Reports of Cases

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

Case C-395/17

European Commission
v

Kingdom of the Netherlands

(Failure of a Member State to fulfil its obligations — Own resources —Decision 91/482/EEC — Decision 2001/822/EC — Association of the Overseas Countries and Territories with the European Union — Importations of milk powder and rice from Curaçao and meal groats from Aruba — EUR.1 certificates incorrectly issued by the customs authorities of an Overseas Country or Territory — Uncollected customs duties by the Member States 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 Kingdom of the Netherlands has failed to fulfil its obligations under the principle of sincere cooperation, embodied in Article 5 EC at the relevant time. It claims that this is due to the failure to compensate the loss of own resources which should have been made available to the EU's budget. That loss occurred as a result of EUR.1 movement certificates being issued in breach of the Overseas Countries and Territories (OCTs) Decisions [2] by customs authorities of Curaçao and Aruba, two OCTs of the Kingdom of the Netherlands. The Commission is of the view that the Kingdom of the Netherlands is responsible under EU law for the loss of own resources caused by those OCTs. It claims that the duty of sincere cooperation requires a Member State to ensure that uncollected customs duties (including the interest accrued) are made available to the EU budget by that Member State.

2. The foundations of the argument advanced by the Commission in the present case are identical to the claim made by the Commission in a parallel case, Case C-391/17, *Commission* v *United Kingdom of Great Britain and Northern Ireland*, an Opinion for which I shall deliver in parallel to the present case. Can the Commission, by an Article 258 TFEU infringement procedure, seek a declaration that a Member State has infringed the duty of sincere cooperation for failure to compensate the loss to the EU budget, thus effectively requesting a declaration of illegality and an assessment of the damage to be paid at the same time? If so, what elements must be established for the claim to succeed?

1 Original language: English.

2 Council Decision 91/482/EEC 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 1991 OCT Decision') and 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) ('the 2001 OCT Decision').

3. The present case differs from the action against the United Kingdom with regard to the individual alleged infringements: not only are the allegations of breaches attributed to the Kingdom of the Netherlands factually different, but they also relate to different provisions of the OCT Decisions in question. The main difference is that the Kingdom of Netherlands is not contesting the statement that the customs authorities of Curaçao and Aruba did indeed issue EUR.1 certificates in breach of the OCT Decisions. It does, however, dispute that it can be held financially liable for those failures under EU law.

II. Legal framework

A. EU law

4. The relevant provisions of the system of own resources applicable at the material time are identical to those reproduced at points 4 to 10 of my Opinion in *Commission* v *United Kingdom*.

5. Concerning the OCT Decisions, different legislative instruments were applicable to the imports from Curaçao and from Aruba.

6. The 1991 OCT Decision was applicable to the facts relating to imports from Curaçao in the period from 1997 to 2000.

7. According to Article 101(1) of the 1991 OCT Decision, 'products originating in the OCT shall be imported into the Community free of customs duties and charges having equivalent effect'.

8. Article 1 of Annex II to the 1991 OCT Decision, concerning the definition of the concept of 'originating products' and methods of administrative cooperation, states that 'for the purpose of implementing the trade cooperation provisions of the Decision, a product shall be considered to be originating in the OCT, the Community or the ACP States if it has been either wholly obtained or sufficiently worked or processed there'.

9. The relevant sub-provisions, in Article 12(1), (2), (6) and (8) of Annex II to the 1991 OCT Decision read as follows:

'1. Evidence of originating status of products, within the meaning of this Annex, shall be given by a movement certificate EUR.1, a specimen of which appears in Annex 4 to this Annex.

2. A movement certificate EUR.1 may be issued only where it can serve as the documentary evidence required for the purpose of implementing the Decision.

…

6. The movement certificate EUR.1 shall be issued by the customs authorities of the exporting country or territory, if the goods can be considered "originating products" within the meaning of this Annex.

…

8. It shall be the responsibility of the customs authorities of the exporting State to ensure that the forms referred to in paragraph 1 are duly completed. In particular, they shall check whether the space reserved for the description of the products has been completed in such a manner as to exclude all possibility of fraudulent additions. …'

10. By contrast, the 2001 OCT Decision was applicable to the import of groats and 'meal of rice' from Aruba in the period from 2002 to 2003.

11. Article 35 of the 2001 OCT Decision reads as follows:

'1. Products originating in the OCTs shall be imported into the Community free of import duty.

2. The concept of originating products and the methods of administrative cooperation relating thereto are laid down in Annex III.'

12. According to Article 2 of Annex III to the 2001 OCT Decision, concerning the definition of the concept of 'originating products' and methods of administrative cooperation:

'1. For the purpose of implementing the trade cooperation provisions of the Decision, the following products shall be considered as originating in the OCT:

(a) products wholly obtained in the OCT within the meaning of Article 3 of this Annex;

(b) products obtained in the OCT incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the OCT within the meaning of Article 4 of this Annex.

2. For the purpose of implementing paragraph 1, the territories of the OCT shall be considered as being one territory.

…'

13. Article 15 of Annex III to the 2001 OCTDecision states:

'1. A movement certificate EUR.1 shall be issued by the customs authorities of the exporting OCT on application having been made in writing by the exporter or, under the exporter's responsibility, by his authorised representative.

…

4. A movement certificate EUR.1 shall be issued by the customs authorities of the exporting OCT if the products concerned can be considered as products originating in the OCT, in the Community or in the ACP and fulfil the other requirements of this Annex.

…'

B. Law of the Netherlands

14. According to Article 51 of the Statuut voor het Koninkrijk der Nederlanden (Charter for the Kingdom of the Netherlands):

'1. If any organ in the Aruba, Curaçao or St Maarten does not or does not adequately perform its duties as required by this present Charter, an international instrument, a Kingdom Act or an order in council for the Kingdom, the measures to be taken may be determined by Kingdom Act, setting forth the legal grounds and the reasons on which it is based.

2. This matter shall be regulated for the Netherlands, if necessary, in the Constitution of the Kingdom.'

15. Article 52 of the Charter for the Kingdom of the Netherlands is worded as follows: 'With the assent of the King, a country ordinance may confer upon the King as head of the Kingdom and upon the Governor as an organ of the Kingdom, powers with respect to Country affairs.'

III. Facts and pre-litigation procedure

A. Facts

1. EUR.1 certificates issued in Curaçao

16. Curaçao is one of the 'Overseas Countries and Territories of the Kingdom of the Netherlands' that is listed in Annex II to the EC Treaty to which the provisions of Part Four of that Treaty applies. The 1991 OCT Decision also applied to that territory at the relevant time.

17. In September 2000, pursuant to Article 26(6) of Annex II to the 1991 OCT Decision and with the cooperation of customs authorities from the Netherlands and Germany, the European Anti-Fraud Office (OLAF) carried out a mission in Curaçao. The outcome showed that during the period from 1997 to 1999, the customs authorities of Curaçao had issued 109 EUR.1 certificates for milk powder and rice, even though the goods at issue did not meet the requirements for obtaining preferential origin status. Both the OLAF mission report published on 24 October 2000 and the 'origin' section of the Customs Code Committee found that, in Curaçao, milk powder originating from the European Union or third countries was mixed with rice originating from Suriname or Guyana. According to the report, the 'mixing' activities in Curaçao did not confer on the end product the status of 'originating product' in order to benefit from the rules of origin.

18. It is further stated by the Commission that as the goods at issue were subsequently imported into the Netherlands and Germany without customs duties applying to them, the authorities of those two Member States were requested to proceed to post-clearance recovery of customs duties that had not been collected due to the incorrectly granted preferential treatment.

19. In July 2005, the Netherlands made the sum of EUR 778 510.54 available, corresponding to the sum that could not be recovered due to the fact that the claims were time-barred, plus interest. The Commission considers that the Netherlands has fulfilled its obligations with regard to those amounts.

20. According to documents obtained through OLAF's enquiries, the Commission has calculated that uncollected customs duties relating to importations into Germany between 20 February 1997 and 22 February 2000 amount to EUR 18 192 641.95. The German authorities could only establish a small amount of that (EUR 4 838 383) and stated that the remainder had been time-barred.

21. On 19 May 2009 the Commission adopted a decision in Case REC 04/07. That decision was issued upon the request made by Germany asking the Commission to decide on a specific case. The case concerned the importation of a product consisting of a mixture of milk powder and rice from Curaçao made by a German company between January 1999 and April 2000. On 20 December 2006, in view of the OLAF findings from 2000 and after a number of appeals, the German authorities notified the company that it owed customs duties. The company requested a waiver of those duties under Article 220(2)(b) of the Customs Code.[3] The Commission decision states, in the light of the OLAF report, that the customs authorities of the Netherlands Antilles knew or should have known that the product did not qualify for preferential treatment. As the error was committed by the

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

customs authorities and could not reasonably have been detected by an operator acting in good faith, the Commission decided that the post-clearance entry of import duties in the accounts was not justified in that case. Moreover, that decision authorised the waiver of post-clearance entry of duties in the accounts, in cases involving comparable issues of facts and law.

22. By letter of 27 January 2012, the Commission stated that it held the Kingdom of Netherlands liable for the error made by the customs authorities in Curaçao. The Commission thereby requested the Netherlands to compensate the EU budget for this loss of own resources, which amounts to EUR 18 192 641.95, to be paid no later than 20 March 2012 in order to prevent accumulation of interest on late payment (based on Article 11 of Regulation No 1150/2000).

23. After two reminder letters of 12 June 2012 and 21 January 2013, the Kingdom of the Netherlands replied on 14 June 2013, disagreeing with the legal standpoint of the Commission and denying all financial liability.

2. EUR.1 certificates issued in Aruba

24. Aruba is also one of the OCTs of the Kingdom of the Netherlands listed in Annex II to the EC Treaty to which Part Four of that Treaty applies. At the material time, the 2001 OCT Decision also applied to that territory.

25. In the period between 4 August 2002 and 18 June 2003, 1 929 import declarations together with EUR.1 certificates were submitted for release for free circulation in the Netherlands of goods declared as consignments of groats and meal of rice originating from Aruba.

26. After carrying out an enquiry, OLAF informed the authorities of the Netherlands on 23 December 2004 that the Aruban authorities had issued EUR.1 origin certificates for products which did not meet the requisite conditions to qualify as products of preferential origin. That was because the processing activities were insufficient to confer Aruban origin on the goods concerned.

27. On 1 August 2005, the Netherlands authorities sent an order requesting payment of EUR 298 080 to the importer. The importer challenged that order before national courts. The Rechtbank Haarlem (Harlem District Court, Netherlands) held that even though the products had not acquired Aruban origin, the request of the importer on the basis of Article 220(2)(b) of the Customs Code had to be granted. The Netherlands authorities communicated this judgment to the Commission in 2010 in the framework of Article 870(2) of Commission Regulation (EEC) No 2454/93. [4]

28. By letter of 31 May 2012, the Commission held the Kingdom of the Netherlands financially liable for the errors made by the Aruban customs authorities. It requested that that Member State make available the corresponding amount of EUR 298 080 no later than 20 July 2012.

29. After two reminder letters of 5 October 2012 and 9 April 2013, the Kingdom of the Netherlands replied on 14 June 2013. It disagreed with the legal standpoint of the Commission, and denied all financial liability.

B. Pre-litigation procedure

30. Considering that the Kingdom of the Netherlands had not fulfilled the obligations incumbent upon it under the Treaty, the Commission issued a letter of formal notice on 21 November 2013.

4 Commission Regulation of 2 July 1993 laying down provisions for the implementation of Council Regulation No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

31. The Kingdom of the Netherlands replied on 20 February 2014. In its response, it did not dispute the facts of the case. However it denied any financial liability for the consequences of the administrative errors made by the customs authorities in Aruba and Curaçao.

32. On 17 October 2014, the Commission sent its reasoned opinion to the Kingdom of the Netherlands, in which it maintained the standpoint set out in the letter of formal notice. The given time period to take the required measures in order to comply with that reasoned opinion ended on 17 December 2014. A request from the Kingdom of the Netherlands to extend this time period to January 2015 was rejected by the Commission by letter of 22 December 2014.

33. In the letter of 19 November 2015, the Kingdom of the Netherlands replied to the reasoned opinion declining any financial liability.

34. Since the Kingdom of the Netherlands has not made the sum of EUR 18 490 721.95 plus interest available to the EU budget, the Commission decided to bring the present action.

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

35. By its application of 30 June 2017, the Commission claims that the Court should:

– Declare that the Kingdom of the Netherlands has failed to comply with its obligations pursuant to Article 5 (subsequently Article 10) of the Treaty establishing the European Community (now Article 4(3) TEU) in not compensating the loss of the amounts of own resources which had to be established and made available for the Union budget pursuant to Articles 2, 6, 10, 11 and 17 of [Regulation (EEC, Euratom) No 1552/89] [5] …if no movement certificates EUR.1 were issued in breach of Article 101(1) of Council Decision 91/482 and Article 12(6) of Annex II to that decision for the import of milk powder and rice from Curaçao in the period from 1997 to 2000, Article 35(1) of Council Decision 2001/822 and Article 15(4) of Annex III to that decision respectively for the import of groats and meal [of rice] from Aruba in the period 2002 to 2003;

– Order the Kingdom of the Netherlands to pay the costs.

36. The Kingdom of the Netherlands claims that the Court should:

– declare the action inadmissible;

– in the alternative, dismiss the action as unfounded;

– order the Commission to pay the costs.

37. By decision of the President of the Court of 4 January 2018, the United Kingdom was granted leave to intervene in support of the form of order sought by the Kingdom of the Netherlands.

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

5 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), as amended by Council Regulation (EEC, Euratom) No 1355/96 of 8 July 1996 (OJ 1996 L 175, p. 3).

V. Assessment

39. Before turning to the merits of the action, a plea of inadmissibility raised by the Kingdom of the Netherlands must first be addressed.

40. It is established case-law that the essential points of law and fact on which an action is based must be indicated coherently and intelligibly in the application itself. The application must allow the Member State and the Court to grasp the scope of the alleged infringement of EU law accurately. It must enable the Member State to present an effective defence and the Court to determine whether there has been a breach of the obligations in question. [6]

41. In the present case, the Kingdom of the Netherlands disputes the admissibility of the action on the ground that it does not meet those requirements. That Member State stresses, in particular, that the application of the Commission is not coherent. That is because in some points of its action, the Commission appears to argue that the Kingdom of the Netherlands is directly liable under EU law for the actions of the OCT authorities, as if they were its own authorities, whereas in other points the Commission highlights the fact that the Kingdom of the Netherlands has not adopted 'appropriate measures' to avoid the incorrect issuance of EUR.1 certificates by the customs authorities of Aruba and Curaçao.

42. I agree that the Commission is not clear on this issue. However, from my point of view, that shortcoming is simply a weakness of the Commission's reasoning on the merits of the case, connected to the difficulty to articulate with precision the specific legal obligation allegedly breached by the Kingdom of the Netherlands by not compensating the EU's budget.

43. However, I am not convinced that this lack of legal precision is enough to render the action incomprehensible and thus inadmissible. It appears to me that the Kingdom of the Netherlands has been able to understand the nature and the scope of the alleged failure. I find that it has effectively exercised its rights of defence with regard to those allegations. The subject matter of the action has been identified in sufficient detail, so the Court will not be ruling *ultra petita*. Therefore, in my view, the present action should be declared admissible.

A. The exact nature of the claim

44. The Commission seeks a declaration that the Kingdom of the Netherlands has failed to comply with its obligations pursuant to Article 5 EC. It alleges that this is because it has not compensated the loss of an amount of own resources, which had to be established and made available to the EU budget pursuant to Articles 2, 6, 10, 11 and 17 of Regulation No 1552/89. It argues that that would have occurred if no EUR.1 movement certificates had been issued in breach of the OCT Decisions. In particular, the provisions breached are (a) Article 101(1) of the 1991 OCT Decision and Article 12(6) of Annex II to that decision for the import of milk powder and rice from Curaçao in the period from 1997 to 2000, and (b) Article 35(1) of the 2001 OCT Decision and Article 15(4) of Annex III to that decision for the import of groats and meal of rice from Aruba in the period 2002 to 2003.

45. In points 33 to 46 of my parallel Opinion in *Commission* v *United Kingdom*, I have outlined the challenges that such a 'cascading' or 'Russian doll' structure of the claim issued by the Commission poses. However, having unpacked the claim brought by the Commission in that Opinion, I suggested that as to its nature, the claim is in effect one for a declaration of failure to compensate for losses/damage caused to the EU's own resources by the alleged illegality, attributable to a Member

6 See, for example, judgment of 22 October 2014, *Commission* v *Netherlands* (C-252/13, EU:C:2014:2312, paragraphs 33 and 34 and the case-law cited).

State. The key difference lies in the subject matter of the action, which is not only concerned with the *abstract declaration* relating to an ongoing failure of a Member State to comply with EU law, but also, in fact, with the request to state the illegality and to quantify damage with regard to *specific breaches* of EU law in the past.

46. In points 48 to 64 of the same Opinion, I suggested that I see nothing in the wording, purpose and overall scheme of the Treaties that should prevent, in principle, the Commission from bringing such an action before this Court as an Article 258 TFEU infringement action. However, I also suggested that if the Commission is asking for the payment of specific and exact amounts of losses allegedly caused by a Member State by specific breaches of EU law, it must establish both that illegality and the losses concerned in line with the standards and conditions required for State liability (points 65 to 73). It cannot 'transpose' the specific regime of own resources to another Member State to which that standard is clearly not applicable (points 74 to 84).

47. All those elements are equally applicable in the context of the present case, certainly as far as the situation in Curaçao is concerned. There too, the alleged loss of own resources incurred in *another Member State* (B). The situation in Aruba is somewhat different. Given that the Commission has pleaded this case as a common infringement allegedly committed by the Netherlands with regard to both OCTs, I shall discuss both situations together. However, as a closing note to this section, I wish to highlight the relevance of the fact that with regard to the imports from Aruba, the loss to own resources was incurred directly *on the territory of the Netherlands* (C).

B. Application to the present case

48. The Commission claims that the Kingdom of the Netherlands has failed to comply with its obligations under the principle of sincere cooperation. That is because it has not compensated the losses to own resources which should have been established and made available to the EU budget, pursuant to Regulation No 1552/89 and Regulation No 1150/2000, had the EUR.1 movement certificates not been issued in breach of the relevant provisions of the OCT Decisions for the imports of milk powder and rice from Curaçao from 1997 to 2000 and of groats and meal of rice from Aruba from 2002 to 2003.

49. In order to establish whether there has been a failure to comply with the obligation to compensate losses, as claimed by the Commission, it is necessary to ascertain whether such an obligation to compensate exists in the first place: exactly what legal obligation is the Kingdom of the Netherlands supposed to have breached by not compensating the EU's budget? Next, in order to trigger State liability for losses thus caused to the European Union, that breach has to be sufficiently serious, and there must be a causal link between the sufficiently serious breach and the alleged damage that has occurred, for which compensation has been requested.

1. Illegality (amounting to a sufficiently serious breach)

50. According to the OCT Decisions (Article 101(1) of the 1991 OCT Decision and Article 35(1) of the 2001 OCT Decision), products originating in the OCTs shall be imported into the European Union without being subject to customs duties and charges having equivalent effect. The quality of originating products must be recorded in EUR.1 certificates as described in Annex II to the 1991 OCT Decision and in Annex III to the 2001 OCT Decision.

51. In the course of the pre-litigation procedure, the Kingdom of the Netherlands has acknowledged that the customs authorities of both Curaçao and Aruba did not comply with the relevant provisions regarding EUR.1 certificates. They had issued certificates for products that did not meet the abovementioned conditions. It is therefore not disputed that the authorities of Curaçao and Aruba made errors when issuing EUR.1 certificates which were contrary to the applicable OCT Decisions.

52. Nor has the Kingdom of the Netherlands disputed the sums requested by the Commission (EUR 18 490 721.95 corresponding to EUR 18 192 641.95 for the certificates issued in Curaçao, and EUR 298 080 for the certificates issued in Aruba) as representing the total value of the customs duties that would have been collected if the imported goods had not been granted preferential status.

53. Thus, the 'original breach', in the present case, in contrast to Case C-391/17, *Commission* v *United Kingdom*,[7] is not in dispute. I am indeed aware of the line of case-law of this Court suggesting that 'it is for the Court, in any event, to determine whether or not the alleged breach of [the obligation] exists, even if the Member State concerned does not deny the breach'.[8] However such a statement should in my view be reasonably interpreted as applying to the scope and extent of legal obligations that are being invoked in the framework of an infringement procedure, and that is to be interpreted and assessed by the Court independently. Such a statement is hardly applicable to facts that are not contested.

54. The key issue in the present case therefore becomes understanding the exact source of the legal obligation for the Kingdom of the Netherlands to compensate the EU's budget in such a situation (a), and whether disregard of that obligation could be considered to amount to a sufficiently serious breach (b).

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

55. The Commission does not claim that the breaches of the OCT Decisions would be directly attributable to the Kingdom of the Netherlands. As indicated in the examination of the objection of inadmissibility,[9] despite some confusion on this matter in its written submissions, the Commission confirmed that it was not the purpose of its action to determine to whom the infringements of the OCT Decisions are attributable, when asked explicitly for clarification about this at the hearing.

56. For the reasons I set out in points 91 to 97 in my parallel Opinion in *Commission* v *United Kingdom*, I would accept that there is indeed, in any case, an *overall responsibility* of a Member State that has a special relationship with the OCT in question to take all the appropriate measures to prevent and follow up on breaches of EU law which may arise from the behaviour (acts or failures to act) in the framework of the association regime. However, as was also explained in that Opinion, from that overall statement, there is still a rather long argumentative way to go before one could (if at all) arrive at the outcome that that Member State is also automatically financially liable for any sum set by the Commission which should have been established and made available as own resources of the European Union in another Member State. Would it then also automatically mean that, via the Article 258 TFEU procedure, the Commission may request payment for any alleged breaches of the OCT Decisions from Member States that have a special relationship with an OCT, irrespective of the nature of that breach and/or the dispute settlement procedures provided in the respective association regimes? Would EU law then essentially require the full reintroduction of direct administration by the Member State with which they have 'a special relationship'?

7 See points 101 to 106 of that Opinion.

8 See, for example, judgments of 22 June 1993, *Commission* v *Denmark* (C-243/89, EU:C:1993:257, paragraph 30); of 3 March 2005, *Commission* v *Germany* (C-414/03, EU:C:2005:134, paragraph 9); of 6 October 2009, *Commission* v *Sweden* (C-438/07, EU:C:2009:613, paragraph 53); and of 16 January 2014, *Commission* v *Spain* (C-67/12, EU:C:2014:5, paragraph 30 and the case-law cited).

9 Above, points 39 to 43 of this Opinion.

57. Similar to the approach proposed in Case C-391/17, *Commission* v *United Kingdom*, I do not think that the Court would need to address that issue in the context of the present case in any great detail. Even if it were accepted, under the general regime of State liability for losses caused to the EU, that the imputed illegality would consist of not putting in place sufficient safeguards and controls that could have prevented the issuance of illegal certificates by the OCT authorities,[10] I simply cannot see, on the facts and context of the present case, how such a breach could be qualified as being sufficiently serious.

(b) A sufficiently serious breach?

58. Unlike the *objective* standard employed in the assessment of the breach of EU law in the context of a traditional infringement action, the standard to be met when assessing the breach of EU law which arguably gave rise to the losses to own resources to be compensated by a Member State is higher. Not every illegality automatically gives rise to liability. A *sufficiently serious breach* must be present in order to trigger an obligation to compensate for damage caused to the European Union by a Member State.

59. According to the case-law of the Court, the test to ascertain whether a sufficiently serious breach is present is 'discretion-dependent'. Where the Member States have discretion, a sufficiently serious breach means that there has been an obvious and serious disregard by a Member State of the limits to that discretion.[11]

60. Moreover, other factors to be taken into account when assessing the 'sufficient seriousness' of a breach of EU law 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'.[12]

61. Three elements are of particular relevance in this regard in the present case. The first is the wide margin of discretion enjoyed by the Kingdom of the Netherlands when deciding on the appropriate measures to comply with the 'main obligation' in the light of the principle of respect for its constitutional arrangements and constitutional identity. The second is the allocation of competences and the institutional framework of the OCT Decisions, which directly entrusts OCT authorities with responsibilities to carry out in application of the OCT Decisions. The third, and perhaps a particularly important one, is the unclear nature of the regime of liability of a Member State which has a special relationship with an OCT(s) in the framework of the OCT Decisions with regard to administrative errors committed by the authorities of the OCTs.

10 To which it could be naturally replied that such an obligation is simply impossible, because no system is infallible. Furthermore, the standard of 'making sure that a system introduced does not produce mistakes and if it does, that Member State is responsible for them' in fact amounts to suggesting direct liability and direct administration with regard to the OCTs, which the Commission stated that it did not wish to argue (above, points 41 to 42 and 55 to 56 of this Opinion).

11 See for example, with regard to the non-contractual liability of the European Union, judgment of 4 April 2017, *European Ombudsman* v *Staelen* (C-337/15 P, EU:C:2017:256, paragraph 37). Similarly, regarding Member States, a sufficiently serious a breach implies 'a manifest and grave disregard by the Member State for the limits set on its discretion'. See, for example, judgment of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 105).

12 Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 56), and of 26 March 1996, *British Telecommunications* (C-392/93, EU:C:1996:131, paragraphs 42 to 45).

62. First, the Commission, without pointing specifically to the measures that, in its view, the Kingdom of the Netherlands ought to have taken, has referred to Articles 51 and 52 of the Charter for the Kingdom of the Netherlands.[13] The Government of the Netherlands has replied that holding that Member State responsible for the acts of the customs authorities of Aruba and Curaçao would be in contravention of Article 4(2) TEU.[14]

63. The OCT Decisions indeed expressly recognise the need to respect the constitutional framework of the relationship between OCTs and the Member States with which they have a special relationship. The specific partnership mechanism incorporated within the system of the OCT Decisions aims to be respectful of the constitutional allocation of competences and responsibilities between OCTs and the Member States, as is apparent, in particular, from recital 12 and Article 10 of the 1991 OCT Decision, and is further reflected in Articles 234 to 236 of that decision, as well as in Article 7 of the 2001 OCT Decision. These provisions show that the EU legislature wished to strike a balance between the need to ensure the effectiveness of the association with OCTs, on the one hand, and the respect for the particular and often rather complex constitutional arrangements of Member States and their OCTs on the other (which lies at the heart of Part Four of the EC Treaty, devoted to a regime of *association* with OCTs).

64. Second, as the Government of the Netherlands has put forward in its written submissions, the OCT Decisions provide for express competences for the authorities of OCTs which are different from those of the Member States, in particular, in the partnership mechanism and in the specific provisions regarding administrative cooperation. The OCT Decisions recognise specific competences of the authorities of the OCTs, both as regards the general partnership mechanism as well as the specific system of administrative cooperation in the field of the issuance of EUR.1 certificates.[15] Moreover, Article 9 of the 2001 OCT Decision explicitly recognises the primary role of the authorities of the OCTs in the day-to-day management of the decision in the field of trade, and the subsidiary role of the Member States ('should the need arise'), and always 'in accordance with the institutional, legal and financial powers of each of the partners'.

65. It is difficult to infer from this how, in the specific context of allocation of competences, the errors of the customs authorities of an OCT would automatically and immediately give rise to a breach of the duty of sincere cooperation on the part of the concerned Member State, where there are no other qualifying circumstances, which do not seem to be present in this case. Indeed, the Commission has not adduced any other argument, such as the disregard of warnings, non-cooperation with OLAF, disregard or lack of follow-up of wrongful acts about which that Member State knew or should reasonably have known, absence of participation or collaboration within the mechanisms of the partnership procedure, or the system of administrative cooperation.

66. Third, and in my view, quite importantly, the fact remains that there are not (and there never were) any explicit obligations in the OCT Decision establishing a specific regime of liability of Member States for acts of the OCTs, be it in the specific context of customs cooperation or in general. Indeed, both parties in these infringement proceedings have drawn the attention of the Court to the *travaux préparatoires* of the 2013 OCT Decision, where such a provision was proposed by the Commission,[16] but clearly rejected in the legislative process in the Council. The statements attached

13 Cited above in points 14 and 15 of this Opinion.

14 Article 4(2) TEU embodies the duty of the Union to 'respect … [the] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

15 See, with regard to the 1991 OCT Decision, Article 12(6) of Annex II; see also Article 108(1). With regard to the 2001 OCT Decision, see Article 15(5) and Article 32 of Annex III.

16 Proposal for a Council Decision on the association of the overseas countries and territories with the European Union ('Overseas Association Decision'), COM(2012) 362 final.

with regard to the Commission's proposal to the Council minutes — both by the Commission and by a group of Member States [17] — bear witness to the fact that the issue of the liability of Member States for the acts of its OCTs concerning the latter's administrative errors could hardly be seen as a non-contentious issue that would clearly emerge from the different versions of the OCT Decision.

67. In view of all these elements, even if it were to be accepted that the duty of sincere cooperation could be stretched so far as to amount to the duty of compensating the EU for losses caused by breaches of EU law committed by an OCT by the Member State with which the OCT in question has special relationship, the Kingdom of the Netherlands could not be censured for committing a sufficiently serious breach of the duty of sincere cooperation in the present case.

2. A remark on the temporal element

68. The Kingdom of the Netherlands has also argued in its defence that holding it liable for errors committed by the customs authorities in Aruba and Curaçao would entail an infringement of the principles of legal certainty and good administration. This is because the Commission did not act within a reasonable period of time. [18] The Commission enquired into the situation some 11 years (with regard to Curaçao) and 7 years (with regard to Aruba) after OLAF had found irregularities.

69. In response to that argument, the Commission stated that the losses to 'own resources' did not become definitive until 2009, through the adoption of the REC decision and the judgment by a national court. Therefore, the liability of the Kingdom of the Netherlands should not be time-barred. At the hearing, the Commission insisted that according to the case-law of the Court, infringement actions are not subject to any limitation periods. Moreover, the Commission also stated at the hearing that the application by analogy of Article 73a of Regulation (EC, Euratom) No 1605/2002, [19] which provides for a time limitation of five years for entitlements of the European Union in respect of third parties and vice versa, should not be admitted. The Commission further argues that, according to the case-law of the Court, there are no limitation periods for the collection of own resources. [20]

70. It may seem surprising to mention the issue of potentially applicable time limits to an action at the end of the substantive assessment of that action. However, as I am suggesting that the Court dismiss the present action, as well as the parallel case against the United Kingdom on the merits, there is indeed no need to discuss the issue of time limits separately at this stage. I nonetheless wish to mention that issue to illustrate a different element: the consequences of the 'three in one' approach chosen by the Commission for these two cases, [21] which in effect make it difficult to state what time limits, if any, should be applicable to such an action.

17 Council Document 16832/13 ADD 1 of 19 December 2013. According to the statement by the Commission, the new rule on financial liability would be a mere codification of an obligation already existing under the Treaties. Denmark, the Netherlands and the United Kingdom firmly rejected that view.

18 The Kingdom of the Netherlands is referring in this regard to the judgment of 13 November 2014, *Nencini* v *Parliament* (C-447/13 P, EU:C:2014:2372, paragraphs 38, 47 and 48.

19 Council Regulation of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

20 Citing the judgment of 12 September 2000, *Commission* v *France* (C-276/97, EU:C:2000:424, paragraph 63).

21 Which is yet another example of the overall 'mixing and matching' approach to applicable rules from various regimes, permeating both of these cases, and discussed in detail in my parallel Opinion in Case C-391/17, *Commission* v *United Kingdom*, in particular points 38 to 42 and 65 to 84.

71. Indeed, in its reasoning, the Commission has imported elements belonging to the specific nature of infringement proceedings of Article 258 TFEU (no time limitations for bringing an infringement action)[22] as well as from the application of the specific system of own resources (no time limitations for actions connected to recovery),[23] and claims that they are applicable to an action which ultimately relies on the determination of an obligation to compensate for losses, disregarding the fact that actions for State liability are generally subject to limitation periods.[24]

C. A closing note on the case of Aruba

72. Finally, throughout this case, the Commission has argued that there is one common infringement of EU law emanating from the incorrect issuing of EUR.1 certificates in Aruba and Curaçao.

73. However, regarding the situation in Aruba, it must be highlighted that the EUR.1 certificates were presented and accepted through the customs procedures carried out by the Netherlands. The Netherlands customs authorities tried to collect customs duties, by sending an order for payment to the importer. The importer, however, successfully challenged that order before national courts, which ruled in its favour on the basis of Article 220(2)(b) of the Customs Code.

74. It must however be recalled that, as follows from the judgment of the Court in *Commission* v *Denmark*, the application of Article 220(2)(b) of the Customs Code does not preclude the obligation of the Member State to establish and make available funds that belong to the EU's own resources, which have not been collected from private importers. Indeed, 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 have been met. It is only the fulfilment of the conditions laid down in Article 17(2) of Regulation No 1552/89 (*force majeure* or reasons not attributable to the Member State which made the amounts irrecoverable) which enables a Member State to discharge itself from that obligation.[25]

75. However, as the Kingdom of the Netherlands has correctly pleaded in its written submissions, the Commission has not claimed a direct breach of the 'own resources regulation' which is attributable to the Netherlands customs authorities for failing to recover customs duties for importation into the territory of the Netherlands. The Commission has thus not provided any information to ascertain whether the conditions of Article 17(2) of Regulation No 1552/89, as amended, were given in the present case. Instead, the Commission chose to plead a different case.

76. Thus, since no such declaration was requested by the Commission, and, in any case, as the Court would not be in a position to give any ruling in that regard due to lack of evidence, I propose that the action of the Commission also be declared unfounded with regard to the situation in Aruba.

22 See, for example, judgment of 6 May 2010, *Commission* v *Poland* (C-311/09, not published, EU:C:2010:257, paragraph 19 and the case-law cited). See on this discussion Opinion of Advocate General Alber in *Commission* v *United Kingdom* (C-359/97, EU:C:2000:42, point 96). However, the excessive duration of the pre-litigation period must not infringe the rights of defence of the Member State. See, to that effect, judgments of 16 May 1991, *Commission* v *Netherlands* (C-96/89, EU:C:1991:213, paragraph 16), and of 12 September 2000, *Commission* v *United Kingdom* (C-359/97, EU:C:2000:426, paragraph 28).

23 See, for example, judgment of 5 October 2006, *Commission* v *Netherlands* (C-312/04, EU:C:2006:643, paragraph 32).

24 For example, as far as the liability of the EU is concerned, Article 46 of the Statute of the Court of Justice of the European Union sets a time limitation of five years from the occurrence of the event giving rise to liability, which shall be interrupted if proceedings are instituted before the Court or if an application is made by the aggrieved party to the relevant EU institution. As far as Member States' liability is concerned, deadlines imposed by national law for claims in respect of debts owed by the State are admitted if they comply with the principles of equivalence and effectiveness. See, for example, judgment of 24 March 2009, *Danske Slagterier* (C-445/06, EU:C:2009:178, paragraphs 31 to 35).

25 Judgment of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraph 66). See also judgment of 17 July 2014, *Commission* v *Portugal* (C-335/12, EU:C:2014:2084, paragraph 79).

VI. Costs

77. 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 Kingdom of the Netherlands has applied for costs to be awarded against the Commission and the latter has been unsuccessful. The Commission must therefore be ordered to pay the costs.

78. Under Article 140(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. In accordance with that provision, the United Kingdom is to bear its own costs.

VII. Conclusion

79. 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 United Kingdom of Great Britain and Northern Ireland to bear its own costs.