguillan authorities appears to have changed. As a result of the change in those invoicing practices, the United Kingdom authorities no longer felt a need to take any further action.

99. In view of such statements and course of events, it is rather difficult to embrace the suggestion that the United Kingdom, as a Member State that does indeed have a special relationship with the OCT in question, was not in any way responsible for indirectly monitoring or following up on potential infringements of the OCT Decision allegedly committed by the Anguillan authorities.

66 See, in particular, Article 7 of Annex III to the OCT Decision. According to paragraph 7 of that provision, disputes not settled between customs authorities shall be submitted to the Committee on Customs Legislation.

67 Article 5 EC 'is the expression of the more general rule imposing on the Member States and [the Union] institutions mutual duties of genuine cooperation and assistance'. Judgment of 15 January 1986, *Hurd* (44/84, EU:C:1986:2, paragraph 38). See also, for example, judgment of 29 April 2004, *Greece* v *Commission* (C-278/00, EU:C:2004:239, paragraph 114), or of 1 April 2004, *Commission* v *Italy* (C-99/02, EU:C:2004:207, paragraph 17).

68 For the relevance of Article 4(2) TEU, see point 63 of my Opinion in C-395/17, *Commission* v *Netherlands*.

100. There is, however, in reality no need to definitively settle that issue, for a rather simple reason: the issue of liability for lack of fulfilment of sincere cooperation for failure to adopt appropriate measures of prevention and control would only arise if it was established that the reproached behaviour was indeed illegal in the first place. Thus, in line with what has already been suggested,[69] it is the illegal nature of the EXP certificates at issue that becomes the first and preliminary step, together with the existence of specific damage caused by the illegality at issue.

(b) The original breach

101. In my view, the United Kingdom is right to point out that the Commission has not established, to the requisite standard of proof, that the 12 EXP certificates issued in 1999 which were attached to its application were invalid on the basis of the grant by the Government of Anguilla of 'an exemption from, or a refund of, in whole or in part, customs duties'.

102. As clarified by the Commission at the hearing, the assessment of whether the payments corresponding to the 'services rendered by Corbis' after December 1998 constitute impermissible refunds that would vitiate the relevant EXP certificates, is based only on the findings of OLAF in its report of 2003.

103. There is of course no doubt that in general, a report by OLAF constitutes evidence that may be taken into account by the Court. There are, however, several argumentative and/or evidentiary steps needed between such a general report and proving that certain export certificates were issued illegally. That is in particular the case since the respondent Member State has, contrary to the Commission's assertion, in the procedure before this Court, repeatedly disputed the fact that those certificates issued after the change in the invoicing practice in December 1998 had been issued illegally in the first place.

104. As a result, the Commission has not established, to the requisite standard of proof, that those particular certificates that have been attached to its application in support of its claim for compensation have in fact been affected by impermissible refunds.

105. In sum, the Commission has failed to establish the illegality of the issuance of EXP certificates after December 1998. Since the illegality which forms the basis of the claim for compensation has not been established, the Commission's action cannot prosper, both with regard to the failure to compensate the losses at issue, and to the failure to pay interest.

106. In my view, the reasoning of the Court with regard to the claim brought against the United Kingdom could end at this stage. However, for the sake of completeness and also in view of the parallel claim against the Netherlands,[70] where these issues are of greater relevance, I wish to add two closing remarks (also) on the sufficiently serious nature of the breach and the qualification of the damage in the present case.

(c) A sufficiently serious breach?

107. In any case, even if it were to be found that an illegality was committed at either the 'original' or potentially the 'intermediate' level, I would indeed find it difficult to suggest that the conduct of the United Kingdom in the present case would reach the threshold of a sufficiently serious breach.

69 Above, points 44 and 87.

70 Case C-395/17, *Commission* v *Kingdom of the Netherlands*.

108. The submissions of the parties,[71] as well as the facts in the present case,[72] show that at the time of the relevant events there was an ongoing legal dispute about what constituted a 'refund' of customs duties within the meaning of Article 101(2) of the OCT Decision. The lack of clarity on the concept of 'refunds' was made even more apparent by the subsequent version of the OCT Decision, which established a method for assessing what constituted permissible public financial aid under the trans-shipment regime.[73]

109. The lack of clarity on what counted as a 'refund' at the relevant time precludes the finding that the alleged breach committed by the United Kingdom would reach the threshold of being sufficiently serious. Indeed, the factors which may be taken into consideration to find a 'sufficiently serious breach', include the clarity and precision of the rule breached, whether any error of law was excusable or inexcusable, or the fact that the position taken by an EU institution may have contributed towards the omission.[74]

110. Finally, if, as suggested above,[75] on the facts of this case, it does not appear that the United Kingdom was not empowered to act with regard to the monitoring and follow-up of potential infringements of the OCT Decision by the Anguillan authorities, the same facts should also be considered to the benefit of the same Member State. It should be acknowledged that that Member State, upon detecting potential issues with the export certificates in Anguilla acted in a relatively rapid way. It conducted an investigation as well as alerted the Commission and the other Member States, thus not contributing to or enhancing (by its inactivity or negligence) a breach that could then be qualified as sufficiently serious.

111. As a result, even if the wrongful character of EXP certificates for the relevant period was established, *quid non* at this stage, the breach of EU law attributed to the United Kingdom does not reach the threshold of being a sufficiently serious infringement of EU law that could trigger its duty to compensate for financial damage.

2. Quantifying damage and causal link

112. The United Kingdom has submitted that the Commission has not reconciled particular exemptions or refunds granted by the Government of Anguilla with identified EXP certificates presented to the Italian authorities in order to establish the causal link between the alleged non-compliance with the OCT Decision and the losses incurred in Italy. The United Kingdom has also claimed that the Commission has not established that the EXP certificates at issue caused the loss of own resources since, inter alia, the Commission has not adduced evidence to establish that all affected imports meet the criteria established by Decision REC 03/2004 to be applied to comparable cases.

71 Above, point 90. OLAF's report of 2003 also makes reference to the uncertain interpretation of what exactly could be considered a 'refund of customs duties'. Similarly, the UCLAF Communication of 1999 indicated the need to seek an interpretation of Article 101 of the OCT Decision. Evidence produced by the parties also bears witness to that uncertainty, such as the Draft Minutes of the partnership working party meeting under Article 7(3) of the OCT Decision of 1 December 2003.

72 Above points 15 and 16.

73 Article 36(2) of Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ('Overseas Association Decision') (OJ 2001 L 314, p. 1). (2001 OCT Decision). That provision explicitly states that the aid 'must take the form of an aid for transport of goods put in free circulation, including legitimate running costs supported in relationship with the transhipment procedure'. That provision also mentions explicitly that, at the request of OCT authorities, a partnership working party referred to in Article 7(3) shall be convened to resolve any issues arising from the administration of the transhipment procedure. The lack of clarity in the previous OCT Decision is acknowledged, since, according to recital 15 to that decision 'the procedure for the transhipment of goods not originating in the OCTs but in free circulation there should be completed and clarified, with a view to ensuring a transparent and reliable legal framework for operators and administrations'.

74 See above, point 70 and the case-law cited therein.

75 Above, point 98.

113. The shortcomings in the Commission's case, pointed out by the United Kingdom, concern not only the establishment and quantification of damage itself, but also the issue of a causal link. They partially go back to the lack of clarity in terms of the precise legal obligation breached and ensuing illegality,[76] but also partially reveal additional issues of their own. The events before and during the pre-litigation procedure illustrate the challenges posed with regard to the establishment and quantification of damage in this action.

114. By letter of 27 September 2010, the Commission requested from the United Kingdom an amount of EUR 2 670 001.29, as a result of the information provided by Italy on the application of Decisions REM 03/2004 and REC 03/2004. Only in 2015, after having issued the reasoned opinion and after the United Kingdom had pointed out repeatedly the absence of documents, did the Commission request the Italian authorities to provide it with details of the customs declarations. This additional request for information revealed inaccuracies in the previous assessments as/since, on the basis the new information, the Commission established that the amount to be claimed from the United Kingdom was EUR 1 500 342.31.

115. Acknowledging that the 2003 report of OLAF did not contain sufficient elements to quantify the losses, and in order to verify that amount, the Commission annexed to its application several documents: a list of duties unrecovered by Italy; export certificates issued by Anguilla with the customs declarations for the imports into Italy; and invoices forwarded to the Commission by the Italian authorities.

116. Following a request by this Court, the Commission sought to provide further clarification on how those documents related to each other. However, it confirmed that the verifications and documentary evidence produced did not cover the amounts corresponding to each of the importation operations which were the subject of the Commission's action.

117. At the hearing, the Commission claimed that it is not obliged to prove reconciliation between the refunds granted by Anguillan authorities and the specific EXP certificates, and that it does not bear the burden of proof to establish the restitution (total or partial) of tariffs. Nor should it be obliged to verify the remission decisions taken by Italy. The Commission draws support for its argument from systematic considerations based on the functioning of the customs union. The assessment of the unrecovered amounts falls, according to the Commission, to the Member State where the losses were incurred, which is not obliged to communicate in every case the files to the Commission.

118. Unless the infringement procedure under Article 258 TFEU, and above all, a claim for compensation by the European Union against a Member State hidden within that, is to be conceived of as a (rather one-sided) session of legal impressionism, I am bound to disagree profoundly with the Commission on this point. The Commission, as a claimant, bears the burden of proof. The Commission, if it wishes to obtain compensation of a given amount for a certain specific illegality allegedly committed by a Member State, bears the burden of proving both the illegality, and justifying the amounts claimed, as well as proving the causal nexus between both.

119. Moreover, this succession of events also neatly demonstrates the problems generally outlined above in practice:[77] the automatic application of assessments and calculations of specific amounts made by a Member State under the system of own resources cannot be accepted as a substitute for the establishment and quantification of losses according to the appropriate standards within the requirements for establishing an obligation of compensation.

76 Above, points 101 to 105.

77 Above, points 74 to 84.

VI. Costs

120. Under Article 138(1) 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. The United Kingdom has applied for costs to be awarded against the Commission and the latter has been unsuccessful. The Commission should thus be ordered to pay the costs.

121. Under Article 140(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Therefore the Kingdom of the Netherlands is to bear its own costs.

VII. Conclusion

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

(1) dismiss the action;

(2) order the European Commission to pay the costs;

(3) order the Kingdom of the Netherlands to bear its own costs.