Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2022*

Table of contents

* Language of the case: English.

(Failure of a Member State to fulfil obligations – Article 4(3) TEU – Article 310(6) and Article 325 TFEU – Own resources – Customs duties – Value added tax (VAT) – Protection of the financial interests of the European Union – Combating fraud – Principle of effectiveness – Obligation for Member States to make own resources available to the European Commission – Financial liability of Member States in the event of losses of own resources – Imports of textiles and footwear from China – Large-scale and systematic fraud – Organised crime – Missing importers – Customs value – Undervaluation – Taxable amount for VAT purposes – Lack of systematic customs controls based on risk analysis and carried out prior to the release of the goods concerned – No systematic provision of security – Method used to estimate the amount of traditional own resources losses in respect of imports presenting a significant risk of undervaluation – Statistical method based on the average price determined at EU level – Whether permissible)

In Case C-213/19,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 7 March 2019,

European Commission, represented by L. Flynn and F. Clotuche-Duvieusart, acting as Agents,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented initially by F. Shibli, S. Brandon, Z. Lavery and S. McCrory, subsequently by F. Shibli and S. McCrory, acting as Agents, and by J. Eadie QC and I. Rogers QC, and by S. Pritchard, T. Sebastian and R. Hill, Barristers,

defendant,

supported by:

Kingdom of Belgium, represented by J.-C. Halleux, P. Cottin and S. Baeyens, acting as Agents,

Republic of Estonia, represented by N. Grünberg, acting as Agent,

Hellenic Republic, represented by M. Tassopoulou, acting as Agent,

Republic of Latvia, represented initially by K. Pommere, V. Soņeca and I. Kucina, and subsequently by K. Pommere, acting as Agents,

Portuguese Republic, represented by P. Barros da Costa, S. Jaulino, L. Inez Fernandes and P. Rocha, acting as Agents,

Slovak Republic, represented by B. Ricziová, acting as Agent,

interveners,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, A. Prechal (Rapporteur), I. Jarukaitis, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, J.-C. Bonichot, T. von Danwitz, M. Safjan, A. Kumin and N. Wahl, Judges,

Advocate General: P. Pikamäe,

Registrar: M.A. Gaudissart, Deputy Registrar,

having regard to the written procedure and further to the hearing on 8 December 2020,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2021,

gives the following

Judgment

1 By its application, the European Commission asks the Court to declare that:

– by failing to enter in the accounts the correct amounts of customs duties and to make available to the Commission the correct amount of traditional own resources and own resources accruing from value added tax (VAT) in respect of certain imports of textiles and footwear from China ('relevant imports'), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 2 and 8 of Council Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union (OJ 2014 L 168, p. 105), Articles 2 and 8 of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), Articles 2, 6, 9, 10, 12 and 13 of Council Regulation (EU, Euratom) No 609/2014 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), as amended by Council Regulation (EU, Euratom) 2016/804 of 17 May 2016 (OJ 2016 L 132, p. 85) ('Regulation No 609/2014'), Articles 2, 6, 9, 10, 11 and 17 of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources (OJ 2000 L 130, p. 1), Article 2 of Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the definitive uniform arrangements for the collection of own resources accruing from value added tax (OJ 1989 L 155, p. 9), as well as Article 105(3) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) ('the Union Customs Code'), and Article 220(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 13) ('the Community Customs Code'),

  as a consequence of its failure to fulfil its obligations under Article 4(3) TEU, Article 325 and Article 310(6) TFEU, Articles 3 and 46 of the Union Customs Code, Article 13 of the Community Customs Code, Article 248(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 3254/1994 of 19 December 1994 (OJ 1994 L 346, p. 1) ('Implementing Regulation I'), Article 244 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation No 952/2013 (OJ 2015 L 343, p. 558) ('Implementing Regulation II'), Article 2(1)(b) and (d), Articles 83 and 85 to 87, and Article 143(1)(d) and (2) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, and corrigendum OJ 2007 L 335, p. 60), as amended by Council Directive 2009/69/EC of 25 June 2009 (OJ 2009 L 175, p. 12) ('Directive 2006/112'),

  the corresponding losses of traditional own resources to be made available to the Commission, less collection costs, amounting to:

  – EUR 496 025 324.30 in 2017 (until 11 October 2017 inclusive);

  – EUR 646 809 443.80 in 2016;

– EUR 535 290 329.16 in 2015;

– EUR 480 098 912.45 in 2014;

– EUR 325 230 822.55 in 2013;

– EUR 173 404 943.81 in 2012;

– EUR 22 777 312.79 in 2011;

– by failing to provide the Commission with all the information necessary to determine the amounts of traditional own resources lost and by not providing it, as requested, with the content of the advice of the legal department of Her Majesty's Revenue & Customs ('HMRC') or the reasons for the decisions cancelling the customs debts established, the United Kingdom has failed to fulfil its obligations under Article 4(3) TEU and Article 2(2) and (3)(d) of Council Regulation (EU, Euratom) No 608/2014 of 26 May 2014 laying down implementing measures for the system of own resources of the European Union (OJ 2014 L 168, p. 29).

I. Legal context

A. Law on own resources

1. Decisions relating to the system of own resources

2 As regards the period from November 2011 to 11 October 2017 inclusive ('the infringement period'), in respect of which the Commission claims in the present proceedings that the United Kingdom failed variously to fulfil its obligations under EU law, two decisions relating to the system of own resources of the European Union were successively applicable: Decision 2007/436 and, with effect from 1 January 2014, Decision 2014/335.

3 Under Article 2(1)(a) and (b) of Decision 2014/335, the wording of which is essentially identical to that of Article 2(1)(a) and (b) of Decision 2007/436, revenue from the following is to constitute own resources entered in the budget of the European Union: 'traditional own resources consisting of … Common Customs Tariff duties and other duties established or to be established by the institutions of the Union in respect of trade with third countries', and 'the application of a uniform rate valid for all Member States to the harmonised VAT assessment bases determined in accordance with Union rules'.

4 Article 8(1) of those decisions provides, in the first subparagraph, that Common Customs Tariff duties, as the European Union's own resources, are to be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which are, where appropriate, to be adapted to meet the requirements of EU rules, and, in the third subparagraph, that Member States are to make the resources provided for in Article 2(1)(a), (b) and (c) of those decisions available to the Commission.

2. Regulations on the methods and procedure for making available own resources

5 As regards the infringement period, two regulations on making available the own resources of the European Union were successively applicable: Regulation No 1150/2000 and, with effect from 1 January 2014, Regulation No 609/2014.

6 Under Article 2(1) of Regulation No 609/2014, the content of which is, in essence, identical to that of Article 2(1) of Regulation No 1150/2000:

'For the purpose of applying this Regulation, the Union's entitlement to the traditional own resources referred to in Article 2(1)(a) of Decision [2014/335] 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.'

7 Article 6(1) and the first and second subparagraphs of Article 6(3) of Regulation No 609/2014, the content of which is, in essence, identical to that of Article 6(1) and (3)(a) and (b) of Regulation No 1150/2000, provides:

'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.

…

3. Entitlements established in accordance with Article 2 shall, subject to the second subparagraph of this paragraph, be entered in the accounts[, commonly known as "the A account",] at the latest on the first working day after the nineteenth day of the second month following the month during which the entitlement was established.

Established entitlements not entered in the accounts referred to in the first subparagraph, 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 the first subparagraph[, commonly known as "the B account"]. 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.

…'

8 As originally worded, the first subparagraph of Article 9(1) of Regulation No 609/2014, the content of which was, in essence, identical to that of the first subparagraph of Article 9(1) of Regulation No 1150/2000, provided:

'In accordance with the procedure laid down in Article 10, each Member State shall credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed.'

9 Since 1 October 2016, that provision has been worded as follows:

'In accordance with the procedure laid down in Articles 10, 10a and 10b, each Member State shall credit own resources to the account opened in the name of the Commission with its treasury or national central bank. Subject to the application of negative interest as referred to in the third subparagraph, that account may only be debited upon instruction by the Commission.'

10 As originally worded, Article 12(1) and (3) of Regulation No 609/2014, the content of which was, in essence, identical to that of Article 11(1) and (3) of Regulation No 1150/2000, was worded as follows:

‘1. 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.

…

3. In the case of Member States not belonging to the Economic and Monetary Union, the rate shall be equal to the rate applied on the first day of the month in question by the Central Banks for their main refinancing operations, increased by two percentage points, or, for the Member States for which the Central Bank rate is not available, the most equivalent rate applied on the first day of the month in question on the Member State’s money market, 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.’

11 Since 1 October 2016, Article 12(5) of Regulation No 609/2014, replacing Article 12(3) thereof, has provided:

‘In the case of Member States not belonging to the Economic and Monetary Union, the interest rate shall be equal to the rate applied on the first day of the month in question by the central banks for their main refinancing operations, or 0 per cent, whichever is higher, increased by 2.5 percentage points. For the Member States for which the central bank rate is not available, the interest rate shall be equal to the most equivalent rate applied on the first day of the month in question on the Member State’s money market, or 0 per cent, whichever is higher, increased by 2.5 percentage points.

This rate shall be increased by 0.25 of a percentage point for each month of delay.

The total increase pursuant to the first and the second subparagraphs shall not exceed 16 percentage points. The increased rate shall be applied to the entire period of delay.’

12 Article 13 of Regulation No 609/2014, entitled ‘Irrecoverable amounts’, the content of which is, in essence, identical to that of Article 17 of Regulation No 1150/2000, provides:

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

2. Member States shall be released from the obligation to place at the disposal of the Commission the amounts corresponding to entitlements established under Article 2 which prove irrecoverable for either of the following reasons:

(a) for reasons of *force majeure*;

(b) for other reasons which cannot be attributed to them.

Amounts of established entitlements shall be declared irrecoverable by a decision of the competent administrative authority finding that they cannot be recovered.

Amounts of established entitlements shall be deemed irrecoverable, at the latest, after a period of five years from the date on which the amount has been established in accordance with Article 2 or, in the event of an administrative or judicial appeal, the final decision has been given, notified or published.

…

3. Within three months of the administrative decision mentioned in paragraph 2 of this Article or in accordance with the time limits referred to in that paragraph, Member States shall provide a report to the Commission with information on those cases where paragraph 2 of this Article has been applied provided the established entitlements involved exceed EUR 50 000.

That report shall include all the facts necessary for a full examination of the reasons referred to in paragraph 2(a) and (b) of this Article, which prevented the Member State concerned from making available the amounts in question, and the recovery measures the Member State took in the case or cases in question.

That report shall be made on a form established by the Commission. For that purpose the Commission shall adopt implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in paragraph 2 of Article 16.

4. The Commission shall, within six months from the receipt of the report provided for in paragraph 3, communicate its comments to the Member State concerned.

Where the Commission finds it necessary to request additional information, the six-month time limit shall run from the date of receipt of the requested supplementary information.'

3. Regulation No 608/2014

13 As regards the part of the infringement period commencing on 1 January 2014, Article 2 of Regulation No 608/2014, entitled 'Control and supervision measures', provides:

'…

2. Member States shall take all measures that are necessary to ensure that the own resources referred to in Article 2(1) of Decision [2014/335] are made available to the Commission.

3. Where control and supervision measures concern the traditional own resources referred to in Article 2(1)(a) of Decision [2014/335]:

(a) Member States shall conduct the checks and enquiries concerning the establishment and the making available of those own resources.

…

(c) Member States shall, if the Commission so requests, associate it with the inspections which they carry out. Where the Commission is associated with an inspection, the Commission shall have access, in so far as the application of this Regulation so requires, to the supporting documents concerning establishing and making available own resources, and to any other appropriate document related to those supporting documents.

(d) The Commission may itself carry out inspections on the spot. The agents authorised by the Commission for such inspections shall have access to documents as set out for the inspections referred to in point (c). Member States shall facilitate those inspections.

…'

4. Regulation No 1553/89

14 Article 2(1) of Regulation No 1553/89 provides:

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

15 The first paragraph of Article 3 of that regulation provides:

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

B. Customs law

1. The Community Customs Code

16 The Community Customs Code is applicable to the relevant imports made during the part of the infringement period prior to 1 May 2016.

17 Article 13 of that code provided:

'1. Customs authorities may, in accordance with the conditions laid down by the provisions in force, carry out all the controls they deem necessary to ensure that customs rules and other legislation governing the entry, exit, transit, transfer and end-use of goods moved between the customs territory of the [European] Community and third countries and the presence of goods that do not have Community status are correctly applied. Customs controls for the purpose of the correct application of Community legislation may be carried out in a third country where an international agreement provides for this.

2. Customs controls, other than spot-checks, shall be based on risk analysis using automated data processing techniques, with the purpose of identifying and quantifying the risks and developing the necessary measures to assess the risks, on the basis of criteria developed at national, Community and, where available, international level.

The committee procedure shall be used for determining a common risk management framework, and for establishing common criteria and priority control areas.

Member States, in cooperation with the Commission, shall establish a computer system for the implementation of risk management.

3. Where controls are performed by authorities other than the customs authorities, such controls shall be performed in close coordination with the customs authorities, wherever possible at the same time and place.

…'

18 Title II of that code included a Chapter 3 entitled 'Value of goods for customs purposes', comprising Articles 28 to 36.

19 Article 29 of that code provided:

'1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33 …

…

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related shall not in itself be sufficient grounds for regarding the transaction value as unacceptable. Where necessary, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. …

…

3. (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. …

…'

20 Under Article 30 of the Community Customs Code:

'1. Where the customs value cannot be determined under Article 29, it is to be determined by proceeding sequentially through subparagraphs (a), (b), (c) and (d) of paragraph 2 to the first subparagraph under which it can be determined …

2. The customs value as determined under this Article shall be:

(a) the transaction value of identical goods sold for export to the Community and exported at or about the same time as the goods being valued;

(b) the transaction value of similar goods sold for export to the Community and exported at or about the same time as the goods being valued;

(c) the value based on the unit price at which the imported goods for identical or similar imported goods are sold within the Community in the greatest aggregate quantity to persons not related to the sellers;

(d) the computed value …

…’

21 Article 31 of that code read as follows:

‘1. Where the customs value of imported goods cannot be determined under Articles 29 or 30, it shall be determined, on the basis of data available in the Community, using reasonable means consistent with the principles and general provisions of:

– the agreement on implementation of Article VII of the General Agreement on Tariffs and Trade of 1994 [(OJ 1994 L 336, p. 103) set out in Annex 1A to the Agreement establishing the World Trade Organisation (OJ 1994 L 336, p. 3)]

– Article VII of the General Agreement on Tariffs and Trade of 1994

– the provisions of this chapter.

2. No customs value shall be determined under paragraph 1 on the basis of:

(a) the selling price in the Community of goods produced in the Community;

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

(c) the price of goods on the domestic market of the country of exportation;

(d) the cost of production, other than computed values which have been determined for identical or similar goods in accordance with Article 30(2)(d);

(e) prices for export to a country not forming part of the customs territory of the Community;

(f) minimum customs values; or

(g) arbitrary or fictitious values.’

22 Article 68 of that code provided:

‘For the verification of declarations which they have accepted, the customs authorities may:

(a) examine the documents covering the declaration and the documents accompanying it. The customs authorities may require the declarant to present other documents for the purpose of verifying the accuracy of the particulars contained in the declaration;

(b) examine the goods and take samples for analysis or for detailed examination.’

23 Article 71 of that code was worded as follows:

‘1. The results of verifying the declaration shall be used for the purposes of applying the provisions governing the customs procedure under which the goods are placed.

2. Where the declaration is not verified, the provisions referred to in paragraph 1 shall be applied on the basis of the particulars contained in the declaration.'

24 Article 217(1) of the Community Customs Code provided:

'Each and every amount of import duty or export duty resulting from a customs debt … shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).'

25 According to the first subparagraph of Article 218(1) of that code:

'Where a customs debt is incurred as a result of the acceptance of the declaration of goods for a customs procedure other than temporary importation with partial relief from import duties or any other act having the same legal effect as such acceptance the amount corresponding to such customs debt shall be entered in the accounts as soon as it has been calculated and, at the latest, on the second day following that on which the goods were released.'

26 Article 220(1) of that code provided:

'Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time limit may be extended in accordance with Article 219.'

27 Article 221 of that code stated:

'1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

…

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.

4. Where the customs debt is the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the amount may, under the conditions set out in the provisions in force, be communicated to the debtor after the expiry of the three-year period referred to in paragraph 3.'

2. The Union Customs Code

28 The Union Customs Code is applicable to the relevant imports made during the part of the infringement period commencing on 1 May 2016.

29 Article 3 of that code provides:

‘Customs authorities shall be primarily responsible for the supervision of the Union’s international trade, thereby contributing to fair and open trade, to the implementation of the external aspects of the internal market, of the common trade policy and of the other common Union policies having a bearing on trade, and to overall supply chain security. Customs authorities shall put in place measures aimed, in particular, at the following:

(a) protecting the financial interests of the Union and its Member States;

(b) protecting the Union from unfair and illegal trade while supporting legitimate business activity;

(c) ensuring the security and safety of the Union and its residents, and the protection of the environment, where appropriate in close cooperation with other authorities; and

(d) maintaining a proper balance between customs controls and facilitation of legitimate trade.’

30 Under Article 46 of that code, entitled ‘Risk management and customs controls’:

‘1. The customs authorities may carry out any customs controls they deem necessary.

Customs controls may in particular consist of examining goods, taking samples, verifying the accuracy and completeness of the information given in a declaration or notification and the existence, authenticity, accuracy and validity of documents, examining the accounts of economic operators and other records, inspecting means of transport, inspecting luggage and other goods carried by or on persons and carrying out official enquiries and other similar acts.

2. Customs controls, other than random checks, shall primarily be based on risk analysis using electronic data-processing techniques, with the purpose of identifying and evaluating the risks and developing the necessary counter-measures, on the basis of criteria developed at national, Union and, where available, international level.

3. Customs controls shall be performed within a common risk management framework, based upon the exchange of risk information and risk analysis results between customs administrations and establishing common risk criteria and standards, control measures and priority control areas.

Controls based upon such information and criteria shall be carried out without prejudice to other controls carried out in accordance with paragraph 1 or with other provisions in force.

4. Customs authorities shall undertake risk management to differentiate between the levels of risk associated with goods subject to customs control or supervision and to determine whether the goods will be subject to specific customs controls, and if so, where.

The risk management shall include activities such as collecting data and information, analysing and assessing risk, prescribing and taking action and regularly monitoring and reviewing that process and its outcomes, based on international, Union and national sources and strategies.

5. Customs authorities shall exchange risk information and risk analysis results where:

(a) the risks are assessed by a customs authority as being significant and requiring customs control and the results of the control establish that the event triggering the risks has occurred; or

(b) the control results do not establish that the event triggering the risks has occurred, but the customs authority concerned considers the threat to present a high risk elsewhere in the Union.

6. For the establishment of the common risk criteria and standards, the control measures and the priority control areas referred to in paragraph 3, account shall be taken of all of the following:

(a) the proportionality to the risk;

(b) the urgency of the necessary application of the controls;

(c) the probable impact on trade flow, on individual Member States and on control resources.

7. The common risk criteria and standards referred to in paragraph 3 shall include all of the following:

(a) a description of the risks;

(b) the factors or indicators of risk to be used to select goods or economic operators for customs control;

(c) the nature of customs controls to be undertaken by the customs authorities;

(d) the duration of the application of the customs controls referred to in point (c).

8. Priority control areas shall cover particular customs procedures, types of goods, traffic routes, modes of transport or economic operators which are subject to increased levels of risk analysis and customs controls during a certain period, without prejudice to other controls usually carried out by the customs authorities.'

31 Article 53 of the Union Customs Code, entitled 'Currency conversion', provides in paragraph 1:

'The competent authorities shall publish and/or make available on the Internet the rate of exchange applicable where the conversion of currency is necessary for one of the following reasons:

…

(b) because the value of the euro is required in national currencies for the purposes of determining the tariff classification of goods and the amount of import and export duty, including value thresholds in the Common Customs Tariff.'

32 Articles 70 and 74 of the Union Customs Code lay down rules for determining the value of goods for customs purposes, the content of which is, in essence, identical to that of the rules laid down in Articles 29 to 31 of the Community Customs Code.

33 Article 103 of the Union Customs Code, entitled 'Limitation of the customs debt', provides, in paragraphs 1 and 2:

'1. No customs debt shall be notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred.

2. Where the customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the three-year period laid down in paragraph 1 shall be extended to a period of a minimum of five years and a maximum of 10 years in accordance with national law.'

34 Article 105 of that code, entitled 'Time of entry in the accounts', states, in paragraph 3:

'Where a customs debt is incurred in circumstances not covered by paragraph 1, the amount of import or export duty payable shall be entered in the accounts within 14 days of the date on which the customs authorities are in a position to determine the amount of import or export duty in question and take a decision.'

35 Article 191 of that code, entitled 'Results of the verification', provides:

'1. The results of verifying the customs declaration shall be used for the application of the provisions governing the customs procedure under which the goods are placed.

2. Where the customs declaration is not verified, paragraph 1 shall apply on the basis of the particulars contained in that declaration.

3. The results of the verification made by the customs authorities shall have the same conclusive force throughout the customs territory of the Union.'

3. Implementing Regulation I

36 Implementing Regulation I is applicable to the relevant imports made during the part of the infringement period prior to 1 May 2016.

37 According to Article 181a of Implementing Regulation I:

'1. The customs authorities need not determine the customs valuation of imported goods on the basis of the transaction value method if, in accordance with the procedure set out in paragraph 2, they are not satisfied, on the basis of reasonable doubts, that the declared value represents the total amount paid or payable as referred to in Article 29 of the [Community Customs] Code.

2. Where the customs authorities have the doubts described in paragraph 1 they may ask for additional information in accordance with Article 178(4). If those doubts continue, the customs authorities must, before reaching a final decision, notify the person concerned, in writing if requested, of the grounds for those doubts and provide him with a reasonable opportunity to

respond. A final decision and the grounds therefor shall be communicated in writing to the person concerned.'

38 Article 248(1) of Implementing Regulation I provides:

'The granting of release shall give rise to the entry in the accounts of the import duties determined according to the particulars in the declaration. Where the customs authorities consider that the checks which they have undertaken may enable an amount of import duties higher than that resulting from the particulars made in the declaration to be assessed, they shall further require the lodging of a security sufficient to cover the difference between the amount according to the particulars in the declaration and the amount which may finally be payable on the goods. However, the declarant may request the immediate entry in the accounts of the amount of duties to which the goods may ultimately be liable instead of lodging this security.'

4. Implementing Regulation II

39 Implementing Regulation II is applicable to the relevant imports made during the part of the infringement period commencing on 1 May 2016.

40 Article 48 of that implementing regulation, entitled 'Provisions on tariff exchange rate', provides in paragraph 1:

'The value of the euro, where required in accordance with Article 53(1)(b) of the [Union Customs] Code, shall be fixed once a month.

The exchange rate to be used shall be the most recent rate set by the European Central Bank [(ECB)] prior to the penultimate day of the month and shall apply throughout the following month.

However, where the rate applicable at the start of the month differs by more than 5% from the rate set by the [ECB] prior to the 15th of that same month, the latter rate shall apply from the 15th until the end of the month in question.'

41 Article 140 of that implementing regulation, entitled 'Non-acceptance of declared transaction values', provides:

'1. Where the customs authorities have reasonable doubts that the declared transaction value represents the total amount paid or payable as referred to in Article 70(1) of the [Union Customs] Code, they may ask the declarant to supply additional information.

2. If their doubts are not dispelled, the customs authorities may decide that the value of the goods cannot be determined in accordance with Article 70(1) of the [Union Customs] Code.'

42 Under Article 144 of that implementing regulation, entitled 'Fall-back method':

'1. When determining the customs value under Article 74(3) of the [Union Customs] Code, reasonable flexibility may be used in the application of the methods provided for in Articles 70 and 74(2) of the [Union Customs] Code. The value so determined shall, to the greatest extent possible, be based on previously determined customs values.

2. Where no customs value can be determined under paragraph 1, other appropriate methods shall be used. In this case the customs value shall not be determined on the basis of any of the following:

(a) the selling price within the customs territory of the Union of goods produced in the customs territory of the Union;

(b) a system whereby the higher of two alternative values is used for customs valuation;

(c) the price of goods on the domestic market of the country of exportation;

(d) the cost of production, other than computed values which have been determined for identical or similar goods under Article 74(2)(d) of the Code;

(e) prices for export to a third country;

(f) minimum customs values;

(g) arbitrary or fictitious values.'

43 Article 244 of Implementing Regulation II, entitled 'Provision of a guarantee', which is intended to implement Article 191 of the Union Customs Code, provides:

'Where the customs authorities consider that the verification of the customs declaration may result in a higher amount of import or export duty or other charges to become payable than that resulting from the particulars of the customs declaration, the release of the goods shall be conditional upon the provision of a guarantee sufficient to cover the difference between the amount according to the particulars of the customs declaration and the amount which may finally be payable.

However, the declarant may request the immediate notification of the customs debt to which the goods may ultimately be liable instead of lodging this guarantee.'

C. VAT law

44 Article 2(1) of Directive 2006/112 provides:

'The following transactions shall be subject to VAT:

…

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:
(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such …;

…

…

(d) the importation of goods.'

45 Under Article 83 of that directive:

'In respect of the intra-Community acquisition of goods, the taxable amount shall be established on the basis of the same factors as are used in accordance with Chapter 2 to determine the taxable amount for the supply of the same goods within the territory of the Member State concerned. In the case of the transactions, to be treated as intra-Community acquisitions of goods, referred to in Articles 21 and 22, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of the supply.'

46 Article 85 of that directive provides:

'In respect of the importation of goods, the taxable amount shall be the value for customs purposes, determined in accordance with the Community provisions in force.'

47 Article 86(1) of Directive 2006/112 reads as follows:

'The taxable amount shall include the following factors, in so far as they are not already included:

(a) taxes, duties, levies and other charges due outside the Member State of importation, and those due by reason of importation, excluding the VAT to be levied;

(b) incidental expenses, such as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the Member State of importation as well as those resulting from transport to another place of destination within the Community, if that other place is known when the chargeable event occurs.'

48 Article 87 of that directive provides:

'The taxable amount shall not include the following factors:

(a) price reductions by way of discount for early payment;

(b) price discounts and rebates granted to the customer and obtained by him at the time of importation.'

49 Under Article 138 of that directive:

'1. Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

2. In addition to the supply of goods referred to in paragraph 1, Member States shall exempt the following transactions:

…

(c) the supply of goods, consisting in a transfer to another Member State, which would have been entitled to exemption under paragraph 1 and points (a) and (b) if it had been made on behalf of another taxable person.'

50 Article 143 of that directive provides:

‘1. Member States shall exempt the following transactions:

…

(d) the importation of goods dispatched or transported from a third territory or a third country into a Member State other than that in which the dispatch or transport of the goods ends, where the supply of such goods by the importer designated or recognised under Article 201 as liable for payment of VAT is exempt under Article 138;

2. The exemption provided for in paragraph 1(d) shall apply in cases when the importation of goods is followed by the supply of goods exempted under Article 138(1) and (2)(c) only if at the time of importation the importer has provided to the competent authorities of the Member State of importation at least the following information:

(a) his VAT identification number issued in the Member State of importation or the VAT identification number of his tax representative, liable for payment of the VAT, issued in the Member State of importation;

(b) the VAT identification number of the customer, to whom the goods are supplied in accordance with Article 138(1), issued in another Member State, or his own VAT identification number issued in the Member State in which the dispatch or transport of the goods ends when the goods are subject to a transfer in accordance with Article 138(2)(c);

(c) the evidence that the imported goods are intended to be transported or dispatched from the Member State of importation to another Member State.

However, Member States may provide that the evidence referred to in point (c) be indicated to the competent authorities only upon request.’

II. Facts and pre-litigation procedure

A. Background to the dispute

51 With effect from 1 January 2005, the European Union abolished all quotas on imports of textiles and clothing from World Trade Organisation (WTO) countries, including China.

52 On 20 April 2007, the European Anti-Fraud Office (OLAF) sent mutual assistance message 2007/015 to Member States to inform them of the risk, inter alia, of extreme undervaluation of imports of textiles and footwear from China which in most cases were made by ‘shell companies’, undertakings registered for the sole purpose of giving a fraudulent transaction the appearance of legitimacy and which, upon investigation, were often found not to have a place of business at the address given to customs authorities. OLAF explained that, in most of the cases examined, the declared values were well below 0.50 United States dollars (USD) per kilogram (kg) and even below 0.10 USD per kilogram. In the light of that fraud mechanism (‘the undervaluation fraud at issue’), OLAF requested all Member States to monitor their imports of textiles and footwear from, inter alia, China for possible indications of undervalued imports, to carry out appropriate checks

at customs clearance for such imports in order to verify the declared customs values to ensure that they reflected true market values, and to take appropriate safeguard measures where there was any suspicion of artificially low invoiced prices.

53 To that end, on the basis of scientific research undertaken by the Commission's Joint Research Centre (JRC), OLAF developed a risk assessment tool based on EU-wide data ('the OLAF-JRC method').

54 That method consists, first of all, in calculating a 'cleaned average price' ('CAP'), also called the 'fair price' or 'fair value', for each eight-digit product code of the Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Implementing Regulation (EU) 2016/1821 of 6 October 2016 (OJ 2016 L 294, p. 1) ('CN'), falling within Chapters 61 to 64 of that nomenclature ('relevant products').

55 CAPs are calculated on the basis of the monthly import prices of the relevant products from China taken from Comext, a reference database for detailed statistics on international trade in goods that is managed by Eurostat, over a period of 48 months. Those prices express a per kilogram value for each of the 495 eight-digit CN product codes concerned, specifying the country of origin and the country of destination in the European Union.

56 Next, an average is calculated for the entire European Union based on the arithmetical average, that is to say, a non-weighted average, of the CAPs of all the Member States. In calculating that arithmetical average, outliers, namely values that are unusually high or low, are excluded, which is why the average price is referred to as 'cleaned'.

57 Lastly, a value corresponding to 50% of the CAP is calculated, which constitutes the 'lowest acceptable price' ('LAP'). The LAP, also expressed as a per kilogram price, is used as a risk profile or threshold enabling the customs authorities of Member States to detect particularly low values declared on importation and, consequently, imports presenting a significant risk of undervaluation.

58 Mutual assistance message 2009/001, issued by OLAF on 23 January 2009, concerned 'Operation Argus', a six-month operation in the context of which OLAF had undertaken to monitor trade in the relevant products from a number of third countries, mainly Asian countries, and to forward to Member States every month a list of imports from the previous month which it had identified as being at risk in terms of customs value. In that mutual assistance message, OLAF asked Member States to report to it, within four weeks, on the implementation of risk profiles, to identify imports presenting a significant risk of undervaluation and to carry out pre-clearance checks of the goods concerned, on the basis of its communications.

59 In 2011, during priority control action 'Discount' ('PCA Discount'), coordinated by the Commission's Directorate-General for Taxation and Customs Union and in which all Member States participated, LAPs calculated in accordance with the OLAF-JRC method were used, as a risk profile, according to the recommendations in the guidelines drawn up for the purposes of that action, to detect and check imports of the relevant products from China with a customs value so unusually low as to be suspect. The United Kingdom participated in that action, albeit that it did not use that risk profile.

60 In 2014, OLAF coordinated the joint customs operation 'Operation Snake' ('JCO Snake'), the operational phase of which took place between 17 February and 17 March of that year and in which all Member States and the Chinese customs authorities participated. The purpose of the latter authorities' involvement was to secure export declarations so that the declared customs value of the relevant products on importation into the European Union could be verified. In the final report on JCO Snake, Member States were asked to continue to use the risk profiles based on the LAPs that had been applied during that operation.

61 After checks were carried out by the United Kingdom authorities as part of that operation on the basis of those risk profiles, those authorities established that additional customs duties had to be applied in the case of 24 traders in respect of their imports over a three-year period from November 2011 to November 2014.

62 Between November 2014 and February 2015, the United Kingdom authorities sent corresponding payment demands to the traders concerned by issuing 24 post-clearance duty recovery demands, known as 'demand notes' or 'C18s' ('the Snake C18s'). However, in the period from June to November 2015, the United Kingdom authorities cancelled those C18s.

63 On 16 January 2015, OLAF opened an investigation specifically directed at certain Member States, including the United Kingdom, covering a period beginning in 2013.

64 In addition, 'Operation Badminton' was conducted by HMRC and the United Kingdom's Border Force between 2013 and 2016. That operation, which mainly concerned VAT fraud, was the basis for a criminal investigation of four major traders importing textiles from China under the customs procedure assigned code 42 in the list of EU customs procedures, under which customs duties are paid on importation and VAT must be paid at a later stage in the Member State of destination ('customs procedure 42').

65 Between February 2015 and July 2016, the United Kingdom participated in several meetings organised by OLAF concerning the undervaluation fraud at issue.

66 On 19 and 20 February 2015, OLAF organised a first bilateral meeting with HMRC to take stock of the follow-up to JCO Snake and the use of CAPs as customs undervaluation risk indicators.

67 At that first meeting, OLAF pointed out that the volume of imports likely to be fraudulently undervalued had not decreased and that statistics showed that the United Kingdom was attracting more fraudulent trade in the relevant products on account of the measures that had been taken by other Member States to counter the undervaluation fraud at issue. HMRC stated that it intended to issue duty recovery demands for evaded VAT and customs duties to the undertakings identified during JCO Snake and following its own analyses, those demands amounting in total to more than 800 million pounds sterling (GBP) (approximately EUR 939 760 000).

68 At an ad hoc meeting on 25 and 26 February 2015 concerning the undervaluation fraud at issue, a meeting organised by OLAF and attended by Member States' authorities, the United Kingdom reiterated its intention to proceed with those demands. During that meeting, OLAF explained that the use of national averages in risk profiles prevented identification of clear cases of undervaluation, and 'strongly recommended', in particular, that Member States implement appropriate risk profiles in order to identify potentially undervalued imports, that they require the provision of security for imports identified as being suspect in that regard, and that they carry

out investigations in order to establish the real customs values of the goods concerned. OLAF also emphasised that while the LAP is an important risk indicator, the EU rules on determining value for customs purposes had to be applied. It also outlined the potential loss of traditional EU own resources arising from imports likely to be undervalued, particularly the relevant imports. The United Kingdom reported potential losses of traditional own resources, for the period from May 2013 to March 2015, of a total of EUR 589 676 121 for a volume of close to 1.5 billion kilograms of relevant products.

69 On 16 June 2015, OLAF issued mutual assistance message 2015/013 in which it asked Member States to take all safeguard measures necessary to protect the financial interests of the European Union against the undervaluation fraud at issue. In that message, OLAF reiterated the conclusions of the ad hoc meeting on 25 and 26 February 2015.

70 In May 2015, the United Kingdom authorities launched 'Operation Breach', the first operation carried out on the territory of the United Kingdom that was specifically aimed at combating the undervaluation fraud at issue ('Operation Breach').

71 According to the United Kingdom, one of the aims of that operation, which is ongoing, was to determine – following the cancellation of the 24 Snake C18s – the customs value of the undervalued imports detected during JCO Snake and to claim the corresponding amounts of traditional own resources evaded.

72 That operation involved, among other things, pre-clearance checks and post-clearance visits in relation to those suspect imports, documentary analysis, audits and inspections, reviewing the commerciality of sales of the relevant products and examining relationships between the importer, freight agents and other undertakings, as well as educational activities for importers on how to identify fraudulent activity. There were also approximately 30 pre-clearance inspections of 13 consignments which were the subject of physical checks with samples being taken. In connection with the same operation, several post-clearance customs duty recovery demands were issued ('the Breach C18s').

73 On 28 July 2015, OLAF organised a second bilateral meeting with HMRC, at which HMRC reported, inter alia, that it was continuing to pursue the recovery of customs duties of more than GBP 800 million and would have recourse to the courts, if necessary. It also stated that it had set up a multidisciplinary task force as part of Operation Breach to examine the background of the importers involved in the fraudulent trade. However, according to HMRC, using risk indicators derived from CAPs would be 'counterproductive and disproportionate' given the volume of the relevant imports. OLAF indicated that the implementation of those indicators in certain Member States had resulted in a considerable reduction in the volume of fraudulent traffic, although that traffic had been diverted to other Member States, in particular to the United Kingdom.

74 On 3 February 2016, OLAF organised a third bilateral meeting with HMRC. HMRC announced that the United Kingdom had audited the 16 undertakings identified in JCO Snake. OLAF again recommended that HMRC use EU-wide risk indicators, namely the LAPs. It highlighted the high percentage of relevant imports regarded as being undervalued and resulting in significant losses of customs duties.

75 On 22 and 23 March 2016, OLAF organised a fourth bilateral meeting with HMRC. OLAF reiterated the utility of implementing EU-wide risk indicators as a pre-importation measure and proposed practical ways in which the United Kingdom authorities could progressively implement them. OLAF again gave an update of the prevailing situation, which showed the increasing loss of traditional own resources in the United Kingdom, mainly through abuse of customs procedure 42.

76 At a meeting held in July 2016, OLAF presented a report showing that the loss of traditional own resources was increasing in the United Kingdom.

77 During a meeting held on 18 and 19 September 2016, the French authorities presented the results of 'Operation Octopus', an operation led by them with the participation of 10 other Member States, including the United Kingdom, and the support of OLAF.

78 It is apparent from the final report on that operation that organised criminal networks were behind the undervaluation fraud at issue. The consignee entered in the customs declarations concerned was almost always a phoenix undertaking. The great majority of transported goods checked in Calais (France) on the basis of predefined criteria involved the fraudulent understatement of value in the United Kingdom under customs procedure 42.

79 In October 2016, the United Kingdom authorities carried out a test operation, known as 'Operation Samurai', which targeted imports made by two traders who stopped their activity immediately after HMRC challenged their customs declarations.

80 On 1 March 2017, OLAF closed its investigation into the implementation of the undervaluation fraud at issue in the United Kingdom and delivered its report ('the OLAF report'), from which it is apparent that, in the United Kingdom, importers had evaded large amounts of customs duty by submitting false and fictitious invoices and incorrect customs declarations on importation.

81 In that report, OLAF indicated that there had been a substantial increase in the scale of the undervaluation fraud at issue in the United Kingdom in the period from 2013 to 2016. That substantial increase coincided with the implementation by other Member States of risk profiles established using the risk assessment tool based on LAPs, in accordance with OLAF's recommendations.

82 According to that report, during that period, fraudulent imports into the United Kingdom increased significantly on account of the inadequate nature of the checks made by the United Kingdom customs authorities. In its report OLAF noted that, in 2016, more than 50% of relevant products imported into the United Kingdom from China were declared below the LAPs and some 80% of total losses of traditional EU own resources were attributable to the operation in the United Kingdom of the undervaluation fraud at issue.

83 In the report, OLAF further stated that organised criminal networks operating throughout the European Union were behind that fraud. Most of the relevant imports into the United Kingdom, a large majority of which were made by the abuse of customs procedure 42, were goods intended for illegal and clandestine trade in other Member States. Consequently, OLAF took the view in its report that there was also substantial VAT fraud in the Member States of final destination of the goods concerned, in particular in Germany, Spain, France and Italy.

84 It is apparent from the OLAF report that, in 2016, 87% of low-value imports of the relevant products into the United Kingdom were made under customs procedure 42, whereas, in the same year, that procedure was used for only 15% of imports of the relevant products from China in the Member States overall. According to OLAF, that disparity confirmed the shift of fraudulent operations from other Member States to the United Kingdom.

85 Again according to that report, the United Kingdom failed to apply risk profiles based on the LAPs, contrary to OLAF's recommendations, and did not carry out appropriate customs checks on importation, except in a one-month period during JCO Snake, from 17 February to 17 March 2014.

86 Consequently, according to that report, the United Kingdom released the relevant products from China involved in the undervaluation fraud at issue for free circulation without conducting appropriate customs controls, with the result that a substantial proportion of the customs duties due were not collected or made available to the Commission.

87 In its report, OLAF calculated the resulting amounts of traditional own resources lost for the period from 2013 to 2016. It fixed the total amount of those losses at EUR 1 987 429 507.96, broken down as follows:

– EUR 325 230 822.55 in 2013;

– EUR 480 098 912.45 in 2014;

– EUR 535 290 329.16 in 2015;

– EUR 646 809 443.80 in 2016.

88 The amounts of those losses were calculated by determining, for each CN product code concerned, the quantity in kilograms of the goods involved in the relevant imports that were considered to be undervalued, namely the goods declared at a value below the LAP concerned, then by applying the applicable rate of customs duty to the difference between the value thus declared and the CAP of the product code concerned.

89 Lastly, in its report, OLAF recommended that HMRC take all appropriate measures to recover the customs duties evaded in the amount of EUR 1 987 429 507.96 and to implement customs undervaluation risk indicators.

90 In the context of the implementation of Regulation No 608/2014, Commission agents carried out five inspections in the United Kingdom between November 2016 and October 2018, in relation, inter alia, to the undervaluation fraud at issue.

91 During inspection 16-11-1, which took place between 14 and 18 November 2016, the Commission found that the amounts of customs duty which had been removed from the separate account provided for in the second subparagraph of Article 6(3) of Regulation No 609/2014, commonly known as the 'B account' ('the B account'), corresponded to the additional debts initially claimed by the issuing of the 24 Snake C18s that were subsequently cancelled, and invited the United Kingdom authorities to establish the customs values corresponding to all the customs declarations concerned, to recalculate the additional duties due based on those values, to enter the

corresponding debts in the B account and to recover the amounts concerned as soon as possible. It also asked the United Kingdom authorities to provide it with the advice of HMRC's legal department which, according to those authorities, had led to the cancellation of those C18s.

92 The Commission also asked those authorities whether they applied the LAP tool developed by OLAF in order to identify imports presenting a significant risk of undervaluation, whether they performed physical controls of the goods concerned at clearance and whether they consistently requested the lodging of security covering the duties likely to be required, in accordance with Article 248(1) of Implementing Regulation I.

93 During inspection 17-11-1, which took place between 8 and 12 May 2017, the Commission selected 12 customs declarations submitted during the first quarter of 2017 with particularly low values for the purpose of on-the-spot checks. The examination of those declarations confirmed that the 12 corresponding consignments had been released for free circulation in the European Union without being checked and without any security being lodged. The United Kingdom authorities admitted that they had not implemented the measures requested by OLAF following JCO Snake in 2014 and again in the report drawn up following inspection 16-11-1. They explained that this was mainly due to advice from their legal department, according to which no acceptable valuation method was available. However, the relevant imports were to be examined by the task force established as part of Operation Breach. The Commission again asked the United Kingdom authorities to provide it with a copy of the advice of HMRC's legal department which, according to those authorities, had led to the cancellation of the Snake C18s.

94 During inspection 17-11-2, which took place between 13 and 17 November 2017, five particularly low-value customs declarations relating to importers already identified as potential fraudsters in JCO Snake were examined on the basis of one of the Snake C18s, in relation to a total customs debt of GBP 62 003 025.23 (approximately EUR 72 834 954). However, without details of how that debt was calculated, it was not possible to establish a link between the debt and the customs declarations concerned, which, according to HMRC, justified the cancellation of that debt. In addition, the Commission's agents had again asked the United Kingdom authorities to provide a copy of the advice of HMRC's legal department that led to the cancellation of those C18s, but the authorities refused to comply with that request on the grounds that the document was confidential and subject to legal professional privilege.

95 During that inspection, the United Kingdom authorities informed the Commission's agents that HMRC had launched 'Operation Swift Arrow' on 12 October 2017.

96 It was explained that the risk profiles used in that operation were based not on the thresholds defined using the OLAF-JRC method, but on national risk thresholds or profiles defined by HMRC on the basis of United Kingdom imports only, and that those thresholds or profiles were applied only to certain traders identified beforehand as being involved in illegal and clandestine trade. The containers detected by those risk thresholds or profiles were subject to physical checks by the United Kingdom authorities at customs clearance of the goods concerned. If those authorities took the view that the declared value of those goods was not justified, they would require security to be lodged before the goods were released.

97 During inspection 18-11-1, which took place between 16 and 20 April 2018, 25 customs declarations concerning the period from 12 October 2017, the date on which Operation Swift Arrow was launched, to 31 December 2017 were examined. It was established that only 7 of those customs declarations with an extremely low value had been identified by those risk

thresholds or profiles and that the other 18 containers had been released for free circulation without the customs value having been challenged. The United Kingdom authorities stated that since the launch of Operation Swift Arrow, HMRC's risk thresholds or profiles had been adjusted in order to include more traders, CN codes and points of entry, so that if the relevant imports had occurred in April 2018, those risk thresholds or profiles would have enabled 11 additional declarations to be identified.

98 Furthermore, according to those authorities, several of the selected traders stopped importing as soon as they were included in those risk thresholds or profiles, subjected to pre-release customs controls and requested to provide security before the goods concerned were released.

99 However, those authorities refused to disclose to the Commission details of the method used by HMRC to calculate the securities required within the framework of Operation Swift Arrow and to draw up the post-clearance duty recovery demands in that context.

100 In May 2018, eight Breach C18s were issued and entered in the B account in respect of imports made from 1 May 2015 that were considered to be undervalued, for a total amount of approximately GBP 25 million (approximately EUR 30 million).

101 During inspection 18-11-2, which took place between 8 and 12 October 2018, the United Kingdom authorities continued to refuse the requests that had already been made and refused during inspection 18-11-1. By contrast, they confirmed that they had established additional duties for seven traders – a number of which had already been identified during JCO Snake – in April 2018, amounting in total to GBP 19 434 197.73 (approximately EUR 22 829 352).

B. Pre-litigation procedure

102 By letters of 24 March and 28 July 2017, the Commission asked the United Kingdom about the action taken in response to the OLAF report. It noted that it had not received any specific additional information from the United Kingdom and that there was no reason to believe that the latter had taken appropriate steps to prevent the undervaluation fraud at issue. In the absence of information to the contrary, the Commission stated that it would be obliged to call on the United Kingdom to make available an amount of traditional own resources corresponding to the losses identified by OLAF, after deducting collection costs.

103 In one of the three letters of 28 July 2017, the Commission also asked for information about the action taken by the United Kingdom authorities in response to inspection report 16-11-1, reiterating in this connection its request to be provided with the advice of HMRC's legal department that had resulted in cancellation of the 24 Snake C18s, and also the list of entries relating to each of the 24 cases, including details of the calculations performed to establish the corresponding customs debts.

104 By letters of 8 August and 12 October 2017, the United Kingdom replied to the Commission's letters.

105 As regards, first of all, the OLAF report, the United Kingdom stated that measures had been taken to address the undervaluation fraud at issue, such as the launch of Operation Breach. It observed that, since EU law does not impose a specific type of control, it is for each Member State to decide on the best way to enforce that law. In addition, customs controls prior to the release of the goods concerned, such as the provision of security, are not inherently more effective than post-release

measures such as those implemented by the United Kingdom. The OLAF-JRC method is neither reliable nor appropriate, according to the United Kingdom, in so far as it is based, in particular, on the application of EU-wide data. That method is therefore questionable, which is why the United Kingdom developed its own method which is not affected by the shortcomings of that recommended by OLAF.

106 As regards, next, the action taken in response to inspection report 16-11-1, the United Kingdom stated that the 24 Snake C18s had been cancelled and the corresponding amounts removed from the B account because it was impossible to prove the actual value of the imported goods, but that that would be addressed by a group of experts as part of Operation Breach.

107 Lastly, the United Kingdom reiterated its view that it was impossible to accede to the request for disclosure of the content of the advice of HMRC's legal department that led to the cancellation of the 24 Snake C18s, citing confidentiality and legal professional privilege.

108 On 9 March 2018, the Commission sent the United Kingdom a letter of formal notice.

109 The United Kingdom replied to the Commission by letter of 22 June 2018. In an annex to that letter, the United Kingdom requested that a full version of the OLAF report be sent to it, as it had only an incomplete version of that report, and asked the Commission to provide it with answers to its detailed questions concerning the method used to calculate the amounts of traditional own resources claimed.

110 On 24 September 2018, the Commission sent a reasoned opinion to the United Kingdom ('the reasoned opinion') in which, in particular, it responded to the requests made by the United Kingdom in the annex to its letter of 22 June 2018. The United Kingdom was given a time limit in the reasoned opinion of two months within which to reply.

111 On 19 December 2018, having received no reply from the United Kingdom to the reasoned opinion within that time limit, the Commission decided to bring an action for failure to fulfil obligations before the Court, having informed the United Kingdom beforehand on 18 December 2018 of its intention to adopt such a decision the following day.

112 At the request of the United Kingdom authorities and following various informal exchanges between those authorities and the Commission's services, a technical meeting between those authorities and those services was held on 9 January 2019. At that technical meeting, a consultancy firm presented the findings of a report commissioned by the United Kingdom.

113 On 11 February 2019, the United Kingdom sent the Commission its reply to the reasoned opinion; the annex to the reply contained that report.

114 On 7 March 2019, having considered that reply, the Commission brought the present action for failure to fulfil obligations.

III. Procedure before the Court

115 By decision of the President of the Court of Justice of 26 September 2019, the Kingdom of Belgium, the Republic of Estonia, the Hellenic Republic, the Republic of Latvia, the Portuguese Republic and the Slovak Republic (together, 'the intervening Member States') were granted leave to intervene in support of the form of order sought by the United Kingdom.

116 By letter of 11 April 2019, the United Kingdom asked the Court to order the Commission to answer the questions put by the United Kingdom in its 'refocused' information request in its letter of 22 March 2019, which expanded on the questions contained in the request for information that it had sent to the Commission by the letter of 22 June 2018.

117 By letter of 6 June 2020, the United Kingdom applied for measures of inquiry or measures of organisation of procedure seeking an order from the Court requiring the Commission to answer a list of questions, some of which had already been submitted in the abovementioned requests for information in the letters of 22 June 2018 and 22 March 2019.

118 In the context of its preparatory enquiries in the case, the Court took into consideration those requests by the United Kingdom in formulating questions for written reply which it sent to the Commission and to the United Kingdom by letter of 14 October 2020. In addition, at the Court's request, the replies to those questions were subsequently the subject of oral argument at the hearing.

IV. The action

119 As a preliminary point it must be recalled that, by Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1), the Council of the European Union approved that agreement, the text of which is attached to that decision (OJ 2020 L 29, p. 7, 'the Withdrawal Agreement'), on behalf of the European Union and of the European Atomic Energy Community (EAEC).

120 It is apparent from Article 86 of that agreement that the Court is to continue to have jurisdiction in any proceedings brought against the United Kingdom before the end of the transition period within the meaning of Article 2(e) of that agreement, read in conjunction with Article 126 thereof, that is to say, before 1 January 2021 ('the transition period'). Since the present action for failure to fulfil obligations was brought on 7 March 2019, the Court continues to have jurisdiction in these proceedings.

121 It may also be noted that, as regards the interpretation and application of EU law on EU own resources relating to financial years until 2020, it follows from Articles 136 and 160 of the Withdrawal Agreement that the Court is to continue to have jurisdiction under Article 258 TFEU after 31 December 2020, and therefore even beyond the period of four years after the end of the transition period referred to in Article 87(1) of that agreement within which a new action may be brought under Article 258 TFEU in relation to a failure to fulfil obligations before the end of the transition period.

A. Admissibility

122 It is appropriate to examine, in the first place, the arguments invoked by the United Kingdom to challenge, in whole or in part, the admissibility of the present action for failure to fulfil obligations.

1. Infringement of the United Kingdom's rights of defence during the pre-litigation procedure and in the proceedings before the Court

(a) Arguments of the parties

123 The United Kingdom submits that the present action for failure to fulfil obligations is inadmissible in so far as its rights of defence have not been respected either during the pre-litigation procedure or in the proceedings before the Court.

124 In the first place, the United Kingdom argues that its rights of defence were infringed in so far as the Commission failed to respond either to its information request in the letter of 22 June 2018 or to its 'refocused' information request in the letter of 22 March 2019, even though the information was needed by the United Kingdom in order for it to be able to understand the failure to fulfil obligations alleged and to be in a position to defend itself.

125 Thus, having failed to obtain a response to those information requests, the United Kingdom did not have the information necessary to be able to replicate the amount of traditional own resources claimed by the Commission. In addition, even after the explanations provided by the Commission in the reply regarding the calculation of that amount, areas of uncertainty remain, in particular as to the method used to clean average prices or the question whether the non-aggregated data held by the United Kingdom match the daily aggregated data used by the Commission in that calculation. In any event, even on the assumption that those explanations contain some of the information requested, it was communicated belatedly and, therefore, in breach both of the United Kingdom's rights of defence and of the Commission's duty of sincere cooperation.

126 The United Kingdom submits that its rights of defence were also infringed in so far as the Commission refused to reply to the information requests contained in the letters of 22 June 2018 and 22 March 2019 by which information was sought from the Commission regarding the measures taken by other Member States to combat the undervaluation fraud at issue.

127 The United Kingdom states that it needed that information in order to defend itself against the Commission's claims that appropriate measures had been taken in other Member States and had produced results in combating that fraud. The information was also relevant for the purposes, first, of determining whether the measures taken by the United Kingdom fell within its discretion and were therefore a reasonable way to combat that fraud and, secondly, of invoking arguments concerning the causal link between the United Kingdom's alleged conduct and the losses of traditional own resources alleged by the Commission.

128 In the second place, the United Kingdom claims that its rights of defence were infringed in so far as the Commission undermined its ability to access all the data necessary for its defence, inasmuch as customs declarations prior to 2014 had been destroyed, having been stored for only four years.

Access to the data was necessary because the Commission extended the infringement period beyond that indicated in the OLAF report, to run from 2011. This change in the Commission's position and expanded challenge were prejudicial to the United Kingdom's rights of defence.

129 In the third place, the United Kingdom argues that the Commission failed to respect its rights of defence in that it did not produce evidence of the nature of the goods concerned and of the Member State of their destination.

130 The Commission disputes the United Kingdom's arguments.

(b) Findings of the Court

131 The Court has consistently held that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under EU law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The proper conduct of that procedure constitutes an essential guarantee required by the FEU Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject matter (judgment of 19 September 2017, *Commission* v *Ireland (Registration tax)*, C-552/15, EU:C:2017:698, paragraphs 28 and 29 and the case-law cited).

132 In addition, it is apparent from settled case-law in relation to Article 120(c) of the Rules of Procedure of the Court of Justice that an application initiating proceedings must state clearly and precisely the subject matter of the proceedings and set out a summary of the pleas in law relied on, so as to enable the defendant to prepare a defence and the Court to rule on the application. It follows that the essential points of law and of fact on which such an action is based must be indicated coherently and intelligibly in the application itself and that the forms of order sought must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on one of the heads of claim (judgment of 31 October 2019, *Commission* v *Netherlands*, C-395/17, EU:C:2019:918, paragraph 52 and the case-law cited).

133 The Court has also held that, where an action is brought under Article 258 TFEU, the application must set out the complaints coherently and precisely, so that the Member State and the Court can know exactly the scope of the alleged infringement of EU law, a condition that must be satisfied if the Member State is to be able to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged (judgment of 31 October 2019, *Commission* v *Netherlands*, C-395/17, EU:C:2019:918, paragraph 53 and the case-law cited).

134 In the present case, as regards, in the first place, the Commission's refusal to provide the United Kingdom with certain information which the latter had requested by its letters of 22 June 2018 and 22 March 2019 when these were allegedly essential for its defence, it must first be noted that, in paragraphs 301 to 326 of the reasoned opinion, the Commission responded appropriately to the complaint made in the letter of 22 June 2018 that the copy of Annex 2 to the OLAF report that was attached to the letter of formal notice was incomplete because several pages of Annex 2 were missing.

135 The Commission explained, in essence, in those paragraphs of the reasoned opinion that Annex 2 had been superseded by Annex 7 to that report, which was available to the United Kingdom authorities and contained two technical documents with detailed information regarding the

OLAF-JRC method, the method which the Commission also used to calculate the amount of traditional own resources losses over the infringement period which the Commission claimed, in the reasoned opinion and in the application, should have been made available to it.

136 In those circumstances, the fact that the copy of Annex 2 to the OLAF report, as enclosed with the letter of formal notice, was incomplete did not undermine the United Kingdom's ability to avail itself of its right to defend itself against the objections formulated by the Commission.

137 Next, according to the United Kingdom, its rights of defence were infringed because the Commission refused to provide certain information, in response to the 'refocused' information request in the letter of 22 March 2019, in relation to the detailed calculation of the CAP and the amount of traditional own resources losses claimed in the reasoned opinion and in the application, even though it was essential for the United Kingdom's defence. In that regard, it must be noted that, as the Advocate General also stated in essence in point 126 of his Opinion, the Commission showed, in paragraphs 132 to 141 of the reply, that both the data used and the method applied to perform that calculation were always known to the United Kingdom which, therefore, at all times both during the pre-litigation procedure and in the proceedings before the Court had all the information necessary to enable it to reconstitute that amount and, therefore, to take issue with it.

138 Furthermore, although the United Kingdom contends that areas of uncertainty remain in relation to certain aspects of that calculation, it must be observed that, both during the pre-litigation procedure and in the proceedings before the Court, the United Kingdom seized the opportunity to criticise that calculation in detail, as well as the data and the OLAF-JRC method underlying it. The replies given by the United Kingdom to the questions put by the Court, in particular those relating to the impact of certain adjustments to the CAP calculation on the amounts of the losses of traditional own resources, confirm, moreover, that the United Kingdom had full access at all times to all the databases and technical documents used by the Commission to perform that calculation.

139 It also follows that, contrary to the United Kingdom's contention, the information provided by the Commission in the reply does not in any way constitute new information; therefore the Commission cannot be accused of having belatedly remedied a lack of information that was prejudicial to the United Kingdom's rights of defence.

140 It must be concluded from this that, in the case of the data and method used by the Commission to calculate the CAP and the losses of traditional own resources claimed by that institution from the United Kingdom, the latter had, both during the pre-litigation procedure and in the proceedings before the Court, all the factual information necessary to enable it to avail itself of its right to defend itself against the objections formulated by the Commission.

141 Lastly, as regards the Commission's refusal to provide the United Kingdom, in response to the letters of 22 June 2018 and 22 March 2019, with information relating to the measures taken by the other Member States to combat the undervaluation fraud at issue, it is sufficient to recall that, according to the Court's settled case-law, a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the Treaties. In fact, in the EU legal order established by the FEU Treaty, the implementation of EU law by the Member States cannot be made subject to a condition of reciprocity. Articles 258 and 259 TFEU provide the appropriate remedies in cases

where Member States fail to fulfil their obligations under the FEU Treaty (judgment of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 106 and the case-law cited).

142 Even if, as the United Kingdom claims, other Member States had arrangements in place during all or part of the infringement period for customs controls to combat the undervaluation fraud at issue that were similar in certain respects to those employed by the United Kingdom at that time, that in itself is irrelevant for the purposes of determining whether the United Kingdom's arrangements complied with the provisions of EU law concerning the protection of the financial interests of the European Union against such fraud, such as Article 325 TFEU.

143 It must also be noted that, as attested to by, inter alia, the various documents annexed to the United Kingdom's letter of 6 June 2020 by which it asked the Court to adopt certain measures of inquiry or measures of organisation of procedure, the United Kingdom was aware of the various measures taken, during all or part of the infringement period, by a number of other Member States to combat the undervaluation fraud at issue, notably those that had been adopted in France, and of the Commission's assessment of those measures, notably as regards their conformity with EU law, and moreover that the United Kingdom used that information in its defence submissions. In addition, the Court put questions on that point to the Commission for written reply. The replies to those questions then confirmed the detailed information which the United Kingdom already had at its disposal.

144 As regards, in the second place, the arguments of the United Kingdom that its rights of defence were infringed because the Commission undermined its ability to access all the data necessary for its defence, inasmuch as the customs declarations prior to 2014 had been destroyed, having been stored for only four years, these arguments also cannot succeed.

145 As the Advocate General also noted, in essence, in point 130 of his Opinion, it is apparent from the file submitted to the Court that, as regards the part of the period of the infringement prior to 2014 that is covered by the present action, an infringement which, as is noted in paragraph 455 of the present judgment, concerns only the customs debts established in the post-clearance duty recovery demands contained in the Snake C18s, the United Kingdom annexed to the rejoinder a table of those C18s which it issued in respect of imports made during that part of the infringement period, together with copies of those C18s and tables setting out the details of supporting calculations. Those tables refer to the customs declarations concerning those imports. In addition, the United Kingdom does not dispute having those customs declarations in so far as they were the subject of post-clearance demand notes that were challenged in administrative review proceedings.

146 As regards, in the third place, the United Kingdom's complaint that the Commission failed to respect its rights of defence in that it did not produce evidence of the nature of the goods concerned and the Member State of their destination, that complaint does not concern the admissibility of the present action for failure to fulfil obligations; rather, it concerns its substance, since it concerns the question whether the Commission, which bears the burden of proving the infringements which it alleges, has demonstrated to the requisite legal standard that the pleas put forward in relation to the estimate of the amount of traditional own resources lost and infringement of provisions relating to own resources accruing from VAT are well founded, in the light in particular of the nature and destination of those goods.

147 In the light of the foregoing considerations, the plea of inadmissibility claiming infringement of the United Kingdom's rights of defence during the pre-litigation procedure and in the proceedings before the Court must be rejected.

2. Insufficiency of the factual and legal basis of the complaint relating to an infringement of EU law on VAT, particularly as regards customs procedure 42

(a) Arguments of the parties

148 The United Kingdom contends that the Commission failed to respect its rights of defence both during the pre-litigation procedure and in the proceedings before the Court in so far as it did not provide sufficient information in the reasoned opinion and in the application regarding the factual and legal basis of the alleged infringement of EU law on VAT and EU law on VAT-based own resources. That omission precluded the United Kingdom from understanding, in particular, the complaint that it should be held liable for the failure to collect the full VAT due in another Member State for goods imported into its territory under customs procedure 42 and, therefore, for the failure to make available to the Commission own resources accruing from VAT. Without that information, the United Kingdom was, it is claimed, unable to avail itself of its right to defend itself against that complaint.

149 The Commission, in particular, did not raise anything that would demonstrate that, in so far as the United Kingdom did not adopt the appropriate measures to counter the undervaluation fraud at issue, it undermined VAT collection in other Member States or hindered other Member States from collecting VAT and making available the corresponding own resources to the Commission.

150 Thus, nothing was claimed in respect of losses of VAT-based own resources allegedly due to the failure to collect VAT and no information was provided in relation to the traders concerned, the Member States of destination of the goods concerned, how those traders were regulated by those Member States before and after the goods were despatched, or the measures taken or not taken by those Member States of destination to collect the VAT from those traders.

151 The Commission disputes the United Kingdom's arguments.

(b) Findings of the Court

152 It is sufficient to note that the arguments relied on by the United Kingdom concern the question whether the complaint alleging an infringement of Directive 2006/112 and of the provisions of EU law on the making available of own resources accruing from VAT, referred to in the first two paragraphs of the first head of claim in the application, has any basis in law, and whether the truth of legally relevant facts has been demonstrated by the Commission to the requisite legal standard in the context of the present proceedings. However, those arguments concern the substance of that complaint, not its admissibility.

153 Consequently, the plea of inadmissibility relating to the insufficiency of the factual and legal basis of the complaint of an infringement of EU law on VAT, particularly as regards customs procedure 42, must be rejected.

3. Breach of the principles of the protection of legitimate expectations, legal certainty, estoppel and sincere cooperation

(a) Arguments of the parties

154 The United Kingdom contends that the Commission breached the principles of the protection of legitimate expectations, legal certainty, estoppel and sincere cooperation, by resiling from certain assurances given to the United Kingdom, when it brought the present action for failure to fulfil obligations in so far as the action covers the period before the end of February 2015, and therefore, to that extent, the action should be dismissed.

155 The United Kingdom relies in that regard on certain statements made by Commission or OLAF agents during meetings with its administration, particularly HMRC, in 2014 and in 2015 concerning measures taken by the United Kingdom to counter the undervaluation fraud at issue.

156 It argues that it follows from those statements that, until the end of February 2015, the United Kingdom was legitimately entitled to believe that the Commission and OLAF regarded its customs controls, characterised by their focus on post-clearance measures, such as duty recovery demands, rather than on measures such as the application of risk thresholds prior to clearance of the goods concerned or the provision of security, as being in conformity with EU law and that the United Kingdom would not therefore be the subject of infringement proceedings on account of those customs controls.

157 The United Kingdom refers, in particular, to three assurances given by OLAF or Commission agents during the infringement period which, in its view, could create such a legitimate expectation.

158 As regards, in the first place, the statement which, according to a meeting note of United Kingdom officials, was made by an OLAF agent in a meeting held on 13 June 2014, that OLAF was 'pleased with the progress the UK have made and the actions that have and are planned', that statement is, it is claimed, an unequivocal assurance that OLAF did not regard the United Kingdom as being in breach of its obligations to protect the financial interests of the European Union and to combat fraud.

159 As regards, in the second place, the statement made in October 2014 by a Commission agent, informing the United Kingdom that its participation in PCA Discount was 'satisfactory' and that the actions required for the proper conduct of that operation '[had been] implemented in a timely and effective manner', that statement was, in the United Kingdom's submission, a clear and unequivocal assurance that the United Kingdom had not failed to fulfil its obligations under EU law so far as its participation in that operation was concerned.

160 As regards, in the third place, the statement made by an OLAF agent at the first bilateral meeting between OLAF and HMRC, held on 19 and 20 February 2015, according to which, in the words of the note of that meeting drawn up by United Kingdom officials, the United Kingdom had 'done the right thing to now', the United Kingdom claims that that statement is an assurance with regard to all the measures it had taken up to that point and not only as regards the issuing of the Snake C18s.

161 The Commission disputes the United Kingdom's arguments.

(b) Findings of the Court

162 In the first place, it should be noted that, according to the settled case-law of the Court, the objective of the procedure provided for in Article 258 TFEU is an objective finding that a Member State has failed to fulfil its obligations under the FEU Treaty or secondary legislation and that procedure also makes it possible to establish an infringement by a Member State of EU law in a given case (judgment of 27 March 2019, *Commission* v *Germany*, C-620/16, EU:C:2019:256, paragraph 40 and the case-law cited).

163 The Court has also ruled that the principles of protection of legitimate expectations and sincere cooperation cannot be relied on by a Member State in order to preclude an objective finding of a failure, on its part, to fulfil its obligations under the FEU Treaty, since to admit that justification would run counter to the objective of the procedure under Article 258 TFEU in relation to such an objective finding (see, to that effect, judgment of 6 May 2010, *Commission* v *Poland*, C-311/09, not published, EU:C:2010:257, paragraph 18 and the case-law cited).

164 To admit such a justification would also run counter not only to the requirement that the European Union respect the equality of Member States before the Treaties, laid down in Article 4(2) TEU, but also to the principle, established in the settled case-law of the Court, that the Commission has a discretion to determine whether it is expedient to take action against a Member State and what provisions, in its view, the Member State has infringed, and to choose the time at which it will bring an action for failure to fulfil obligations; the considerations which determine that choice cannot affect the admissibility of the action (judgment of 19 September 2017, *Commission* v *Ireland (Registration tax)*, C-552/15, EU:C:2017:698, paragraph 34 and the case-law cited).

165 In the second place, it is apparent from the case-law of the Court that the Commission may not, except where such powers are expressly conferred upon it, give guarantees concerning the compatibility of particular practices with EU law, and in no circumstances does it have the power to authorise practices which are contrary to EU law (see, to that effect, judgment of 15 June 2000, *Commission* v *Germany*, C-348/97, EU:C:2000:317, paragraph 45 and the case-law cited).

166 It must be noted that even if the statements invoked by the United Kingdom mentioned in paragraphs 158 to 160 of the present judgment were such that OLAF's and the Commission's agents had intended thereby to give guarantees concerning the compatibility with EU law of the United Kingdom's arrangements for combating the undervaluation fraud at issue, the Commission did not, at the time when those statements were made, have any power to give such guarantees, so that those agents were not in any event entitled to give assurances to that effect that could now be relied upon by the United Kingdom in order to challenge the admissibility of the present action for failure to fulfil obligations.

167 In the third place, it should be noted that, according to the settled case-law of the Court, the right to rely on the principle of protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union. That right applies to any individual in a situation in which an EU institution, body, office or agency, by giving that person precise assurances, has led him or her to entertain well-founded expectations. By contrast, a person may not plead breach of that principle unless he or she has been given those

assurances (see, to that effect, judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 62, and of 16 July 2020, *ADR Center* v *Commission*, C-584/17 P, EU:C:2020:576, paragraph 75 and the case-law cited).

168 In the light of the case-law recalled in paragraphs 162 to 164 of the present judgment, even if the statements invoked by the United Kingdom could have given rise to a legitimate expectation on its part that its system of customs controls to counter the undervaluation fraud at issue, as implemented before 1 March 2015, was compatible with EU law, those statements cannot in any event be relied upon to preclude the Commission from bringing an action for failure to fulfil obligations, since the Commission has a discretion to determine whether it is expedient to take action against a Member State. Nor can those statements preclude an objective finding by the Court of a failure, on the part of that Member State, to fulfil its obligations under the FEU Treaty, in accordance with the objective of the procedure provided for in Article 258 TFEU.

169 The effectiveness of the infringement procedure would be liable moreover to be seriously undermined if a Member State were permitted to rely on a legitimate expectation that it had acted lawfully, due to some statements made by Commission agents, in order to avoid such a procedure. As the Commission correctly observes, in a system in which Member States are responsible for correctly implementing EU customs legislation in their national territories, they cannot deny responsibility for any infringement of EU law they may have committed, solely because OLAF or the Commission did not criticise them for that infringement at a given point in time.

170 Lastly, as the Advocate General also noted in point 151 of his Opinion, while the United Kingdom invokes not only a breach of the principle of the protection of legitimate expectations but also breach of the principles of legal certainty, estoppel and sincere cooperation, it has not developed any specific arguments relating to the latter principles, and therefore the arguments put forward by the United Kingdom in that respect must be rejected.

171 In the light of the foregoing considerations, the plea of inadmissibility alleging breach of the principles of the protection of legitimate expectations, legal certainty, estoppel and sincere cooperation must be rejected.

4. The Court's lack of jurisdiction, in infringement proceedings under Article 258 TFEU, to hear and determine an application by the Commission for a Member State to be ordered to make available a specific amount of own resources

(a) Arguments of the parties

172 The United Kingdom submits that the third paragraph of the first head of claim in the application, by which the Commission claims that specific amounts of traditional own resources are to 'be made available to the Union budget' for each of the seven years of the infringement period, that is to say, approximately EUR 2.7 billion in total, is inadmissible, since, in the first place, according to the judgments of 14 April 2005, *Commission* v *Germany* (C-104/02, EU:C:2005:219, paragraphs 48 to 51), and of 5 October 2006, *Commission* v *Germany* (C-105/02, EU:C:2006:637, paragraphs 43 to 45), in the context of an action for failure to fulfil obligations under Article 258 TFEU, the Court cannot order a Member State to enter in the account opened in the name of the Commission specific amounts of own resources which allegedly remain unpaid because of that Member State's alleged failure to fulfil obligations.

173 The United Kingdom challenges the Commission's argument that it studiously 'structured' the form of order sought in the application in such a way as to avoid the error made in the cases giving rise to the judgments cited in the preceding paragraph, which the Court penalised in those judgments by rejecting the claims concerned as being inadmissible. It claims that this is a 'device' intended to circumvent the Court's lack of jurisdiction, since the Commission is in fact seeking to achieve the same outcome as that sought in those cases.

174 Furthermore, the Commission's approach would deny the United Kingdom the opportunity afforded to it under Article 260 TFEU to remedy any breach found under Article 258 TFEU and so fails to respect the respective competences of the Commission, the Court of Justice and the Member States under the Treaties.

175 In the United Kingdom's submission, the present case also differs from that giving rise to the judgment of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683). While, by that judgment, the Court granted an application seeking a declaration that the Member State concerned had failed to fulfil its obligations by refusing to make available a specific amount of own resources, it must be noted that, in the case giving rise to that judgment, as is apparent from paragraph 56 thereof, neither the existence of a customs debt nor the amount of own resources lost was contested.

176 Also relevant in that context, according to the United Kingdom, is the judgment of 31 October 2019, *Commission* v *United Kingdom* (C-391/17, EU:C:2019:919), since paragraphs 118 and 119 of that judgment would suggest that if the Commission submits an application seeking the determination of a specifically quantified loss of own resources, it must prove each and every element of its claim for each import where a loss has resulted and also the causal link between each of those elements and that loss.

177 In the second place, the United Kingdom contends that the present action is in reality aimed at obtaining compensation for loss sustained and is, accordingly, inadmissible in so far as the Commission asks the Court to adjudicate on certain specific amounts which the United Kingdom should have made available to the Commission. Even if the Court should rule that such an action is admissible, the United Kingdom submits that it is for the Commission to prove that all the conditions for engaging the United Kingdom's liability are satisfied, that is, an unlawful act, specific damage that has been quantified, and a direct causal link between that act and that damage.

178 In the alternative, the United Kingdom maintains that the application is inadmissible because the Commission conflates the three steps that must be followed in order to determine the amount of own resources lost. In the first step, the Commission was required to produce proof of the United Kingdom's failure to fulfil its obligations under EU law, of a causal link between that failure and the specific amount claimed and of the fact that its request for a specific amount to be made available was admissible. In the second step, if the Commission was in a position to provide proof of those three elements, the Court would first of all have to examine the United Kingdom's assessment of the additional own resources due. Only if that assessment were to be rejected as being manifestly unreasonable would the Court be able to examine, in the third step, the estimate of losses relied on by the Commission.

179 The Commission disputes the United Kingdom's arguments.

(b) Findings of the Court

180 As regards, in the first place, the United Kingdom's arguments in relation to the judgments of 14 April 2005, *Commission* v *Germany* (C-104/02, EU:C:2005:219), and of 5 October 2006, *Commission* v *Germany* (C-105/02, EU:C:2006:637), it must be recalled that, in an action for failure to fulfil obligations, the Commission cannot seek from the Court anything other than a finding that the failure to fulfil obligations alleged exists with a view to bringing that situation to an end. Thus the Commission cannot, for example, ask the Court, in such an action, to require a Member State to adopt a particular conduct in order to comply with EU law (judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 56 and the case-law cited).

181 Accordingly, the Court has rejected as inadmissible applications made under Article 258 TFEU by which the Commission sought an order that a Member State make certain payments if it was established that that Member State had failed to fulfil its obligations under EU law, essentially on the ground that those applications were not seeking a declaration by the Court that that Member State had failed to fulfil its obligations under EU law, but an order of the Court that the Member State take specific measures in order to comply with EU law (see, to that effect, judgments of 14 April 2005, *Commission* v *Germany*, C-104/02, EU:C:2005:219, paragraphs 48 to 51, and of 5 October 2006, *Commission* v *Germany*, C-105/02, EU:C:2006:637, paragraphs 43 to 45 and the case-law cited).

182 In the present case, although the third paragraph of the first head of claim in the application includes the expression 'the corresponding [traditional own resources] losses to be made available to the Union budget', it cannot be regarded as a request that the Court order the United Kingdom to pay the amounts of those resources specified in that third paragraph. On the contrary, that paragraph constitutes a request for a declaration by the Court of a failure to fulfil the United Kingdom's obligations.

183 That pecuniary claim must be understood not in isolation, but in the light of the more general and unquantified claim in the first paragraph of the first head of claim in the application, by which the Court is requested to declare that, 'by failing to … make available the correct amount of traditional own resources … in respect of [the relevant imports]', the United Kingdom has failed to fulfil its obligations under certain provisions of EU law on own resources.

184 It follows that the third paragraph of the first head of claim in the application contains a claim for a declaration by the Court that, by failing to make available specific amounts of traditional own resources in respect of each year of the infringement period, the United Kingdom has not complied with its obligations under EU law.

185 The admissibility of such a claim is indisputable, as is apparent from the own resources case-law of the Court in which claims of that nature were also in issue (see, in particular, judgments of 15 November 2005, *Commission* v *Denmark*, C-392/02, EU:C:2005:683, paragraphs 30 to 34; of 3 April 2014, *Commission* v *United Kingdom*, C-60/13, not published, EU:C:2014:219, paragraphs 37 to 62; and of 11 July 2019, *Commission* v *Italy (Own resources – Recovery of a customs debt)*, C-304/18, not published, EU:C:2019:601, paragraphs 48 to 77).

186 Contrary to the United Kingdom's contention, that case-law cannot be understood as meaning that, in so far as such a claim involves a finding of an infringement consisting in the failure to make available a specific amount of own resources, the claim is admissible only if that amount is not disputed by the Member State concerned.

187 Indeed, the Court upheld a claim by the Commission for a declaration that EU law had been infringed because a specific amount of own resources had not been made available even though the Member State concerned was challenging the European Union's very entitlement to that amount (see, to that effect, judgment of 11 July 2019, *Commission* v *Italy (Own resources – Recovery of a customs debt)*, C-304/18, not published, EU:C:2019:601, paragraphs 48 to 77).

188 More fundamentally, it is apparent from the case-law that the Commission's ability to submit to review by the Court, in infringement proceedings, a dispute between the Commission and a Member State regarding the latter's obligation to make available to the Commission a certain amount of the European Union's own resources is inherent in the system of own resources, as currently configured in EU law (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 68).

189 Litigation in relation to own resources arises precisely because the Member State concerned disputes the fact that it is required to make available the amounts demanded by the Commission. In the context of infringement proceedings relating to own resources, it is therefore entirely natural for pecuniary obligations to be at stake, and EU law does not preclude the failure to comply with those obligations from being raised in connection with the infringement alleged. In the context of such proceedings, it is for the Commission to demonstrate to the requisite legal standard, in an exchange of arguments in which the Member State can present its own case, the accuracy of the amounts of own resources which it considers to be due.

190 In addition, contrary to what is argued by the United Kingdom, the Commission cannot be precluded from asking the Court to declare that a specific amount of traditional own resources is due on the ground that that approach would deny the United Kingdom the opportunity afforded to it under Article 260 TFEU to remedy any breach found under Article 258 TFEU and so fail to respect the respective competences of the Commission, the Court of Justice and the Member States under the Treaties.

191 While it is open to the Commission not to formulate such a pecuniary claim and to confine itself to asking the Court to declare, in general terms, the existence of an infringement consisting in the non-collection of own resources, without determining the amount, as it did, in particular, in the case giving rise to the judgment of 31 October 2019, *Commission* v *United Kingdom* (C-391/17, EU:C:2019:919), there is nothing to prevent the Commission from seeking in the form of order sought in the application a declaration of an infringement of EU law in relation to the failure to make available a specific amount of own resources, in so far as the Commission regards that amount as being due and is in a position to demonstrate its accuracy.

192 As regards, in the second place, the United Kingdom's arguments to the effect that the present action is aimed in reality at obtaining compensation for damage sustained and is, therefore, inadmissible in so far as the Commission asks the Court to adjudicate on certain specific amounts which the United Kingdom should have made available to the Commission, it follows from the foregoing that, in the context of infringement proceedings under Article 258 TFEU, the admissibility of a claim such as that set out in the third paragraph of the first head of claim in the application cannot be called into question.

193 In that regard, it must also be borne in mind that the Court has held that an action by which the Commission complains that a Member State did not make available to it a certain amount of own resources and the associated default interest, contrary to EU law, is not a claim for damages for which there is no provision in the Treaties, since, by such an action, the Commission is seeking a declaration from the Court that the Member State concerned has failed to fulfil an obligation imposed on it by EU law, and not an order that it pay damages and interest (judgment of 15 November 2005, *Commission* v *Denmark*, C-392/02, EU:C:2005:683, paragraphs 31 to 34).

194 Consequently, the claim in question does indeed fall within infringement proceedings and not proceedings in which damages are sought, even if that claim is of a pecuniary nature.

195 It follows that, contrary to the United Kingdom's contention, while the Commission is required to demonstrate the infringement which, by that claim, it seeks to have declared, the Commission does not have to prove the existence of damage or of a causal link between that infringement and that damage.

196 As regards, in the third place, the argument put forward by the United Kingdom in the alternative, to the effect that the application is inadmissible in so far as the Commission conflates the three steps which, as has been stated in paragraph 178 of the present judgment, should be followed in order to determine the amount of the own resources lost, it is sufficient to note that that argument relates to the substance of the present action, in particular the substance of the first and second complaints raised by the Commission, rather than to its admissibility.

197 In the light of the foregoing considerations, the United Kingdom's plea of inadmissibility in relation to the lack of jurisdiction of the Court must be rejected.

5. Whether the application is premature and inadmissible as regards the period from 1 May 2015 to 11 October 2017 inclusive on account of the Breach C18s issued in relation to that period

(a) Arguments of the parties

198 The United Kingdom contends that, in relation to the part of the infringement period that extends from 1 May 2015 to 11 October 2017 inclusive, the claim for traditional own resources to be made available that appears in the third paragraph of the first head of claim in the application is 'premature and inadmissible' and, alternatively, that that claim should be rejected because the Commission was in no position to prove its claim regarding the existence of losses of own resources at the time when the period for compliance with the reasoned opinion expired.

199 Although the Commission was aware, in May 2018, of eight Breach C18s that had been issued and entered in the B account in the course of that month, in relation to imports considered to be undervalued that were made as from 1 May 2015 for a sum of approximately GBP 25 million, it did not challenge those C18s in the reasoned opinion or in the application, nor did it deduct that amount from the losses of traditional own resources referred to in the third paragraph of the first head of claim in the application.

200 Accordingly, the Commission had failed to take account of sums which might have been recovered following the issue of the Breach C18s or of the fact that the United Kingdom could be released from its recovery obligation under Article 13(2)(b) Regulation No 609/2014 if the entitlements established and entered in the B account ultimately proved to be irrecoverable.

201 The Commission disputes the United Kingdom's arguments.

(b) Findings of the Court

202 The argument of the United Kingdom that, in relation to the part of the infringement period that extends from 1 May 2015 to 11 October 2017 inclusive, the claim for traditional own resources to be made available that appears in the third paragraph of the first head of claim in the application is 'premature and inadmissible', since it does not take into account the eight Breach C18s issued in May 2018 in respect of undervalued imports made during that part of the infringement period, cannot be accepted.

203 As is recalled in paragraph 164 of the present judgment, according to settled case-law of the Court, it is for the Commission to determine whether it is expedient to take action against a Member State and what provisions, in its view, the Member State has infringed, and to choose the time at which it will bring an action for failure to fulfil obligations; the considerations which determine that choice cannot affect the admissibility of the action (judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 75 and the case-law cited).

204 In so far as the United Kingdom puts forward that argument to challenge the claim for traditional own resources to be made available that is set out in the third paragraph of the first head of claim in the application in relation to the part of the infringement period that extends from 1 May 2015 to 11 October 2017 inclusive, on the ground that the Commission was in no position to prove its claim regarding the existence of losses of own resources at the time when the period for complying with the reasoned opinion expired, that argument is intended to challenge the substance of the action, rather than its admissibility.

205 Consequently, the plea of inadmissibility relating to the premature nature and inadmissibility of the application as regards the period from 1 May 2015 to 11 October 2017 inclusive on account of the Breach C18s issued in relation to that period, and, therefore, all of the objections of inadmissibility raised by the United Kingdom, must be rejected.

B. Substance

1. Failure to fulfil obligations to protect the financial interests of the European Union and to counter fraud, and failure to fulfil obligations under EU customs law

206 By the first plea in law, which concerns the complaints set out in the second paragraph of the first head of claim in the application, with the exception of that relating to an infringement of EU legislation on VAT, in particular certain provisions of Directive 2006/112, the Commission claims that, during the infringement period, despite repeated warnings and requests from the Commission and OLAF concerning the risk of undervaluation fraud presented by the relevant

imports, the United Kingdom failed to take risk-based measures to protect the financial interests of the European Union. The failure to adopt those measures breached both the Member States' general obligations to protect the financial interests of the European Union and to combat fraud laid down in Article 310(6) and Article 325 TFEU, and the specific obligations imposed on Member States under EU customs legislation, first of all, to take measures to protect the financial interests of the European Union under Article 3 of the Union Customs Code in conjunction with Article 4(3) TEU, next, to carry out customs controls based on risk analysis under Article 13 of the Community Customs Code and Article 46 of the Union Customs Code and, lastly, to require the provision of securities or guarantees under Article 248(1) of Implementing Regulation I and Article 244 of Implementing Regulation II.

207 Furthermore, in so far as it concerns an alleged infringement of EU customs law, it is also necessary to examine, in the context of the first plea, the complaint referred to in the first paragraph of the first head of claim in the application, according to which, during the infringement period, the United Kingdom committed an ongoing infringement of Article 220(1) of the Community Customs Code and Article 105(3) of the Union Customs Code in that, as regards the relevant imports, the United Kingdom did not 'enter in the accounts', in accordance with Article 217(1) of the Community Customs Code and Article 104 of the Union Customs Code, the customs debts which remained to be recovered as soon as its customs authorities became aware of the situation giving rise to the establishment of those customs debts.

(a) Infringement of Article 310(6) TFEU and Article 325 TFEU

(1) Obligations imposed on Member States under Article 325 TFEU

208 As regards, in the first place, the alleged failure by the United Kingdom to comply with its obligations to protect the financial interests of the European Union and to combat fraud under Article 310(6) TFEU and Article 325 TFEU, it must, as a preliminary point, be stated that this contention must be examined in the light of Article 325 TFEU alone, since, as the Advocate General also observed, in essence, in point 170 of his Opinion, Article 310(6) TFEU merely cross-refers to Article 325 TFEU and imposes no obligations other than those provided for by the latter provision. Indeed, Article 310(6) TFEU merely provides that 'the Union and the Member States, in accordance with Article 325 [TFEU], shall counter fraud and any other illegal activities affecting the financial interests of the Union'.

209 Article 325(1) TFEU requires the Member States to counter fraud and any other illegal activity affecting the financial interests of the European Union through effective and deterrent measures (judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 50 and the case-law cited).

210 In accordance with Article 2(1) of Decision 2014/335, the content of which is in essence identical to that of Article 2(1)(a) of Decision 2007/436, own resources of the European Union include, inter alia, Common Customs Tariff duties. Therefore, there is a direct link between the collection of revenue deriving from those duties and the availability of the corresponding resources. Any failure in the collection of that revenue potentially causes a reduction in those resources (see, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 51 and the case-law cited).

211 Accordingly, in order to ensure the protection of the financial interests of the European Union in accordance with Article 325(1) TFEU, the Member States are obliged to adopt the measures necessary to guarantee the effective and comprehensive collection of customs duties, an obligation which requires that customs inspections should be able to be carried out properly (judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 52).

212 It thus follows from the obligations imposed on the Member States under Article 325(1) TFEU that they must, to that end, provide for the application not only of appropriate penalties, but also of effective and dissuasive customs control measures in order to counter, in an appropriate manner, infringements of EU customs legislation where these are liable to impede the effective and comprehensive collection of traditional own resources in the form of customs duties and, therefore, are likely to affect the financial interests of the European Union (see, to that effect, judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 53).

213 It is true that, in accordance with Article 325(1) TFEU, in order to ensure the effective and comprehensive collection of revenue assigned to the European Union's own resources and, in particular, revenue consisting in Common Customs Tariff duties, the Member States have a certain latitude and freedom of choice as to the measures to be taken as regards, in particular, the way in which they use the means at their disposal. However, that latitude or freedom of choice is limited not only by the principles of proportionality and equivalence, but also by the principle of effectiveness, which requires that the measures taken should be effective and dissuasive, subject, however, to the necessary observance of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter') and general principles of EU law (see, to that effect, in particular, judgments of 7 April 2016, *Degano Trasporti*, C-546/14, EU:C:2016:206, paragraphs 20 and 21; of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraphs 33 to 36; and of 17 January 2019, *Dzivev and Others*, C-310/16, EU:C:2019:30, paragraphs 27, 30 and 34 and the case-law cited).

214 It must be pointed out in that regard that, according to the settled case-law of the Court, Article 325(1) TFEU imposes on the Member States precise obligations as to the result to be achieved, which are not subject to any condition regarding the application of the rules which that article lays down (judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 64 and the case-law cited).

215 In the light of the foregoing considerations and contrary to the United Kingdom's contention, it does not therefore follow from the case-law of the Court that the Member States have a broad discretion under Article 325(1) TFEU as to the choice of measures to be taken to counter any fraud that may affect the European Union's financial interests, meaning that only measures that are manifestly inappropriate having regard to all of the circumstances of the case may be penalised under that provision.

216 Nor, moreover, contrary to what is claimed by the United Kingdom, can that case-law support the argument that the duty to ensure the effective and comprehensive collection of own resources does not require exhaustive efforts to verify and recover taxes contributing to those resources, but requires simply reasonable efforts, or that the Member States are required only to show due care in collecting those resources. On the contrary, according to the actual wording of that case-law, Article 325(1) TFEU imposes on the Member States 'precise obligations as to the result to be achieved', not merely obligations as to the means to be used.

217 Contrary to what is maintained by the United Kingdom, it also does not follow from the case-law of the Court that a Member State can only be accused of failing to fulfil the obligations imposed in Article 325(1) TFEU in situations in which the Commission demonstrates that the national measure in question implies that there is a 'clear and major risk of impunity' or leads to the 'absence of a sanction' (Opinion of Advocate General Bot in *M.A. S. and M.B.*, C-42/17, EU:C:2017:564, point 83), or indeed where 'negligence' or 'arbitrary' conduct of the Member State concerned is at issue (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; and of 18 October 2007, *Commission* v *Denmark*, C-19/05, EU:C:2007:606, paragraphs 18 and 35).

218 While the Court has in its case-law, in the extremely specific situations in those cases, found that there was an infringement of EU law and, in particular, an infringement of Article 325(1) TFEU, it does not in any way follow from that case-law that that provision applies only to such situations, especially since the cases giving rise to that case-law concerned penalties and procedures relating to those penalties and, consequently, measures that were fundamentally different from those constituted by the customs controls at issue in the present proceedings.

219 It is also apparent from the settled case-law of the Court concerning the requirements imposed by Article 325(1) TFEU, as regards penalties for infringements of EU customs legislation, that, while the Member States have in that regard freedom to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, they must nonetheless ensure that cases of serious fraud or any other serious illegal activity affecting the financial interests of the European Union in customs matters are punishable by criminal penalties that are effective and that act as a deterrent (judgment of 5 June 2018, *Kolev and Others*, C-612/15, EU:C:2018:392, paragraph 54 and the case-law cited).

220 It follows that the nature of the customs control measures to be adopted by the Member States in order to comply with the requirements imposed on them by Article 325(1) TFEU in the fight against fraud or any other illegal activity that may affect the financial interests of the European Union cannot be determined in an abstract and fixed manner, since the nature of those measures depends on the characteristics of that fraud or other illegal activity, which may change over time.

(2) Breach of obligations imposed under Article 325 TFEU

(i) Preliminary observations

221 Before examining the infringement of Article 325 TFEU of which the United Kingdom is specifically accused by the Commission, it must be recalled that, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission, which is responsible for proving the existence of the alleged infringement, to provide the Court with the information necessary for it to determine whether that infringement is made out, and the Commission may not rely on any presumption for that purpose (judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 124 and the case-law cited).

222 It follows from this that, in the present case, it is for the Commission to demonstrate to the requisite legal standard that the measures which the United Kingdom adopted during the infringement period to counter the undervaluation fraud at issue did not guarantee the effective and comprehensive collection of revenue assigned to the European Union's own resources, namely Common Customs Tariff duties, contrary to the principle of effectiveness laid down in Article 325(1) TFEU.

223 In that regard, the Commission maintains, essentially, that in view of the characteristics of the undervaluation fraud at issue, which were known to the United Kingdom throughout the infringement period, the only customs control measures appropriate to counter that fraud and duly protect the European Union's financial interests in accordance with the principle of effectiveness laid down in Article 325(1) TFEU were those which it had recommended, together with OLAF, including throughout the infringement period, namely, in essence, a system of pre-clearance customs controls of the goods concerned, based on a risk analysis.

224 The Commission submits that, in so far as the United Kingdom's arrangements to counter the undervaluation fraud at issue were focused on customs measures applied after clearance of the goods concerned, such as post-clearance demands for recovery of customs duty, it did not take the steps which the principle of effectiveness laid down in Article 325(1) TFEU required of it.

(ii) Reminder of the essential characteristics of the undervaluation fraud at issue

225 Before this complaint is examined, it is appropriate to recall the essential characteristics of the undervaluation fraud at issue as set out, in particular, in the OLAF report and which, moreover, are not in dispute.

226 This was a relatively unsophisticated fraud involving extremely low customs values being declared by 'phoenix' or 'shell' undertakings, namely undertakings with negligible resources formed for the sole purpose of carrying out the fraud, which would be wound up or would disappear as soon as the accuracy of the declared values was questioned by the customs authorities, making any post-clearance recovery of customs duties unlikely, if not practically impossible in the vast majority of cases.

227 The fraud was organised by criminal groups that operated through a network and used those undertakings to carry it out. The fraud was mobile and highly responsive in the sense that this illegal and clandestine trade was quickly diverted to another point of entry in the customs territory of the European Union as soon as customs controls were announced or signals to that effect were intercepted by those groups.

228 Very large volumes of goods were involved in the fraud, making it more or less profitable, including for those undertakings, depending on the level of duties evaded. It was carried out on a large scale and affected the whole of the European Union, although not all Member States were affected to the same extent, since it would gravitate towards Member States with less rigorous customs controls, which could therefore be considered the weakest links in the customs territory of the European Union in that respect. In practice, the goods involved in the undervaluation fraud at issue were, in the vast majority of cases, imported into the United Kingdom under customs procedure 42, meaning that those goods were, from the outset, destined for other Member States, such as the French Republic or the Italian Republic, and that VAT was supposed to be

paid in those other Member States, which was not however generally the case, as the goods concerned were typically intended to be traded illegally and clandestinely in those other Member States.

(iii) The United Kingdom's knowledge, from the start of the infringement period, of the essential characteristics of the undervaluation fraud at issue and of effective measures needed to counter it

229 Although, as the Advocate General also noted in point 185 of his Opinion, the United Kingdom admitted, repeatedly, both during the pre-litigation procedure and in the proceedings before the Court, that an undervaluation fraud had taken place within its territory during the infringement period, while adding that it was the victim of that fraud, it maintains that it took the measures that it could reasonably have been expected to take to combat that fraud given the limited knowledge that it had, at the time when those measures were taken, both of the nature and scale of that fraud and of effective measures needed to counter it.

230 The United Kingdom maintains that it was not until the end of 2014, following JCO Snake, that OLAF and some affected Member States began properly to understand the fraudulent activities confronting them, and that it was only after mutual assistance message 2015/013 that the United Kingdom had sufficient knowledge of the undervaluation fraud at issue and of the particular measures necessary to combat it.

231 Yet it is apparent from the file submitted to the Court that all the Member States, including, at that time, the United Kingdom, had, at the very least from the start of the infringement period, sufficient knowledge of the essential characteristics of the undervaluation fraud at issue and of the countermeasures needed to combat it effectively that were recommended to them by OLAF and the Commission.

232 In mutual assistance message 2007/015, OLAF had informed all the Member States of the risk, inter alia, of extreme undervaluation of imports of relevant products from China into the European Union, in most cases by shell undertakings which, as it often transpired in practice upon verification, did not have their corporate seat at the address stated in the customs declaration, and also of the risk of the fraud's being transferred to other EU ports.

233 In the light of those essential characteristics of the undervaluation fraud at issue, OLAF requested all those Member States to analyse imports of relevant products coming, inter alia, from China for possible indications of undervalued imports, to carry out appropriate customs checks at customs clearance for the goods concerned in order to check the declared values of those goods and to ensure that they reflected their true market values, and to take appropriate safeguard measures where there was any suspicion of artificially low invoiced prices.

234 In addition, by mutual assistance message 2009/001, OLAF informed all the Member States that its analyses in relation to the period from January to June 2009 had confirmed the existence of imports of relevant products from China throughout the European Union with declared values that were extremely low. In the light of that finding of 'serious undervaluation fraud' and referring to the recommendations already made in mutual assistance message 2007/015, OLAF asked Member States to report the implementation of '(adjusted) risk filters' in place to it within four weeks. It also asked all the Member States to 'take appropriate action to counter the endemic undervaluation phenomenon' and 'identify high-risk consignments', and recommended that they 'verify the existence of an importer'.

235 In addition, the PCA Discount guidelines included a description of a specific methodology, based on the 'fair prices' of the OLAF-JRC method and applicable before clearance of the goods concerned, and Member States were encouraged to implement that methodology in order to tackle the undervaluation fraud at issue, in particular in the context of that customs operation. The measures which OLAF and the Commission recommended taking also included the provision of guarantees.

236 At a meeting of the Commission's Customs Code Committee on 9 March 2012, in which a United Kingdom representative participated, a representative of the Commission explained that PCA Discount had essentially entailed clearance checks of the goods concerned in order to ensure the effectiveness of the operation, in that it was intended to combat illegal and clandestine trade involving 'missing traders'.

237 It must also be noted that, between February 2015 and July 2016, the United Kingdom attended several meetings organised by OLAF concerning the undervaluation fraud at issue, at which OLAF reiterated and updated the information which it had previously provided regarding the scale and nature of that fraud, particularly the fact that that illegal trade was developing more and more in the United Kingdom, and the countermeasures to be taken to tackle that fraud effectively. In those meetings, OLAF continued to recommend strongly that the United Kingdom establish risk thresholds to identify consignments likely to be undervalued and to subject those risky consignments to customs control measures before releasing the goods concerned for free circulation, such as physical controls, the taking of samples and the provision of guarantees, in order to ensure that customs duties were actually collected on the basis of the true value of those goods.

238 Accordingly, contrary to the Portuguese Republic's submission, it does not follow from mutual assistance message 2015/013 that it was only after JCO Snake that the Member States effectively became aware of the undervaluation fraud at issue. Furthermore and in any event, that mutual assistance message referred expressly to mutual assistance messages 2007/015 and 2009/001 as well as, therefore, to the information provided by OLAF in the latter messages and summarised in paragraphs 232 and 234 of the present judgment.

239 Nor, contrary to the Portuguese Republic's contention, does it follow from mutual assistance message 2015/013 and from paragraph 83 of Special Report No 24/2015 of the European Court of Auditors, entitled 'Tackling intra-Community VAT fraud: More action needed', that the United Kingdom customs authorities were unaware of the existence of a widespread practice of making false customs declarations before JCO Snake.

240 In fact it is apparent from that mutual assistance message and from paragraph 83 of that special report that JCO Snake had led to the finding that, in the case of customs procedure code 40 according to the list of EU customs procedures, which provides for simultaneous release for free circulation and home use of goods which are not the subject of a VAT-exempt supply ('customs procedure 40'), the risk of undervaluation was estimated at around 20% of the relevant imports and, in the case of customs procedure 42, that risk was estimated at 40% of those imports.

241 That information cannot be taken to mean that the problem of the undervaluation fraud at issue was one of which the Member States became aware only after JCO Snake.

242 Consequently, the Commission has established to the requisite legal standard that, from the start of the infringement period, the United Kingdom had sufficient knowledge of the essential characteristics both of the undervaluation fraud at issue, summarised in paragraphs 226 to 228 of the present judgment, and of the measures which OLAF and the Commission were recommending that it take to tackle that fraud effectively, namely, essentially, pre-clearance customs controls of consignments identified on the basis of a risk analysis tool such as risk thresholds, namely the LAPs determined in accordance with the OLAF-JRC method, as being likely to be undervalued.

243 That conclusion cannot be called into question by the fact that, over the course of the infringement period, the United Kingdom's knowledge of the scale and nature of that fraud and of the means of countering it effectively further improved in view, in particular, of the growth of fraudulent imports at extremely low prices on its territory and the ensuing potential losses of traditional own resources or of certain aspects of the implementation of the OLAF-JRC method as a risk analysis tool.

(iv) Inconsistency with Article 325(1) TFEU of the system of customs controls applied by the United Kingdom during the infringement period to counter the undervaluation fraud at issue

244 As is indicated in paragraph 224 of the present judgment, the Commission maintains that the system of customs controls applied by the United Kingdom during the infringement period to counter the undervaluation fraud at issue was not consistent with the principle of effectiveness laid down in Article 325(1) TFEU, in so far as it was essentially limited to post-clearance customs control measures applied after clearance of the goods concerned, and, in particular, to post-clearance recovery of duties.

245 The Commission claims, as has been noted in paragraph 223 of the present judgment, that only a system of customs controls that is essentially the same in nature as that recommended by OLAF, that is to say, involving risk thresholds set at a level at least equivalent to the LAPs and applied prior to clearance, and the provision of guarantees, would be capable of tackling the undervaluation fraud at issue effectively, in view of the essential characteristics of that fraud, recalled in paragraphs 226 to 228 of the present judgment, namely a large-scale fraud that is mobile, responsive to controls and committed by phoenix undertakings. According to the Commission, pre-clearance controls of the goods concerned did not form part of the system of customs controls applied by the United Kingdom until October 2017.

246 The Commission submits that the post-clearance measures applied by the United Kingdom were bound to fail and were manifestly inappropriate for tackling that fraud, since, as the United Kingdom was aware, it was being implemented by phoenix undertakings, making any post-clearance recovery of customs duty unlikely, if not practically impossible, in the vast majority of cases.

247 In that regard, it is common ground that, before the launch of Operation Swift Arrow, the United Kingdom customs authorities applied pre-clearance customs control measures only very exceptionally, and focused their activities on post-clearance recovery of customs duties. Thus, physical checks of the goods concerned and the taking of samples on the basis of the risk profiles of the OLAF-JRC method were carried out only during the operational phase of JCO Snake, that is, over a period of one month from 17 February to 17 March 2014, as part of Operation Samurai, which involved only two traders, and as part of Operation Breach, in respect of 13 consignments. It is also apparent from the United Kingdom's answer to a question put by the Court that,

although securities were demanded during the operational phase of JCO Snake, the total amount of those securities represented only 0.4144% of the total amount of additional customs duties claimed in the Snake C18s, and, moreover, those securities were subsequently released after the cancellation of the C18s, meaning that they did not result in any duty being recovered.

248 The United Kingdom maintains that it adopted its own strategy based on a risk analysis, consisting essentially in the application of a risk profile designed to identify, then to control after clearance, where appropriate through the issue of duty recovery demands, a discrete group of traders that regularly import goods at very low prices, described as 'high-risk importers', which it claims is legitimate given the considerable leeway afforded to the United Kingdom and in view of the fact that the OLAF-JRC method was not mandatory. It also claims that while, for example, in the context of PCA Discount, its customs authorities did not apply the risk thresholds of the OLAF-JRC method before clearance, but only afterwards, OLAF did not criticise it for doing so. Various assurances had, on the contrary, been given to it by OLAF agents that its system of customs controls was compatible with EU law.

249 In that regard, as is recalled in paragraph 169 of the present judgment, first, it must be pointed out that, in a system in which Member States are responsible for correctly implementing EU customs legislation in their national territories, those States cannot avoid responsibility for any infringement of EU law they may have committed, by relying on the fact that OLAF or the Commission did not criticise them for that infringement at a given point in time.

250 Secondly, in paragraphs 162 to 169 of the present judgment, the Court has rejected the arguments put forward by the United Kingdom to the effect that it was entitled to base a legitimate expectation on certain statements made by OLAF agents according to which its system of customs controls was allegedly compatible with EU law.

251 Thirdly, as is recalled in paragraph 220 of the present judgment, it is apparent from the case-law of the Court that the nature of the customs control measures to be adopted by the Member States in order to comply with the requirements imposed on them by Article 325(1) TFEU in the fight against fraud or any other illegal activity that may affect the financial interests of the European Union, and, in particular, the obligation to ensure the effective and comprehensive collection of the European Union's own resources, in the form of customs duties, subject to the necessary observance of the fundamental rights guaranteed by the Charter and general principles of EU law, cannot be determined in an abstract and fixed manner, since the nature of those measures depends on the characteristics of that fraud or other illegal activity, which, moreover, may change over time.

252 As the Commission notes, where, exceptionally, the United Kingdom customs authorities did carry out pre-clearance controls, these proved to be immediately effective and to have a deterrent effect. Thus, for example, it is common ground that as soon as physical controls were announced, containers were diverted from the port of Felixstowe (United Kingdom) to ports of other Member States, and the two traders subjected to pre-clearance controls as part of Operation Samurai immediately ceased trading after their customs declarations were challenged by HMRC.

253 Moreover, throughout the infringement period, in so far as the system of customs controls applied by the United Kingdom was focused on post-clearance measures such as recovery of duties, it has been shown to be ineffective as a means of tackling the undervaluation fraud at issue, since that was essentially characterised by the fact that it was committed by phoenix undertakings from which any recovery of duties could be ruled out in the vast majority of cases.

254 In that context, reference must be made to a meeting held on 13 June 2014 concerning the follow-up to JCO Snake, at which the United Kingdom customs authorities indicated, according to the notes of that meeting drawn up by a United Kingdom official, that although, in those cases in which no criminal proceedings were brought, those authorities envisaged implementing post-import recovery procedures to provide a 'monetary deterrent', they considered it 'unlikely, based on past experience and from what [had] already been seen in this fraud model, that any debts [would] be recovered'.

255 In addition, it must be noted that, both as regards the customs debts claimed in the Snake C18s and those claimed in the Breach C18s, the United Kingdom claims not to be obliged to make available to the Commission the traditional own resources corresponding to those debts, because the fact that they are irrecoverable cannot be attributed to the United Kingdom as the debtors are phoenix undertakings. That claim, however, even assuming it to be well founded, would demonstrate that the system of customs controls put in place by the United Kingdom did not serve to ensure the effective and comprehensive collection of revenue assigned to the European Union's own resources.

256 Furthermore, the Commission contends, without being contradicted in this respect, that some of the traders targeted by the controls carried out as part of Operation Breach were already targeted by a duty recovery demand in one of the Snake C18s, which would confirm that the system of customs controls put in place in the United Kingdom did not, at that time, have a sufficient deterrent effect.

257 Accordingly even if, as is apparent from the case-law recalled in paragraph 213 of the present judgment, Article 325(1) TFEU does indeed allow Member States a certain latitude and freedom of choice as to the customs control measures to be taken in order, in particular, to ensure the effective and comprehensive collection of the European Union's own resources, in the form of Common Customs Tariff duties, it must be held that, in the present case, having regard to the particular features of the undervaluation fraud at issue and particularly the fact that that fraud was mobile, highly responsive to controls and essentially carried out by missing or insolvent undertakings from which any post-clearance recovery of duties was, in the great majority of cases, ruled out from the outset – features of which, moreover, the United Kingdom customs authorities were aware at a sufficiently early stage because of their own experience – the system of customs controls put in place by the United Kingdom during the infringement period to combat that fraud, limited as it was with very few exceptions to post-clearance action to recover duties, failed – manifestly so – to respect the principle of effectiveness laid down in Article 325(1) TFEU.

258 Having regard to the foregoing considerations, the first plea in law must be upheld, in so far as it alleges an infringement of Article 325(1) TFEU.

(b) Breach of obligations imposed by EU customs legislation

259 As regards, in the second place, the United Kingdom's alleged failure to fulfil its obligations under EU customs legislation, the Commission claims that the United Kingdom failed, first, to take measures to protect the financial interests of the European Union, contrary to Article 3 of the Union Customs Code, read in conjunction with Article 4(3) TEU; secondly, to carry out customs controls based on risk analysis, contrary to Article 13 of the Community Customs Code and Article 46 of the Union Customs Code; thirdly, to require the provision of securities or guarantees, contrary to Article 248(1) of Implementing Regulation I and Article 244 of

Implementing Regulation II; and, fourthly, to enter in the accounts the customs debts which remained to be recovered as soon as its customs authorities became aware of the situation giving rise to the establishment of those customs debts, contrary to Article 220(1) of the Community Customs Code and Article 105(3) of the Union Customs Code.

(1) Preliminary observations

260 As a preliminary point, it must be noted that the complaint relating to Article 3 of the Union Customs Code, read in conjunction with Article 4(3) TEU, is not independent in scope from that relating to an infringement of Article 325 TFEU which is examined in paragraphs 208 to 258 of the present judgment. In fact the Commission does not expound that complaint on the basis of specific arguments relating to the provisions on which it is based.

261 In addition, as the Advocate General also noted, in essence, in point 173 of his Opinion, as regards Member States' obligations to counter any fraud or other illegal activities that may affect the financial interests of the European Union, Article 325(3) TFEU is a specific manifestation of the general principle of sincere cooperation laid down in Article 4(3) TEU. It follows that it is not necessary to examine that complaint separately (see, to that effect, judgment of 30 May 2006, *Commission* v *Ireland*, C-459/03, EU:C:2006:345, paragraphs 169 to 171).

262 However, it is necessary to examine whether, as the Commission maintains, in the action taken by the United Kingdom to combat the undervaluation fraud at issue during the infringement period, the United Kingdom infringed, first, Article 13 of the Community Customs Code and Article 46 of the Union Customs Code, in that it did not carry out pre-clearance customs controls of the goods concerned based on a risk analysis, such as the OLAF-JRC method, which allows imports likely to be undervalued, and which should therefore be subjected to checks as to the accuracy of the declared customs value, to be detected; and, secondly, Article 248(1) of Implementing Regulation I and Article 244 of Implementing Regulation II, in that the United Kingdom did not request the provision of securities or guarantees for imports thus identified as being potentially undervalued.

263 In that respect, the Commission infers from the judgment of 16 June 2016, *EURO 2004. Hungary* (C-291/15, EU:C:2016:455) that where goods are declared at customs values that are extremely low and, in particular, at values under 50% of the statistical average price, there would be reason to doubt the correctness of the customs declarations in question, and therefore those goods cannot be released for free circulation without prior checks of the values thus declared. It also refers to the judgment of 17 March 2011, *Commission* v *Portugal* (C-23/10, EU:C:2011:160) as justification for the principle that where customs authorities have concrete indications as to the inaccuracy of customs declarations, which might result in lesser amounts of customs duty being collected than are actually due, those authorities are under an obligation to verify those declarations and to carry out the requisite checks.

264 The United Kingdom, supported by the intervening Member States, contends that it follows from the case-law relied on by the Commission that Member States' customs authorities are obliged to carry out customs controls only if they have concrete indications as to the inaccuracy of the particulars given in a customs declaration. However, where those authorities merely have doubts as to the accuracy of those particulars, based, for example, on a difference of more than 50% being established between the declared price and the statistical average value, it is merely open to those authorities to carry out such checks; they are not obliged to do so.

265 In the present case, in the light of the information available to them, those authorities did not have concrete indications that the relevant imports were undervalued; rather, at most, they had reasonable doubts as to the accuracy of the declared customs values, within the meaning of the case-law, and therefore it would have been open to them to carry out customs controls, although they would not have been obliged to do so. Similarly, the finding that the declared customs value was under 50% of the statistical average value and, therefore, below the LAP threshold of the OLAF-JRC method is, in the United Kingdom's submission, not a concrete indication of undervaluation of that customs value but, at most, would give rise to reasonable doubts as to its accuracy and, therefore, would not have obliged the United Kingdom authorities to verify the accuracy of that customs value.

266 In that regard, it is sufficient to state at this stage that, first, the undervaluation fraud at issue was a large-scale fraud involving imports over a relatively long period into the whole of the European Union, and, in particular, into the United Kingdom, of large volumes of goods with declared values that were extremely low and, therefore, ostensibly suspect by 'missing' undertakings, clearly exposing the European Union to significant risks with regard to its financial interests because of consequential losses of traditional own resources that were to a very large extent irrecoverable. In that context, the knowledge of the United Kingdom customs authorities, particularly after information was communicated by OLAF and the Commission regarding the scale and particular features of the fraud as well as of the significant financial risks to which that fraud exposed the European Union, meant that those authorities had sufficiently concrete indications regarding the inaccuracy of the particulars given in a significant number of customs declarations regarding the value of the relevant products from China, thus obliging them to take appropriate customs control measures in order systematically to verify the value of the relevant imports so as to ensure, ultimately, full and effective payment of customs duties due.

267 Secondly, against that background of fraud, the information derived for Member States' customs authorities from the identification of very low-priced imports through a risk profile such as that of the OLAF-JRC method's LAPs as being likely to be undervalued was capable of providing those authorities with concrete indications that the particulars given in the customs declarations in respect of the goods covered by that risk profile were incorrect and should, therefore, be subject to customs controls before the goods concerned cleared customs.

268 With the benefit of those preliminary considerations, it is thus appropriate to examine the complaints referred to in paragraph 259 of the present judgment, with the exception of that relating to an infringement of Article 3 of the Union Customs Code, read in conjunction with Article 4(3) TEU.

(2) Breach of obligations imposed in Article 13 of the Community Customs Code and Article 46 of the Union Customs Code

(i) Arguments of the parties

269 As regards the complaint that the United Kingdom failed to fulfil obligations in that it allegedly infringed Article 13 of the Community Customs Code and Article 46 of the Union Customs Code, the Commission submits that, in the context of the action taken by the United Kingdom to combat the undervaluation fraud at issue during the infringement period, the United Kingdom did not carry out pre-clearance customs controls of the goods concerned based on a risk analysis such

as that of the OLAF-JRC method, which allows imports likely to be undervalued, and which should therefore be subjected to checks as to the accuracy of the declared customs value, to be detected.

270 In that regard, it is apparent from the file submitted to the Court that the Commission's complaint vis-à-vis the United Kingdom is not that the United Kingdom failed to apply the OLAF-JRC method, but rather that it failed to take the basic measures recommended by OLAF, namely, inter alia, controls based on pre-clearance risk profiles. The Commission accepts that that method was not legally binding on the Member States and, while it maintains that it was preferable to apply EU-wide risk profiles or thresholds, such as the LAPs established in accordance with that method, it claims, without, moreover, being contradicted in this respect by the United Kingdom, that it always accepted that Member States could apply their own risk profiles or thresholds provided that these were comparable to, or stricter than, the LAPs.

271 The United Kingdom maintains that the customs controls which it carried out during the infringement period to counter the undervaluation fraud at issue were based on a risk analysis. That analysis essentially involved the application of a risk profile to identify, and then check, a limited group of traders that regularly import the relevant products at very low prices and are classified as 'high-risk importers', and results, where appropriate, in post-clearance duty recovery demands such as C18s being issued. Thus, under Operation Breach, which was launched in May 2015 and is ongoing, 239 'high-risk importers' were identified for the purposes of applying that risk profile. The strategy is one that is 'legitimate and reasonable' since it has been shown in practice that the great majority of relevant imports are accounted for by just 129 traders from a total of 20 000 traders importing the relevant products from China.

(ii) Findings of the Court

272 Article 13(2) of the Community Customs Code, applicable to the part of the infringement period ending on 30 April 2016, provided, in its first subparagraph, that customs controls, other than spot-checks, were to be based on 'risk analysis using automated data processing techniques', with the purpose of identifying and quantifying the risks and developing the necessary measures to assess the risks, on the basis of criteria developed at national, Union and, where available, international level, and, in its second subparagraph, that 'the committee procedure' was to be used for determining a 'common risk management framework', and for establishing 'common criteria' and 'priority control areas'.

273 Those obligations were reproduced, with modified wording, in Article 46(2) and (3) of the Union Customs Code, applicable to the part of the infringement period commencing on 1 May 2016.

274 Article 46(2) of the Union Customs Code provides that customs controls, other than random checks, are 'primarily [to] be based on risk analysis using electronic data-processing techniques', with the purpose of identifying and evaluating the risks and of developing the necessary countermeasures, on the basis of criteria developed at national, Union and, where available, international level. Article 46(3) of that code provides that customs controls are to be performed within a 'common risk management framework', based upon the exchange of risk information and risk analysis results between customs administrations and establishing 'common risk criteria and standards, control measures and priority control areas'.

275 Article 46(4) of that code also requires Member States' customs authorities to undertake 'risk management'.

276 Article 46(6) and (7) of that code lists the matters of which account must be taken when establishing, in particular, 'common risk criteria and standards', and what those criteria and standards must include.

277 It is common ground that, during the infringement period, the Commission did not establish common risk criteria or standards in the form of an act that was binding on the Member States, although it did adopt, on 21 August 2014, by means of a communication, a strategy and action plan for customs risk management (Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the EU Strategy and Action Plan for customs risk management: Tackling risks, strengthening supply chain security and facilitating trade (COM(2014) 527 final)). As the Portuguese Republic observed at the hearing and as is confirmed by paragraphs 13 and 15 of Special Report No 04/2021 of the Court of Auditors, entitled 'Customs controls: insufficient harmonisation hampers EU financial interests', on 31 May 2018 the Commission adopted an initial binding decision establishing common financial risk criteria and standards in the form of an 'EU restricted' document, which was complemented, in December 2019, by a non-binding 'guidance document'.

278 The OLAF-JRC method, as recommended to Member States by OLAF and the Commission and set out, in particular, in the PCA Discount guidelines for use in the context of that operation, may, in so far as it includes, inter alia, a description of the risks and risk factors or indicators to be used to select goods for customs control and specifies the nature of customs controls to be undertaken by the customs authorities, be regarded as applying non-binding common risk criteria which form part of the common risk management framework.

279 It must be pointed out that since customs controls are ultimately aimed at preventing and countering fraud against the EU customs regime, any non-binding common measure that could be adopted or recommended in relation to the risk analysis and management criteria referred to in the first and second subparagraphs of Article 13(2) of the Community Customs Code and Article 46(2) and (3) of the Union Customs Code is necessarily part of the fight against fraud referred to in Article 325 TFEU. It is apparent from Article 325(1) and (3) TFEU that the fight against fraud involves close cooperation between, on the one hand, the Member States and the European Union and, on the other, the Member States themselves.

280 In that respect, in so far as the common risk management framework within which customs controls are to be performed is based, in accordance with Article 46(3) of the Union Customs Code, not only on common risk criteria and standards, but also on the exchange of risk information and risk analysis results between customs administrations and on customs control measures and priority control areas, it is a specific manifestation of Article 325(3) TFEU, which states that the Member States are to coordinate their action aimed at protecting the financial interests of the European Union against fraud, by organising, with the aid of the Commission, close and regular cooperation between the competent authorities.

281 Therefore, where such non-binding common risk analysis and risk management criteria are recommended, the Member States, while not, in principle, formally bound by those criteria, are required, pursuant to that duty of cooperation, to take due account of those criteria or to follow them if they have not developed national criteria that are at least as effective as those recommended by the European Union.

282 It follows that, in accordance with its obligations under Article 13 of the Community Customs Code and Article 46 of the Union Customs Code, read in conjunction with Article 325 TFEU, the United Kingdom was required, at the very least, when establishing its system of risk analysis and risk management during the infringement period, to take due account – in the light of the modus operandi and specific characteristics of the undervaluation fraud at issue that were known to it – of the risk profiles and types of customs control which OLAF and the Commission were recommending that it use to counter that fraud, and to do so notwithstanding the non-binding nature of the risk criteria applied.

283 It must be observed that, in spite of the renewed recommendations of OLAF and the Commission, the United Kingdom did not, save during the operational phase of JCO Snake, that is, in the period from 17 February to 17 March 2014, carry out pre-release customs controls of the goods concerned on the basis of risk profiles such as the risk thresholds of the OLAF-JRC method or other risk profiles of comparable effectiveness.

284 That said, as is apparent from paragraph 281 of the present judgment, in the absence of binding EU measures, the United Kingdom was not obliged to follow such recommendations, provided that the risk analysis and risk management criteria that it adopted were at the very least comparable, in terms of their effectiveness, to those recommended by the European Union, if not more effective than them.

285 However, at a meeting held on 28 July 2015, the United Kingdom customs authorities indicated to OLAF that the use of risk indicators based on average prices would be counter-productive and disproportionate due to the quantities of imports into the territory of that Member State.

286 The United Kingdom submits, in particular, in response to questions put by the Court, that in so far as the risk profiles of the OLAF-JRC method were insufficiently precise, in its opinion, notably in that they gave rise to false positives in the case of legitimate low-priced imports for well-known high street retailers, it preferred to develop its own more effective national risk profiles. The fact that these ultimately became operational only from 12 October 2017, the date on which Operation Swift Arrow was launched, is attributable to the complexity of the exercise and the significant resources that had to be spent on it.

287 That argument must be rejected.

288 It is necessary to emphasise, first, the gravity and scale of the undervaluation fraud at issue, and the significant financial risks it clearly entailed for the European Union, which were, moreover, known to the United Kingdom which had repeatedly been warned of them by OLAF and the Commission, and, secondly, the fact that the United Kingdom was at the very least obliged to take due account, when developing its risk analysis and risk management system, of the risk criteria which OLAF and the Commission had on several occasions recommended that it apply, particularly risk thresholds such as the LAPs of the OLAF-JRC method to be applied before clearance of the goods concerned.

289 In those circumstances, the United Kingdom could not, pending completion of its work to put in place its own allegedly more effective risk thresholds, refuse to apply any risk profile that would make it possible to identify, before clearance of those goods, very low-priced imports presenting a significant risk of undervaluation for the purposes of the application of customs controls before the release of those goods for free circulation.

290 It should be borne in mind in that regard that the Commission is not complaining that the United Kingdom failed to apply the risk profiles of the OLAF-JRC method correctly, but rather that, prior to the launch of Operation Swift Arrow, the United Kingdom failed to apply any pre-clearance risk profile to the goods concerned as part of its system of risk analysis and risk management, although that was the only method that would have enabled it to detect imports likely to be undervalued for the purposes of targeting customs controls before releasing those goods.

291 Moreover, it is apparent from the analysis of Article 325 TFEU in paragraphs 208 to 220 of the present judgment that, in view of the characteristics of the undervaluation fraud at issue, countermeasures enabling that fraud to be tackled effectively and that would have a deterrent effect could not be confined to post-clearance recovery of duties, since that was generally bound to fail in the case of missing undertakings, but had to include customs controls prior to the goods declared at extremely low prices being released for free circulation.

292 In accordance with Article 13 of the Community Customs Code and Article 46 of the Union Customs Code, read in conjunction with Article 325 TFEU, the United Kingdom was obliged, for the purposes of ensuring that the fight against fraud was effective and acted as a deterrent, to select the customs declarations to be subjected to such pre-clearance controls on the basis of a risk analysis using electronic data-processing techniques, which it failed to do throughout the entire infringement period, except during the operational phase of JCO Snake, from 17 February to 17 March 2014.

293 Since the Commission's complaint is based on that omission alone, there is no need to examine the various complaints about the OLAF-JRC method, used as a risk analysis tool, to the extent that it prescribes arbitrary or overly inclusive risk thresholds given the high number of false positives generated that concern low-priced, yet legitimate imports by high street retailers.

294 So far as this point might be relevant, it may be stated that, since it is apparent from the studies annexed to the OLAF report that the LAPs, used as risk thresholds in connection with the OLAF-JRC method, were set from CAPs on the basis of scientific research carried out by the JRC involving analysis of histograms and the price distribution of different types of imports, they appear not to be arbitrary but to be based on objective and neutral criteria.

295 In addition, given that the risk thresholds of the OLAF-JRC method, namely the LAPs, are based on statistical average prices, namely the CAPs, and are merely intended to identify imports presenting a high risk of undervaluation in order for the declared customs values of those imports to be verified, not in order to determine whether those imports are actually undervalued, those risk thresholds, by their very nature, entail a certain rate of false positives.

296 Consequently, contrary to the United Kingdom's contention, the reliability of LAPs as a risk profile cannot be called into question merely on account of the fact, assuming it to be established, that 11.2% by volume of legitimate imports by certain well-known high street retailers are declared at values below those prices. Such a rate of false positives does appear to be reasonable in view of the valuable contribution made by LAPs in the detection of the undervaluation fraud at issue.

297 Lastly, as the Advocate General also noted in point 209 of his Opinion, the Commission indicated in reply to questions put by the Court and without being contradicted in that respect by the United Kingdom, first, that LAPs had been introduced and then applied as risk profiles in PCA

Discount in 2011 and, subsequently, in JCO Snake in 2014 after detailed discussion between Member States and by consensus, and, secondly, that setting LAPs at 50% of CAPs had not, as such, been called into question by any Member State during the infringement period.

298 Having regard to the foregoing considerations, the first plea in law must be upheld to the extent that it relates to the alleged infringement by the United Kingdom of Article 13 of the Community Customs Code and Article 46 of the Union Customs Code in so far as, in the context of the action taken to combat the undervaluation fraud at issue during the infringement period, the United Kingdom did not carry out customs controls based on risk analysis before clearance of the goods concerned.

(3) Breach of obligations imposed in Article 248(1) of Implementing Regulation I and Article 244 of Implementing Regulation II

299 As is noted in paragraph 259 of the present judgment, the Commission complains that the United Kingdom has failed to fulfil its obligations under Article 248(1) of Implementing Regulation I and Article 244 of Implementing Regulation II, which oblige the customs authorities to request the provision of a sufficient security or guarantee where they consider that the verification of the customs declaration may result in a higher amount of duty than that resulting from the particulars of the customs declaration.

300 While, as the United Kingdom submits, Article 248(1) of Implementing Regulation I and Article 244 of Implementing Regulation II do, on account of the use of the verb 'consider', allow Member States' customs authorities a certain margin of discretion when deciding whether it is necessary to require security or a guarantee to be provided, that margin of discretion is limited, as the Advocate General also noted, in essence, in point 218 of his Opinion, by the principle of effectiveness laid down in Article 325(1) TFEU, under which effective protection of the financial interests of the European Union must be ensured against any fraud or any other illegal activities that may affect those interests.

301 As is pointed out in paragraphs 220 and 251 of the present judgment, in so far as the principle of effectiveness applies to the specific obligation to which Member States are subject under Article 325(1) TFEU to guarantee the effective and comprehensive collection of the European Union's own resources, in the form of customs duties, the scope of that principle cannot be determined in an abstract and fixed manner, since it depends on the characteristics of the fraud or other illegal activities concerned, which, moreover, may change over time.

302 In the present case, it must be borne in mind that the undervaluation fraud at issue was characterised by imports, at extremely reduced prices, of large quantities of relevant products from China by phoenix undertakings which were established specifically to carry out that fraud, which had only minimal assets and which disappeared or were wound up as soon as they were subjected to controls regarding the accuracy of the customs values they had declared, so that any post-clearance recovery of duties was unrealistic from the outset in the vast majority of cases.

303 In the context of that fraud, effective protection of the financial interests of the European Union against the significant losses of traditional own resources likely to flow from the non-collection of large amounts of customs duty relating to those massive and clearly fraudulently undervalued imports called not only for the establishment of a risk profile that would make it possible to

detect automatically imports posing a significant risk of undervaluation and consequently having to be verified as to the accuracy of the customs values declared, but also for the provision of guarantees to be systematically demanded in respect of those imports.

304 However, as has been noted in paragraph 247 of the present judgment, it is undisputed that, during the infringement period, the United Kingdom required securities to be provided only very exceptionally during the operational phase of JCO Snake, for a total amount representing just 0.4144% of the total amount of additional customs duty claimed in the Snake C18s, and those securities were, moreover, repaid after the C18s to which they related were cancelled.

305 The United Kingdom disputes that there was any such failure to fulfil obligations, claiming, in the first place, that as its customs authorities did not have the data to enable them to calculate amounts for guarantees on the basis of a reliable replacement value, such guarantees were likely to be successfully challenged in administrative and judicial proceedings if they were calculated on the basis of CAPs.

306 That argument must be rejected.

307 As the Advocate General also noted, in essence, in point 224 of his Opinion, given that the United Kingdom was responsible for correctly determining customs values declared at importation into its territory by applying customs controls which, in the light of the particular features of the undervaluation fraud at issue, had to include pre-clearance checks of the goods concerned, it was for the United Kingdom customs authorities to request information from the traders concerned concerning the quality of those goods and to collect samples in connection with physical checks, giving those authorities the data necessary to determine a replacement value that could be used to calculate the correct amount for guarantees.

308 In that context, although, under JCO Snake, OLAF tried to support the action taken by Member States by asking the Chinese authorities to provide export prices that could be used to determine replacement values of goods imported at an undervalue, the fact that, ultimately, relatively few export prices were provided by the Chinese authorities and that the use in judicial proceedings of the prices that were provided was also subject to strict limitations cannot alter the fact that it was for the United Kingdom, and not for OLAF or the Commission, to organise its arrangements for combating the undervaluation fraud at issue in such a way that it would have sufficient data in relation to the value of the goods concerned, such as data relating to the quality or level of finishing of those goods.

309 In the second place, the United Kingdom denies any failure to fulfil its obligations based on an infringement of Article 248(1) of Implementing Regulation I and Article 244 of Implementing Regulation II, on the ground that the obligation systematically to provide security or a guarantee would unacceptably interfere with the right to property of the importers concerned and would, therefore, be contrary to Article 17 of the Charter and Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952.

310 In that regard, as is recalled in paragraphs 220 and 251 of the present judgment, it follows from the case-law of the Court in relation to Article 325(1) TFEU that the obligation to ensure the effective and comprehensive collection of the European Union's own resources, namely customs duties, requires the necessary observance of the fundamental rights guaranteed by the Charter and of general principles of EU law.

311 In the present case, the Commission complains that the United Kingdom failed systematically to require the provision of guarantees before clearance of the goods concerned only in respect of imports whose declared value was below a risk threshold and which therefore presented a significant risk of undervaluation.

312 Furthermore, it must be noted, as the Advocate General did in point 222 of his Opinion, that the United Kingdom does not explain precisely why such an obligation systematically to provide guarantees for imports identified by means of a risk profile as posing a significant risk of undervaluation would constitute an infringement of the right to property of the traders concerned.

313 Further, while the obligation systematically to provide guarantees for such imports may entail a limitation of the fundamental right to property, such a limitation would appear to be justified in the light of the conditions laid down in Article 52(1) of the Charter.

314 In accordance with that provision, that limitation is provided for by law and respects the essence of the right to property, as well as the principle of proportionality, since the limitation is necessary and genuinely meets objectives of general interest recognised by the European Union.

315 In that respect, first of all, the obligation systematically to provide a guarantee for imports presenting a significant risk of undervaluation genuinely meets the objective of general interest, recognised in Article 325 TFEU, that the European Union's financial interests should be protected and, in particular, that Member States' customs authorities should take appropriate customs control measures to that effect to ensure the effective and comprehensive collection of traditional own resources, namely customs duties.

316 Next, in view of the fact that a guarantee is released as soon as the importer concerned pays the duties actually due or it is established, after verification, that the importer has correctly declared the customs value of the goods concerned, the obligation to provide such a guarantee – even systematically – is strictly temporary and respects the essence of the right to property as well as the principle of proportionality.

317 Lastly, the proportionate nature of such an obligation is due also to the fact that the Commission criticises the United Kingdom specifically for having failed to impose it only in respect of imports presenting a significant risk of undervaluation that are detected, using an automated risk profile, prior to the release of those goods.

318 Indeed, in the case of such imports, the customs authorities must, in accordance with Article 181a of Implementing Regulation I and Article 140 of Implementing Regulation II, have doubts as to the customs value declared, in that they cannot be satisfied that it represents the total amount paid or payable and are, therefore, bound to consider that the verification of the customs declarations concerned may result in a higher amount of duty becoming payable than that resulting from the particulars of those customs declarations, as provided for in Article 248 of Implementing Regulation I and Article 244 of Implementing Regulation II.

319 Having regard to the foregoing considerations, it must be concluded that, by essentially limiting, over the course of the infringement period, its system of customs controls to counter the undervaluation fraud at issue to measures applied after clearance of the goods concerned, such as post-clearance duty recovery demands, and failing systematically to incorporate pre-clearance measures in that system, particularly customs controls of imports identified by means of an

automated risk profile as presenting a significant risk of undervaluation, and the systematic provision of securities or guarantees in respect of those imports, the United Kingdom has failed to fulfil its obligations under Article 13 of the Community Customs Code, Article 46 of the Union Customs Code, Article 248(1) of Implementing Regulation I and Article 244 of Implementing Regulation II.

320 That conclusion follows essentially from the finding of ineffectiveness and, in the present case, the manifest ineffectiveness of the system of customs controls applied by the United Kingdom during the infringement period to counter the undervaluation fraud at issue, due to the fact that that system was focused on post-clearance controls of the goods concerned, and was thus not tailored to the characteristics of that fraud, even though the United Kingdom was sufficiently aware of that fraud from the start of that period.

321 As the Advocate General also noted, in essence, in point 227 of his Opinion, that conclusion regarding the manifestly inappropriate and inadequate nature, in the present case, of the customs controls carried out by the United Kingdom over the course of the infringement period to counter the undervaluation fraud at issue is not invalidated by the United Kingdom's argument that it participated in customs control operations at EU level, such as PCA Discount in 2011, JCO Snake in 2014 or Operation Octopus in 2016, and conducted its own operations, such as Operation Breach or Samurai.

322 It is for the customs authorities of the Member States to ensure that EU customs law is applied and, in particular, to undertake appropriate customs controls in order to protect the European Union's financial interests effectively. The performance of such a task requires those authorities to work continuously, consistently and systematically, work that cannot be limited to occasional participation in customs operations, the effects of which may only be temporary. In addition, customs control actions undertaken at EU level are intended to support the Member States, but cannot replace the actions to control and protect the European Union's financial interests effectively that are the Member States' responsibility.

323 In that regard, it is common ground that Operation Breach, launched by the United Kingdom authorities in May 2015, was the first customs control exercise by the United Kingdom aimed specifically at combating the undervaluation fraud at issue, and that Operation Swift Arrow was the first action by the United Kingdom systematically to incorporate into the system of customs controls pre-clearance checks of imports detected using the risk profile.

324 As the Commission submits, the manifest ineffectiveness of the measures taken by the United Kingdom during the infringement period to counter the undervaluation fraud at issue and, conversely, the effectiveness and deterrent nature of a system that systematically incorporated pre-clearance customs controls of the goods concerned based on a risk profile are also apparent from the statistical data provided by the Commission.

325 Those statistics, set out in particular in the annex to the Commission's replies to questions put by the Court, confirm that, first, during the infringement period, the volume of imports declared for customs purposes in the United Kingdom at prices below the LAP (that is, 50% of the CAP), particularly those with declared prices below 10% of the CAP, and, therefore, extremely low prices, increased substantially from year to year, while the volume of imports at prices above the LAP remained relatively stable.

326 Thus, the volume of imports at prices below 10% of the CAP increased from 4 189 937 kg in 2011 to 314 088 517 kg in 2016. For the infringement period, the volume of imports with declared prices below the LAP was 41% of total imports of relevant products from China. In that period, 69.5% of imports with declared prices below the LAP were imports with declared prices below 10% of the CAP.

327 In addition, while 51% of imports at prices below the LAP were declared at a price below 10% of the CAP in December 2012, that rate rose to 85% in December 2016.

328 Secondly, the statistical data provided by the Commission indisputably show that since the launch of Operation Swift Arrow, the first operation by the United Kingdom authorities systematically to incorporate into the system of customs controls pre-clearance checks of imports identified by an automated risk profile as presenting a significant risk of undervaluation, imports at prices declared below the LAP immediately declined and disappeared altogether within the space of a few months. Those undervalued imports fell by 90% over a period of just three months.

(4) Breach of obligations imposed in Article 220(1) of the Community Customs Code and Article 105(3) of the Union Customs Code

329 As is noted in paragraph 207 of the present judgment, it is appropriate next to examine the complaint alleging an ongoing breach of obligations under Article 220(1) of the Community Customs Code and Article 105(3) of the Union Customs Code, in that, as regards the relevant imports, the United Kingdom did not enter in the accounts the customs debts which remained to be recovered as soon as its customs authorities became aware of the situation giving rise to the establishment of those debts.

330 The United Kingdom challenges that complaint, contending, in essence, that it was not required to enter additional customs debts in the accounts unless it was under a duty to verify the customs declarations concerned, since the additional duties legally due could not be calculated unless those declarations had first been verified. It argues that it was not under a duty to verify those customs declarations whose value fell below the thresholds set by OLAF and that it did not in fact verify them. In any event, that obligation to enter duties in the accounts of own resources of the European Union would have required the United Kingdom to have particulars of the precise amounts owed that it failed to enter in the accounts. Even if the United Kingdom had carried out verifications, it would not have had that information.

331 In that regard, to the extent that the Commission claims, by its complaint of an infringement of Article 220(1) of the Community Customs Code and Article 105(3) of the Union Customs Code, that, in the case of the relevant imports made throughout the infringement period, the United Kingdom did not enter in the accounts the full customs duty due within the time limits prescribed by those provisions, it is apparent from the examination of the first plea in law that, contrary to Article 325(1) TFEU and EU customs law, the United Kingdom customs authorities did not take appropriate customs control measures to verify the customs values declared in respect of those imports.

332 It follows that, with regard to those imports, those customs authorities did not comply with their obligation to ensure, by means of appropriate customs controls, that the customs values were correctly determined in accordance with EU customs rules.

333 Consequently, by calculating customs duty in respect of those imports on the basis of incorrect values, these being manifestly too low, then by entering those amounts of duty in the accounts, the United Kingdom customs authorities failed, contrary to Article 220(1) of the Community Customs Code and Article 105(3) of the Union Customs Code, to enter in the accounts in an effective manner the full customs duty due within the time limits prescribed by those provisions.

334 In particular, contrary to those provisions, amounts corresponding to the difference between the duties calculated on the basis of incorrectly declared values and the duties which would have been established if they had been calculated on the basis of the true value of the goods concerned, in accordance with the rules of EU customs law on customs valuation, were not entered in the accounts in due time.

335 Having regard to the foregoing considerations, the first plea in law must be upheld to the extent that it relates to an infringement by the United Kingdom of its obligations under Article 325(1) TFEU, Article 13 and Article 220(1) of the Community Customs Code, Article 46 and Article 105(3) of the Union Customs Code, Article 248(1) of Implementing Regulation I and Article 244 of Implementing Regulation II.

2. Failure to fulfil obligations imposed by EU law on the making available of traditional own resources consisting in customs duties

336 By the second plea in law, which relates to certain complaints in the first paragraph of the first head of claim in the application and also to the single complaint in the third paragraph of that first head of claim, in the first place, the Commission claims that the United Kingdom has infringed EU legislation on own resources and, in particular, Articles 2 and 8 of Decisions 2007/436 and 2014/335, Articles 2, 6, 9, 10, 11 and 17 of Regulation No 1150/2000 and the corresponding provisions of Articles 2, 6, 9, 10, 12 and 13 of Regulation No 609/2014, since, during the infringement period, the United Kingdom did not make available to the Commission the traditional own resources in respect of the relevant imports that were due. In the second place, the Commission submits that, according to its estimates, the amounts of traditional own resources losses, minus collection costs but together with default interest, which must consequently be made available to it by the United Kingdom in accordance with those provisions are as follows:

– EUR 496 025 324.30 for 2017 (until 11 October 2017 inclusive);

– EUR 646 809 443.80 for 2016;

– EUR 535 290 329.16 for 2015;

– EUR 480 098 912.45 for 2014;

– EUR 325 230 822.55 for 2013;

– EUR 173 404 943.81 for 2012;

– EUR 22 777 312.79 for 2011.

(a) Complaint alleging breach by the United Kingdom of its obligation of principle to make traditional own resources available

337 In the first place, the Commission submits that in so far as, as is claimed in the context of the first plea, the United Kingdom customs authorities did not carry out appropriate customs controls during the infringement period, the goods comprising the relevant imports were not declared correctly in terms of their customs value, in consequence of which the customs duties due in respect of those goods were not calculated correctly and the amounts of own resources corresponding to those duties which should have been established were not established or made available to the Commission when they ought to have been.

338 Moreover, the Commission complains that, in connection with JCO Snake, as from June 2015 the United Kingdom customs authorities cancelled the customs debts which they had previously established in post-clearance duty recovery demands issued between November 2014 and February 2015, namely the Snake C18s relating to the relevant imports made between November 2011 and November 2014, and that the United Kingdom therefore failed, on account of administrative errors attributable to its customs authorities, to make available to the Commission the traditional own resources due in respect of those imports.

(1) The principle of the United Kingdom's liability for the non-establishment of losses of traditional own resources of the European Union

339 In order to assess the various complaints of the Commission and the arguments relied on by the United Kingdom in its defence, first of all, it is necessary to recall the characteristics of the system of own resources of the European Union, as summarised by the Court in its case-law.

340 It is apparent from Article 8(1) of Decisions 2007/436 and 2014/335 that the European Union's own resources referred to, respectively, in Article 2(1)(a) of Decision 2007/436 and Article 2(1) of Decision 2014/335 are collected by the Member States who are obliged to make them available to the Commission (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 56 and the case-law cited).

341 To that end, the Member States are required, under Article 2(1) of Regulations No 1150/2000 and No 609/2014, to establish the European Union's entitlement to own resources as soon as the conditions provided for by the customs regulations have been satisfied 'concerning the entry of the entitlement in the accounts and the notification of the debtor' and, therefore, their authorities are in a position to calculate the duties arising from a customs debt and to determine who is liable for them. The Member States are accordingly required to enter the entitlements established in accordance with Article 2 of those regulations in the accounts for the European Union's own resources on the conditions laid down in Article 6 of those regulations. It must be noted in that regard that, under Article 6(3)(b) of Regulation No 1150/2000 and the second subparagraph of Article 6(3) of Regulation No 609/2014, an established entitlement which has not yet been recovered and in respect of which no security has been provided is to be shown in the B account (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 57 and the case-law cited).

342 The Member States must then make the European Union's own resources available to the Commission on the conditions laid down, in identical terms, in Articles 9 to 11 of Regulation No 1150/2000 and in Articles 9, 10 and 12 of Regulation No 609/2014, by crediting those resources, within the prescribed period, to the account opened in the name of that institution. In

accordance with Article 11(1) of Regulation No 1150/2000 and Article 12(1) of Regulation No 609/2014, any delay in making the entry in that account is to give rise to the payment of interest by the Member State concerned (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 58).

343 In addition, under Article 17(1) of Regulation No 1150/2000 and Article 13(1) of Regulation No 609/2014, Member States are required to take all requisite measures to ensure that the amounts corresponding to the entitlements established under Article 2 of those regulations are made available to the Commission.

344 Furthermore, under Article 17(2) of Regulation No 1150/2000 and Article 13(2) of Regulation No 609/2014, Member States are to be released from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements only if recovery could not proceed for reasons of *force majeure* or proves definitively to be impossible for other reasons which cannot be attributed to them.

345 It follows that, as EU law currently stands, the management of the system of the European Union's own resources is entrusted to the Member States and is their responsibility alone. Thus, the obligations to collect, establish and place those resources on account with a view to making them available to the Commission are imposed directly on the Member States under EU legislation on own resources and, in this case, Decisions 2007/436 and 2014/335 and Regulations No 1150/2000 and No 609/2014 (see, to that effect, judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 62 and the case-law cited).

346 Lastly, in so far as there is a direct link between the collection of revenue deriving from customs duties and the availability to the Commission of the corresponding resources, it is for the Member States, in accordance with the obligations imposed on them under Article 325(1) TFEU to protect the financial interests of the European Union against fraud or any other illegal activities affecting those interests, to adopt the measures necessary to guarantee the effective and comprehensive collection of those duties and, therefore, of those resources (see, to that effect, judgment of 11 July 2019, *Commission* v *Italy (Own resources – Recovery of a customs debt)*, C-304/18, not published, EU:C:2019:601, paragraph 50 and the case-law cited).

347 In the light of those considerations regarding the characteristics of the system of own resources of the European Union, it must be noted, as the Advocate General stated, in essence, in point 240 of his Opinion, that since, as has been established following examination of the first plea in law, the United Kingdom customs authorities did not, contrary to Article 325(1) TFEU and EU customs law, adopt measures during the infringement period that would ensure that the correct level of the customs values of the relevant imports made during that period would be established, such as pre-clearance controls of the goods concerned based on a risk analysis, and the obligation to provide guarantees for imports identified by means of a risk profile as presenting a significant risk of undervaluation, the United Kingdom calculated the customs debts in respect of those imports on the basis of values that were inaccurate, being generally lower than the true values of the goods concerned. Accordingly, the United Kingdom did not enter in the accounts the full customs duty due, nor, consequently, did it establish or make available to the Commission, contrary to Articles 2 and 8 of Decisions 2007/436 and 2014/335 and Articles 2, 6, 9, 10, 11 and 17 of Regulation No 1150/2000 and the corresponding provisions of Articles 2, 6, 9, 10, 12 and 13 of Regulation No 609/2014, all of the own resources relating to those imports at the time when they ought to have been established and made available.

348 The United Kingdom contests that finding. In its view, in so far as the purpose of the present action is to obtain an order from the Court requiring the United Kingdom to make certain amounts of own resources available to the Commission, it is an action seeking compensation based on an infringement of Article 325 TFEU and EU customs law, arising from the fact that the United Kingdom customs authorities allegedly carried out inadequate controls of fraudulently undervalued imports.

349 Consequently, in accordance with the principles governing all actions for damages, the Commission is required to establish a direct causal link between those controls and the losses of own resources which the Commission claims by way of damages.

350 However, in the United Kingdom's submission, there is no such causal link. The United Kingdom submits in that regard that, in accordance with those principles, the question must be asked as to what would have happened if the customs control measures recommended by OLAF and the Commission had been adopted to counter the undervaluation fraud at issue, namely, essentially, pre-clearance controls of the goods concerned based on a risk profile.

351 According to the United Kingdom, if such measures had been adopted, the relevant imports would simply not have been made, and therefore no loss would have been caused to the EU budget. The traders concerned would not be prepared to pay the customs duties payable in respect of the relevant imports since, in particular, their remuneration depended on the amount of customs duty evaded.

352 Accordingly, the United Kingdom argues that it cannot be accused of having failed to make available to the Commission the traditional own resources due in respect of the relevant imports, the United Kingdom itself moreover having been the victim. It cannot, therefore, be held liable for any loss of those own resources.

353 Those arguments must be rejected.

354 It must, first of all, be recalled that, as set out in paragraph 180 et seq. of the present judgment, in these proceedings, the Commission is not seeking an order from the Court requiring the United Kingdom to pay damages; therefore the present action is not a claim for compensation and no direct causal link between the United Kingdom customs authorities' inadequate controls and the losses of own resources is required to be established on account of the allegedly compensatory nature of the present proceedings.

355 Likewise, contrary to the United Kingdom's contention, a requirement that the Commission demonstrate a direct causal link between an infringement of EU law and the losses of own resources for which a Member State should be held liable also does not follow from the judgment of 31 October 2019, *Commission* v *United Kingdom* (C-391/17, EU:C:2019:919).

356 The Court did, in paragraphs 121 and 122 of that judgment, use the expression 'causal link' between a wrongful action by the customs authorities of Anguilla (overseas territory of the United Kingdom) and the losses of own resources resulting from an infringement of 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) in order to examine, and then reject, the arguments relied on by the United Kingdom in relation to the absence of such a link. It is nevertheless apparent from paragraph 120 of that judgment that that expression relates to the question whether that wrongful action 'entailed, as a matter of certainty, a loss of own resources',

a question which the Court answered in the affirmative in paragraph 120, on the basis of the finding that that wrongful action had led the Italian authorities to accept goods from Anguilla for importation into the European Union free of customs duties and to issue decisions on the remission and refund of customs duties.

357 In the present case, it must be noted that the inadequate controls by the United Kingdom customs authorities of the customs values declared in respect of the relevant imports during the infringement period resulted in the corresponding customs duties being calculated and entered in the accounts on the basis of understated values and that, as a result, the relevant products were accepted for importation into the European Union when only a fraction of the customs duty due had been paid. Accordingly, that lack of appropriate controls entailed, as a matter of certainty, losses of the European Union's own resources.

358 Contrary to the United Kingdom's contention, the question that must be put in that respect in order to determine whether losses of the European Union's own resources were caused by the inadequate nature of the system of customs controls is not whether the relevant imports would have taken place if the customs controls recommended by OLAF and the Commission had been carried out, but only what would have been the amounts of customs duty that would have been entered in the accounts, and of EU own resources that would have been established by the United Kingdom customs authorities, if those imports – of which, as is undisputed, there were in fact great quantities in the territory of the United Kingdom – had been subjected to appropriate checks to ensure that the customs duties were calculated on the basis not of manifestly understated customs values but of correctly established customs values, in accordance with the rules of EU customs law on customs valuation.

359 In that regard, it follows from the case-law recalled in paragraph 346 of the present judgment that, in so far as there is a direct link between the collection of revenue deriving from customs duties and the availability to the Commission of the corresponding traditional own resources, it is for the Member States, under Article 325(1) TFEU, to adopt the measures necessary to guarantee the effective and comprehensive collection of those duties and, therefore, of the corresponding amounts of those resources.

360 Yet, in the present case, as has been held following examination of the first plea in law, the United Kingdom did not adopt the measures necessary for that purpose during the infringement period.

361 Consequently, the customs duties in respect of the goods involved in the relevant imports were calculated on the basis of values the great majority of which can be regarded as having been declared fraudulently in that they were far below their true value and were not, therefore, determined correctly.

362 In consequence, therefore, of the inadequacy of those controls, the amounts of customs duty and of own resources actually due in respect of the relevant imports were not effectively and comprehensively collected and made available to the Commission by the United Kingdom.

363 Given that those amounts could have been correctly established as soon as the imports were made and subsequently cleared through customs if the United Kingdom authorities had carried out the necessary checks, the United Kingdom must be treated in relation to the infringement period as if it had correctly established the corresponding customs duties and had entered them in the own

resources accounts of the European Union (see, by analogy, judgment of 17 March 2011, *Commission* v *Portugal*, C-23/10, not published, EU:C:2011:160, paragraph 63 and the case-law cited).

364 In addition, as the Advocate General also noted, in essence, in point 265 of his Opinion, if, as a result of the inadequate controls which they carried out, the United Kingdom customs authorities failed, contrary to their obligations under Article 325(1) TFEU and EU customs law, to collect – possibly because of errors committed by them – the full customs duty due for the relevant imports, that does not affect the obligation of the United Kingdom to make available to the Commission the resources which would have been established if those duties had been correctly entered in the accounts.

365 Lastly, since, throughout the infringement period, massive quantities of the goods concerned were imported into the United Kingdom at an undervalue, without the accuracy of the values declared in accordance with the rules of EU customs law on customs valuation having been verified before their release for free circulation, the United Kingdom created an irreversible situation leading to considerable losses of own resources for the European Union, for which the United Kingdom must be held liable.

366 Apart from the fact that a reconstitution of the facts such as that advocated by the United Kingdom would be a speculative exercise, which it is not for the Court to undertake for the purposes of finding that it is for a Member State to compensate losses of own resources of the European Union, that reconstitution cannot in any event cast doubt on the fact and significance of the losses sustained in respect of the relevant imports.

(2) The United Kingdom's liability for the losses of own resources of the European Union established in the Snake C18s

367 It is appropriate to examine, next, the Commission's complaint that, contrary to Article 13 of Regulation No 609/2014, the United Kingdom did not make available to the Commission the traditional own resources that were due in respect of the relevant imports made between November 2011 and November 2014, in so far as, between June and November 2015, the United Kingdom customs authorities annulled the decisions on the post-clearance recovery of additional customs duties taken in connection with JCO Snake, in particular the 23 Snake C18s issued between November 2014 and February 2015 for the recovery of additional customs duties ultimately amounting in total, according to the United Kingdom, to GBP 192 568 694.30.

368 It is common ground in that regard that the additional customs duties claimed in the Snake C18s were entered in the accounts and notified to the debtors, that the amounts of own resources corresponding to those duties were entered in the B account in accordance with Article 6(3) of Regulations No 1150/2000 and No 609/2014, since these were entitlements that were established but which had not yet been recovered and for which no security had been provided, and that the United Kingdom customs authorities subsequently cancelled those C18s and removed the entry of those amounts from that account.

369 The United Kingdom maintains that the cancellation of the Snake C18s was justified because it had become definitively impossible to recover the duties concerned for reasons which could not be attributed to it, and therefore, in accordance with Article 13(2)(b) of Regulation No 609/2014, it was released from the obligation to place at the disposal of the Commission the amounts corresponding to the established entitlements.

370 In its view, recovery of the entitlements established by those C18s became definitively impossible, first, because of the fact – not attributable to the United Kingdom – that those duties were owed by phoenix undertakings, that is to say, missing or insolvent undertakings, and, secondly, since it was apparent from decisions taken on review of appeals brought against those C18s before an independent department of HMRC that the additional customs duties claimed in those C18s had been calculated on the basis of CAPs and, therefore, 'not … in accordance with an acceptable methodology which could be supported by evidence'.

371 In that regard it must be recalled, first of all, that, under Article 13(1) of Regulation No 609/2014, Member States are obliged to take all requisite measures to ensure that the amounts corresponding to the entitlements established under Article 2 of that regulation are made available to the Commission as specified in that regulation.

372 In the present case, as the details of the calculations of additional customs duties claimed in the Snake C18s, which the United Kingdom annexed to its rejoinder, confirm, those additional entitlements were calculated incorrectly on the basis of the CAPs.

373 That is an administrative error by the United Kingdom customs authorities, since, as OLAF repeatedly pointed out in meetings with those customs authorities and as is clear, moreover, from the PCA Discount guidelines, CAPs could be used only as a risk analysis tool, that is to say, a tool for detecting on the basis of risk profiles those imports likely to be undervalued which required verification, not for determining their customs value.

374 Consequently, in order to fulfil its obligations under Article 13(1) of Regulation No 609/2014, the United Kingdom was obliged to take the requisite measure to ensure that the amounts corresponding to the entitlements established under Article 2 of that regulation would be made available to the Commission and correct that administrative error. In particular, the United Kingdom was required to re-determine the customs value by applying one of the methods prescribed for that purpose by EU customs law and, in particular, by the sequential rules of EU law on customs valuation, as laid down in Articles 70 to 74 of the Union Customs Code.

375 In that regard, the Court has ruled that the methods of determining customs values provided for by those articles are subordinately linked, so that when a customs value cannot be determined by applying a given article, it is appropriate to refer to the article which comes immediately after it in the established order (see, to that effect, judgment of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 29).

376 It is also apparent from the file submitted to the Court, in particular the notes of the meeting held on 20 February 2015 between OLAF and HMRC, that the United Kingdom customs authorities quickly realised the error they had made, but decided to cancel the demand notes rather than reissue them after correcting them by applying one of the methods referred to in the preceding paragraph of the present judgment to determine the customs value correctly. That decision not to reissue the demand notes after correcting them also constitutes an administrative error.

377 In that context, the United Kingdom cannot rely on the fact that, although OLAF had promised to provide it with export price data from the Chinese authorities, very little of the data ultimately provided was provided in a form that could be used to determine the customs value of the goods concerned in accordance with the sequential rules of EU law on customs valuation. In the same way, the United Kingdom cannot rely on the fact that it did not have data relating to the value of those goods to enable it to determine the customs value in accordance with those rules.

378 Since applying EU customs law is a matter for the Member States, which are exclusively responsible for doing so, the United Kingdom was obliged to apply the appropriate measures, such as physical controls, requests for information and documents or the collection of samples, so as to have sufficient data to ensure that the customs values concerned would be established correctly. The United Kingdom cannot therefore profit from its own inaction in order to justify the failure to make the resources due available to the Commission.

379 It follows that, in so far as the United Kingdom custom authorities decided to cancel the Snake C18s rather than reissue them after correcting them by replacing the CAPs with customs values determined in accordance with the sequential methods of EU customs law, the United Kingdom did not, contrary to Article 13(1) of Regulation No 609/2014, take the requisite measures to ensure that the amounts corresponding to the entitlements established or to be established pursuant to Article 2 of that regulation would be made available to the Commission as specified in that regulation.

380 Next, under Article 13(2) of Regulation No 609/2014, Member States are to be released from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements only if those amounts cannot be recovered for reasons of *force majeure* or if recovery proves definitively to be impossible for other reasons which cannot be attributed to them.

381 In that regard, a Member State can rely on such a release, which is by its very nature exceptional, for a reason which could not be attributed to it, only if it complies with the procedure provided for in Article 13(3) and (4) of Regulation No 609/2014.

382 That procedure is triggered by the Member State concerned providing a report to the Commission, within three months of the decision of the competent administrative authority by which amounts of established entitlements are declared irrecoverable, with information on those cases where Article 13(2) of that regulation has been applied, provided the established entitlements involved exceed EUR 50 000. That information must include 'all the facts necessary for a full examination' of the reasons referred to in Article 13(2)(a) and (b) of that regulation which prevented the Member State concerned from making available the amounts in question, and the recovery measures the Member State took in the case or cases in question. The Commission then has a period of six months from the receipt of that report, or from the date of receipt of any supplementary information which the Commission finds it necessary to request, to communicate its comments to the Member State concerned.

383 In the present case, it must be noted that the United Kingdom did not follow that procedure which includes an open dialogue with the Commission and is based on an unambiguous and detailed report of the reasons relied on by the United Kingdom which, from its point of view, would have justified its being released from the obligation to make available the resources established in the Snake C18s, pursuant to Article 13(2) of Regulation No 609/2014.

384 The customs debts established in the Snake C18s do not appear to have been declared irrecoverable by a decision of the competent administrative authority finding that they cannot be recovered, as provided for in the second subparagraph of Article 13(2) of Regulation No 609/2014. The letters by which an HMRC body cancelled those C18s in the context of administrative review procedures do not constitute such a write-off decision.

385 In addition, it is undisputed that the United Kingdom also failed to provide a report to the Commission, within three months of the adoption of such a decision, with 'all the facts necessary for a full examination' of the reasons referred to in Article 13(2) of Regulation No 609/2014 which may have prevented the United Kingdom from making available the amounts established in the Snake C18s, and the recovery measures it took in the case in question.

386 The Commission was thus in no position to communicate its comments or, if necessary, to request additional information within the six-month time limit imposed.

387 It must be added that, with regard to the substance, the reasons relied on by the United Kingdom to explain why it was definitively impossible for it to recover the entitlements established in the Snake C18s were the fact, first, that the debtors of those entitlements were phoenix undertakings, that is to say, missing or insolvent undertakings, and, secondly, that those entitlements had been calculated on the basis of CAPs and there were no other methods for determining the value of the goods concerned in the absence of data that could be used for that purpose, such as the export prices promised, but not provided, by OLAF.

388 The reasons thus relied on by the United Kingdom are not capable of releasing it from the obligation to place at the disposal of the Commission the own resources derived from the customs duties established in the Snake C18s.

389 If those duties have proved to be irrecoverable from the phoenix undertakings concerned, that is due to a double administrative error on the part of the United Kingdom customs authorities since, once they realised their error in having calculated the duties on the basis of CAPs, when OLAF had clearly stated that those prices were to be used only in connection with risk analysis, they preferred to cancel the Snake C18s rather than reissue them after correcting them in a timely fashion using one of the sequential methods available under EU law on customs valuation.

390 In addition, the impossibility of recovering the customs duties established in the Snake C18s is ultimately due to the lack of physical controls carried out prior to clearance of the goods concerned, in conjunction with the collection of samples, and applied in a sufficiently systematic manner. In consequence of the lack of such controls, notwithstanding the United Kingdom customs authorities' exclusive responsibility in this respect, those authorities did not have the necessary data, including data relating to the quality of those goods, to enable the value of the goods to be established in accordance with EU customs law.

391 Likewise, although, in fact, post-clearance recovery of duties from phoenix undertakings has proved to be impossible, in the great majority of cases, because of their insolvency, that situation could and should have been avoided if the United Kingdom customs authorities had, as OLAF and the Commission had repeatedly recommended to them, systematically called for the provision of guarantees prior to clearance of the goods concerned.

392 While the United Kingdom customs authorities did not reissue the Snake C18s after cancelling them, on the ground that they did not have the data necessary to determine the value of the goods concerned pursuant to EU rules on customs valuation, that reason, stemming as it does from the United Kingdom's disregard of its exclusive responsibility for ensuring that the customs values had been correctly determined on the basis of sufficient physical and documentary data, cannot in any event justify the United Kingdom's being released from its obligation to place at the disposal of the Commission the resources relating to those C18s in accordance with Article 13(2) of Regulation No 609/2014.

393 In that context, the United Kingdom cannot be exempt from its responsibility to ensure that the customs values of the goods concerned had been correctly established on the basis of data obtained for that purpose by its customs authorities, by claiming that very little of the export price data from the Chinese authorities which OLAF had provided in connection with JCO Snake was capable of being used. Those prices could, at best, constitute an additional tool for determining the correct customs value of the relevant imports on the basis of one of the methods prescribed by the rules of EU law on customs valuation. However, they could not in any event take the place of data relating to the value of those imports which it was incumbent on the United Kingdom customs authorities to obtain in the context of the application of pre-clearance customs control measures in respect of the goods concerned.

394 It must be concluded that, in accordance with the settled case-law of the Court, in so far as the United Kingdom failed, after having established an entitlement of the European Union to own resources, to make the corresponding amount available to the Commission, without one of the conditions laid down in Article 13(2) of Regulation No 609/2014 being met, the United Kingdom fell short of its obligations under EU law, notably Articles 2 and 8 of Decisions 2007/436 and 2014/335 (see, to that effect, judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 67 and the case-law cited).

395 Consequently, as the Advocate General also observed, in essence, in point 250 of his Opinion, it must be held that, on account of the cancellation of the 23 Snake C18s and the failure to make available to the Commission the traditional own resources relating thereto, contrary to Article 13 of Regulation No 609/2014, those resources are payable by the United Kingdom in respect of the period from November 2011 to November 2014.

396 Lastly, as regards the infringement of Article 12 of Regulation No 609/2014 and the corresponding provision that is Article 11 of Regulation No 1150/2000, in that the United Kingdom has not paid the interest due as a result of the delay in making the entry in the account referred to in Article 9(1) of those regulations of amounts corresponding to the losses of traditional own resources which have not been made available to the Commission, it must be noted that the Commission clearly stated in the reasoned opinion (paragraphs 271 to 273 and the operative part of that opinion) that, in accordance with Article 12 of Regulation No 609/2014, interest for late payment was due and would be calculated once the principal amount was made available to the Commission. An infringement of the latter provision is also expressly mentioned in the conclusions of the reasoned opinion. The United Kingdom wrongly, therefore, maintains that the request made by the Commission in the claim for payment of default interest pursuant to Article 12 of Regulation No 609/2014 is inadmissible because it was not made in the reasoned opinion.

397 The Court must also reject the United Kingdom's argument that it would be premature and inadmissible to claim that the United Kingdom was in breach of any obligation to pay default interest, since that obligation may only arise at a future date.

398 In that regard, it should be noted that Member States that do not share the Commission's view regarding their obligation to make available to it an amount of the European Union's own resources and fail to make those resources available run the risk of having to pay interest, should the Court find that they have failed to fulfil their obligations under the legislation governing own resources (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 69).

399 According to the Court's settled case-law, there is an inseparable link between the obligation to establish the European Union's own resources, the obligation to credit them to the account opened in the name of the Commission within the prescribed time limit and the obligation to pay interest in the event of delay, such interest being payable regardless of the reason for the delay in making the entry in that account (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 59 and the case-law cited).

400 Thus, the obligation to pay interest pursuant to Article 11(1) of Regulation No 1150/2000 is ancillary to the obligation to make the European Union's own resources available to the Commission in accordance with the conditions laid down in Articles 9 to 11 of that regulation, in particular, the time limits fixed by the regulation (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 70).

401 In that context, it must be added that a Member State can avoid the adverse financial consequences of interest, the amount of which may be high, by making the amount claimed available to the Commission, while expressing reservations as to the validity of the Commission's arguments (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 72 and the case-law cited).

402 In the present case, the United Kingdom chose, however, not to make available to the Commission at the end of the period fixed in the reasoned opinion the amount of own resources claimed in that opinion, or even to do so subject to possible reservations, but merely disputed any obligation to be required to place an amount of own resources at the disposal of the Commission, thereby exposing the United Kingdom to payment of default interest.

403 It follows that, in so far as it is established that the United Kingdom has failed to fulfil its obligation to make available to the Commission the European Union's own resources in respect of the relevant imports during the infringement period, the United Kingdom, contrary to Article 12 of Regulation No 609/2014 and the corresponding provision that is Article 11 of Regulation No 1150/2000, has also failed to fulfil its ancillary obligation to pay default interest in relation to those resources of up to a possible 16% as provided for in the third subparagraph of Article 12(5) of Regulation No 609/2014.

404 In the light of all of the foregoing considerations, the Commission's second plea in law must be upheld to the extent that it concerns the complaint in the first paragraph of the first head of claim that the failure of the United Kingdom to fulfil its obligations, in that it did not adopt the necessary customs control measures to counter the undervaluation fraud at issue effectively, contrary to Article 325 TFEU and EU customs law, has resulted in losses of customs duty and thus of traditional own resources, and therefore, by failing to establish and make available to the Commission the resources due, amounting to the customs duties which should have been entered in the accounts if the customs value of the relevant imports had been correctly determined, the United Kingdom has failed to fulfil its obligations under EU law on EU own resources, in particular those imposed by Articles 2 and 8 of Decisions 2007/436 and 2014/335 and Articles 2, 6, 9, 10, 11 and 17 of Regulation No 1150/2000 and the corresponding provisions of Articles 2, 6, 9, 10, 12 and 13 of Regulation No 609/2014.

(b) Complaint alleging breach by the United Kingdom of its obligation to make available specific amounts of traditional own resources

405 In the second place, the Commission's second plea must be examined to the extent that it concerns the complaint in the third paragraph of the first head of claim in the application that the United Kingdom failed more specifically to fulfil its obligations under EU law on own resources by not making available to the Commission traditional own resources corresponding to a specific amount for each year of the infringement period, that is a total gross amount, minus collection costs, for the whole of that period of EUR 2 679 637 088.86.

406 In order to determine those amounts of traditional own resources losses which, according to the Commission, the United Kingdom was required to make available to it, the Commission relied, as OLAF had done in its report in order to calculate the amounts of traditional own resources losses for the years 2013 to 2016, on a statistical estimate using the OLAF-JRC method which had originally been developed and applied as from PCA Discount as a risk analysis tool to identify imports likely to be undervalued that required verification before the goods concerned could be cleared.

407 The United Kingdom estimates, on the basis of its own methodology developed specifically in order to calculate the amount of traditional own resources losses ('the HMRC method'), that its liability in respect of such resources for the infringement period is limited to a maximum total of GBP 123 819 268 (approximately EUR 145 450 494).

408 In the rejoinder, the United Kingdom sets out the details of the calculation resulting in that amount as follows. For the first part of the infringement period, namely the period from November 2011 to November 2014, the losses of traditional own resources must be taken to be the total of the customs debts claimed in the 23 Snake C18s, that is, GBP 192 568 694.30. That amount should be reduced to a sum of approximately GBP 25 million under the HMRC method, because those debts would have been calculated incorrectly according to the OLAF-JRC method and, in particular, on the basis of CAPs. To that sum of approximately GBP 25 million should then be added, in respect of the second part of the infringement period, namely the period from January 2015 to 11 October 2017 inclusive, a sum of GBP 143 115 553 (approximately EUR 168 117 840) representing the amount of own resources losses calculated according to the HMRC method. Lastly, as regards the relevant imports during that second period, the amounts claimed in the Breach C18s previously notified to 34 traders should be deducted, resulting in a revised total amount of GBP 44 296 285.04 (approximately EUR 52 034 846).

409 It follows that the very different estimates by the Commission and the United Kingdom of the scale of the losses of traditional own resources resulting from the inadequate controls of the relevant imports arise from the fundamentally different methods used by the Commission and the United Kingdom to calculate those losses.

(1) The United Kingdom's argument that the Court must examine the United Kingdom's estimate of traditional own resources losses first

410 It is necessary first of all to examine the United Kingdom's argument that the Court should first examine the calculation of traditional own resources losses made by the United Kingdom on the basis of the HMRC method. It is only if that calculation were to be rejected as being manifestly unreasonable that the Court would be able to examine, secondly, the estimate of losses made by the Commission on the basis of the OLAF-JRC method.

411 That argument that the estimate of losses of own resources according to the HMRC method should prevail is based on the exclusive competence of the Member States to determine, in the context of implementing EU customs law, the value for customs purposes that is used to calculate customs duties and to decide, in the context of the management of the system of the European Union's own resources, the amount of resources to be made available to the Commission.

412 As regards, in the first place, the United Kingdom's argument regarding the allocation of competences between the European Union and the Member States in the EU customs system, it must be stated that it is true that, in the context of that system, as currently configured in EU law, it is the exclusive competence and responsibility of Member States to ensure that declared customs values are established in accordance with the rules of EU law on customs valuation, as laid down in Articles 29 to 31 of the Community Customs Code or in the corresponding provisions of Articles 70 to 74 of the Union Customs Code and, in particular, in accordance with one of the sequential methods of determining customs values provided for in those articles or provisions.

413 In the case of the relevant imports, it was therefore for the United Kingdom customs authorities, as has been held in the context of the examination of the other complaints raised in support of the first and second pleas, to take the appropriate measures, such as physical controls or the collection of samples, in order to ensure that the declared customs values were established correctly in accordance with those rules of EU customs law on the basis of sufficient physical or documentary data in relation to the value of the goods concerned, notably as regards the quality of their finish.

414 As has been established in connection with the examination of the first plea, the United Kingdom customs authorities failed, contrary to Article 325(1) TFEU and EU customs law, to take such measures in a sufficiently systematic manner, with the result that the customs values concerned were not determined correctly; those authorities also failed to collect the physical or documentary data in relation to the quality of the relevant products.

415 Consequently, significant quantities of manifestly undervalued imported goods were released for free circulation in the internal market from the United Kingdom during the infringement period in breach of the rules of EU customs law on customs valuation.

416 Since the goods concerned could no longer be recalled for the purposes of physical controls and sufficient data as to their true value was not requested from the traders concerned, nor, therefore, provided, it is now no longer possible to determine, in respect of each customs declaration at issue, the customs value of the relevant products from China on the basis of one of the methods prescribed in Articles 70 and 74 of the Union Customs Code, such as the fall-back method in Article 74(3) of that code, which consists in determining the customs value on the basis of 'data available' in accordance with the conditions laid down in Article 144 of Implementing Regulation II.

417 In those circumstances, the United Kingdom, supported by the intervening Member States, cannot criticise the Commission for having applied the OLAF-JRC method for the purposes of calculating the losses of customs duties and, therefore, of traditional own resources resulting from the lack of adequate controls of the relevant imports, a method that is by nature essentially statistical and which is not based on one of the sequential methods prescribed in Articles 70 and 74 of the Union Customs Code for determining, in respect of each customs declaration concerned, the customs value of the goods concerned.

418 As regards, in the second place, the United Kingdom's argument that its own estimate of traditional own resources losses according to the HMRC method should prevail, as the corollary of the exclusive competence of the Member States to decide on the making available of own resources to the Commission, it is true that, as the Court has held, as EU law currently stands, the management of the system of the European Union's own resources is entrusted to the Member States and is their responsibility alone. Thus, the obligations to collect, establish and place those resources on account with a view to making them available to the Commission are imposed directly on the Member States under EU legislation on own resources and, in the present case, Decisions 2007/436 and 2014/335 as well as Regulations No 1150/2000 and No 609/2014, and no decision-making power has been conferred on the Commission enabling it to require the Member States to establish and to make available to it amounts that represent the European Union's own resources (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 62 and the case-law cited).

419 In the present case, the United Kingdom chose not to make available to the Commission at the end of the period fixed in the reasoned opinion the amount of own resources claimed in that opinion, or even to do so subject to possible reservations, merely disputing that it was required to enter any amount of own resources in the Commission's account.

420 In those circumstances, in the exercise of its discretion to determine whether it is expedient to initiate the procedure laid down in Article 258 TFEU and, more generally, in accomplishing its task as guardian of the Treaties which is conferred on it under Article 17(1) TEU, requiring it to ensure the proper performance by the Member States of their obligations in relation to the European Union's own resources, the Commission cannot be criticised for having availed itself of the ability that is inherent in the system of the European Union's own resources as currently configured in EU law to submit to review by the Court, in infringement proceedings, the present dispute between the Commission and the United Kingdom regarding the latter's obligation to make a certain amount of own resources available to the Commission (see, to that effect, judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraphs 65, 66 and 68).

421 Consequently, contrary to what is maintained by the United Kingdom, since the dispute between the United Kingdom and the Commission concerns the amount of own resources to be made available to the Commission, it is entirely within the jurisdiction of the Court under Article 258 TFEU.

422 The Commission cannot therefore be required first to bring an action for failure to fulfil obligations that is limited to the question of principle as to whether the Member State concerned has failed to fulfil its obligations under EU law to make own resources available to the Commission, but without quantifying those resources, before then being entitled to bring a dispute before the Court concerning the precise amounts of resources due, in proceedings under Article 260(2) TFEU, if the Commission takes the view that the Member State concerned has not adopted the measures necessary to comply with the judgment of the Court establishing such a failure to fulfil obligations because those amounts have not been made available to the Commission.

423 That said, as is recalled in paragraph 221 of the present judgment, in proceedings under Article 258 TFEU for failure to fulfil obligations, it is for the Commission, which is responsible for proving the existence of the alleged infringement, to provide the Court with the information necessary for it to determine whether that infringement is made out, and the Commission may not rely on any presumption for that purpose.

424 In the present case, that information must relate, in particular, to the method used by the Commission to calculate the amount of the own resources which it claims from the United Kingdom.

425 Consequently, it is necessary to consider whether the Commission has demonstrated to the requisite legal standard, in reliance on the OLAF-JRC method, the accuracy of the specific amounts of traditional own resources lost which it maintains must be made available to it, that question having moreover been the subject of an exchange of arguments between the parties both during the pre-litigation procedure and before the Court.

(2) The Commission's estimate of the amounts of traditional own resources losses according to the OLAF-JRC method

426 Before examining that question, it is necessary briefly to recall the essential characteristics of the OLAF-JRC method, as used by the Commission to calculate the amounts of losses of traditional own resources which it requested the United Kingdom to make available to it, in identical terms in the reasoned opinion and in the application.

427 As is apparent from paragraphs 53 to 57 of the present judgment, the OLAF-JRC method was developed as a risk analysis tool that could be used by Member States' customs authorities to identify imports presenting a significant risk of undervaluation which should therefore be subject to checks as to the customs values declared. It consists in calculating a CAP and a LAP, which is uniformly fixed at 50% of the CAP, for each of the 495 eight-digit CN product codes concerned falling within Chapters 61 to 64 of that nomenclature. Those prices are derived from the Comext database on the basis of the import prices of the relevant products from data provided by all the Member States and are thus established at EU level. The LAP is a risk profile or threshold that serves to identify imports likely to be undervalued and which should therefore be subject to pre-clearance checks of the goods concerned with regard to their declared customs values.

428 The OLAF-JRC method as used by the Commission to determine the amounts of losses of traditional own resources which it claims from the United Kingdom is a method of estimating those losses that is essentially statistical.

429 First of all, the volume of imports that must be deemed to be undervalued is calculated on the basis of data collected from the Surveillance 2 database over a period of 48 months. To that end, the imports of each product code whose daily aggregated value is below the LAP of the relevant product code are used for each of the 495 eight-digit CN product codes concerned.

430 Secondly, the losses for the quantities deemed to be undervalued are calculated in terms of additional customs duties payable on the basis of the difference between that daily aggregated value and the CAP.

431 It follows from this that, according to the OLAF-JRC method, the volume of undervalued imports is calculated by taking into account the imports into the United Kingdom of relevant products from China whose price is lower than the LAP (that is, 50% of the CAP) whereas the value of undervalued imports thus identified is calculated by applying the CAP, albeit that those two prices are calculated at EU level, not at United Kingdom level only.

(3) The United Kingdom's estimate of the amounts of traditional own resources losses according to the HMRC method

432 The United Kingdom takes issue with the OLAF-JRC method, maintaining that, as a result of its flaws and inaccuracies, it overestimates both the quantity of undervalued imports and the value attributed to them.

433 Its own method, the HMRC method, consists in calculating, for each 10-digit CN product code concerned, a 'compliance threshold' on the basis not of an average price established at EU level, but by reference only to the values declared on importation into the United Kingdom.

434 As the United Kingdom explained in reply to questions put by the Court, this method consists in identifying, on the basis of an analysis of histograms relating to the infringement period, for each 10-digit CN product code concerned, falling within Chapters 61 to 64 of that nomenclature, both a 'spike', comprising a large volume of comparatively low declared prices which are assumed to be almost exclusively undervalued, and a point beyond that spike at which more typical volumes of imports and legitimate declared prices appear.

435 A compliance threshold is fixed for each product code concerned at the price level that corresponds to the point beyond that spike at which legitimate imports appear and that must therefore be considered to be an acceptable price.

436 Imports whose declared customs value is below that compliance threshold are then considered to be undervalued according to that 'spike' method. For those imports, additional customs duties are calculated, for each customs declaration relating to a relevant product, on the basis of the difference between the declared customs value and that compliance threshold.

437 Therefore, that compliance threshold, as used to calculate the amounts of losses of the European Union's traditional own resources, is a reference value established on the basis of statistical data relating to imports of the relevant products from China into the United Kingdom, which serves both to identify the imports that can be regarded as being undervalued and to determine the value that must be assigned to those imports for the purposes of calculating the additional customs duties due and, therefore, the corresponding losses of traditional own resources that have yet to be made available to the Commission.

438 It is also apparent from the report of a consultancy firm annexed to the United Kingdom's response to the reasoned opinion and to the defence that approximately 80% of the substantial difference between the United Kingdom's estimate of the losses and the Commission's estimate, the former being less than 10% of the latter, arises from the fact that, according to the HMRC method, the imports that are deemed to be underestimated are 'revalued' to the level of a price threshold, that is, the compliance threshold, which is a price derived only from prices on importation into the United Kingdom, whereas, according to the OLAF-JRC method, the value is determined not at the level of a price threshold such as the LAP, that is to say, 50% of the CAP, but

at the level of the 'fair price', that is, 100% of the CAP, which is a price derived from the arithmetical and therefore unweighted average of the CAPs of all the Member States, including, at that time, those of the United Kingdom.

(4) General arguments against the OLAF-JRC method

439 Before examining the various specific criticisms levelled by the United Kingdom, supported by the intervening Member States, against the essential characteristics of the OLAF-JRC method, used as a method for estimating the amounts of own resources losses, it is necessary to examine the general arguments put forward by the United Kingdom against that method.

440 According to those arguments, since that method was specifically developed to be used by the Member States as a risk profile to identify imports that present a significant risk of undervaluation and must therefore be checked, it would be inappropriate for that method to be applied for the purposes of calculating the amounts of own resources losses corresponding to the customs duties that were not collected in the United Kingdom as a result of the inadequacy of the controls carried out by its customs authorities.

441 This, it is argued, is an essentially statistical method for determining the value for customs purposes of undervalued imports that is not one of the sequential methods prescribed in Articles 70 and 74 of the Union Customs Code, such as the fall-back method provided for in Article 74(3) of that code, which consists in determining the customs value of the goods concerned on the basis of 'data available' in accordance with the conditions laid down in Article 144 of Implementing Regulation II.

442 In that regard, while the OLAF-JRC method is indeed an essentially statistical method of estimating the amounts of own resources losses which is not intended to determine the customs value of the goods concerned in accordance with Articles 70 and 74 of the Union Customs Code, having regard to each customs declaration concerned, the Commission cannot be criticised for having used such a statistical method for the purpose of calculating the amounts of own resources losses in the circumstances of the case.

443 It is common ground that the relevant imports were made on a large scale and that the goods concerned were released for free circulation and cannot now be recalled for checks to establish their true value. Furthermore, the United Kingdom failed, contrary to Article 325(1) TFEU and EU customs legislation, to adopt necessary measures, such as physical controls, requests for information or documents or the systematic collection of samples. Accordingly, in the absence of sufficient data in relation to the quality of the goods already released for free circulation, it is now no longer possible, owing to those failures to act, to determine the value of those goods on the basis of one of the evaluation methods provided for in Articles 70 and 74 of the Union Customs Code; therefore only a statistical method can be used to estimate the value of those goods.

444 In addition, as the Advocate General also noted, in essence, in point 274 of his Opinion, in the particular circumstances of this case, there was nothing in principle to prevent OLAF and the Commission from using the OLAF-JRC method, even if that method was originally designed as a risk analysis tool for estimating the amounts of own resources losses entailed by the inadequate controls of the United Kingdom customs authorities, since that method includes a price threshold, the LAP, making it possible to determine the volume of undervalued imports, and a reference price, the CAP, making it possible to assign a replacement value to those imports for the purposes of calculating the customs duties remaining due.

445 Moreover, as the Advocate General also observed, in essence, in points 276 to 278 of his Opinion, in its case-law, the Court has accepted that, in circumstances similar to those of this case, the quantification of own resources losses may be based on statistical data rather than on data relating directly to the value of the goods concerned.

446 In a situation in which, in the absence of the goods concerned, the fact that it was impossible to carry out checks was the inevitable consequence of the failure of the customs authorities to carry out checks to verify the actual value of those goods, leading to the systematic acceptance by those authorities of the customs values declared, when they knew that, on average, they were undervalued, the Court held that, in that case, it was not inappropriate to quantify the amount of own resources losses resulting from such a practice on the basis of data relating to the difference between the declared average standard weight of similar goods imported in a subsequent period and their average weight established during controls which, because of their extent, could be considered relevant (see, to that effect, judgment of 17 March 2011, *Commission* v *Portugal*, C-23/10, not published, EU:C:2011:160, paragraphs 54, 63, 65 and 66).

447 In the particular circumstances of the present case, the own resources losses arise from the United Kingdom customs authorities' practice of, essentially, systematically accepting, during the infringement period, customs declarations in respect of the relevant products imported from China without verifying the values mentioned in those declarations, when those authorities knew or ought reasonably to have known that large volumes of those products were being imported fraudulently at manifestly undervalued prices. Consequently, the amounts of those losses can be determined on the basis of a method such as the OLAF-JRC method which is based on statistical data rather than on a method intended to determine the customs value of the goods concerned on the basis of direct evidence, in accordance with Articles 70 and 74 of the Union Customs Code. The latter method can no longer be applied in the absence of direct evidence of that value which has been obtained by those authorities in sufficient quantities.

448 Furthermore, as the Advocate General also noted, in essence, in footnote 277 to point 274 of his Opinion, the HMRC method, which the United Kingdom proposes as a means of estimating the amounts of own resources losses, is also a methodology based essentially on statistical data since the compliance thresholds are derived from historical statistical values.

449 It is nevertheless appropriate to determine whether, by relying on the OLAF-JRC method in order to calculate the amounts of traditional own resources losses alleged, the Commission has demonstrated to the requisite legal standard the accuracy of the seven amounts claimed in respect of each of the years making up the infringement period, in accordance with the burden of proof which it bears in infringement proceedings, according to the settled case-law of the Court recalled in paragraph 423 of the present judgment.

450 In that context, and in the light also of what has been held in paragraphs 423 to 425 of the present judgment, it is for the Court to verify whether, in so far as the Commission relied on the OLAF-JRC method as a method of calculating the amounts of own resources losses that were not made available to it in breach of EU law, the Commission has provided sufficient evidence to demonstrate that those amounts are accurate and, therefore, that the claim of infringement is well founded, in accordance with the burden of proof on the Commission.

451 As the Advocate General also observed in point 281 of his Opinion, the Court is therefore required not to choose between the different methodological approaches proposed by the parties, as the United Kingdom seems to suggest in the defence, but only to assess the OLAF-JRC method relied on by the Commission in support of the present action by examining the various criticisms of that method expressed by the United Kingdom, supported by the intervening Member States.

452 It must be stated in that regard that the Court's examination of the OLAF-JRC method in the context of the present infringement proceedings must essentially aim, as the Advocate General also observed, in essence, in point 286 of his Opinion, to verify that that method was justified in the light of the particular circumstances of the case and that it was sufficiently precise and reliable in that, in particular, it was based on criteria that are neither arbitrary nor biased and on an objective and coherent analysis of all the relevant data available, and accordingly does not lead to a clear overestimate of the amount of those losses.

453 While the accuracy of the various amounts of losses of traditional own resources set out in the third paragraph of the first head of claim in the application must, in theory, as indicated in paragraph 449 of the present judgment, be verified in relation to each of the seven years mentioned in that third paragraph, for reasons of procedural economy the Court's examination will proceed in relation to two successive periods within the infringement period, namely the period from November 2011 to November 2014 and the period from 1 January 2015 to 11 October 2017 inclusive.

(5) Estimate of the amount of traditional own resources losses for the period from November 2011 to November 2014

454 As regards, in the first place, the period from November 2011 to November 2014, it is apparent from the amounts set out for the years 2011 to 2014 in the third paragraph of the first head of claim in the application that the Commission claims that the United Kingdom did not make available to it a total amount of traditional own resources of EUR 1 001 511 991.60 over that period.

455 As the Advocate General also noted, in essence, in points 293 to 297 of his Opinion, it is clear from the grounds of the application and the reply that, for that period, owing, in particular, to the rules on limitation of customs debts laid down in Article 221(3) of the Community Customs Code and Article 103(1) of the Union Customs Code, the Commission intended to limit the scope of the action to the customs debts established in the post-clearance duty recovery demands contained in the 23 Snake C18s which were issued between November 2014 and February 2015 and which, after being entered in the accounts and notified to the traders concerned, were cancelled between June and November 2015. Furthermore, the Commission's intention in that respect is confirmed by the formulation of the complaints in the letter of formal notice and in the reasoned opinion.

456 As has been found in paragraphs 367 to 395 of the present judgment, the cancellation of the 23 Snake C18s is attributable to administrative errors by the United Kingdom customs authorities which cannot be justified under Article 13(2) of Regulation No 609/2014; therefore the United Kingdom was not released from the obligation to place the resources relating to those C18s at the disposal of the Commission.

457 In the defence, the United Kingdom indicated that the amounts claimed in the Snake C18s were calculated on the basis of the CAPs of the OLAF-JRC method. In the reply, the Commission counters that, during the pre-litigation procedure, it had indicated its presumption, which the

United Kingdom did not correct, that those amounts were calculated on the basis of the LAP and, therefore, according to the Commission, at a level that was manifestly too low for the purposes of estimating the amounts of own resources losses, which had caused it to apply its method of estimating those losses in the application, including for the period from November 2011 to November 2014, in respect of all imports during that period with a declared price below the LAP.

458 It is clear from the file submitted to the Court and, in particular, from the Snake C18s and details of the calculations relating to them which were produced by the United Kingdom in the annexes to the rejoinder, first, that the additional customs debts claimed in those C18s were indeed calculated, albeit following administrative errors, on the basis of the CAPs and not on the basis of the rules of EU customs law on customs valuation and, secondly, that the total amount of those debts was GBP 192 568 694.30.

459 It follows that there is an inconsistency between the form of order sought in the application and the grounds set out in it, with regard to the amount of own resources claimed by the Commission in the present proceedings.

460 On the basis of the third paragraph of the first head of claim in the application, the Commission asks the Court to find that, for the period from November 2011 to November 2014, the United Kingdom failed to fulfil its obligations under EU legislation on own resources, in so far as it did not make available to the Commission a total amount of EUR 1 001 511 991.60, that amount having been calculated using the OLAF-JRC method and taking into account all undervalued imports below the LAP in that period, including the very many imports not covered by the Snake C18s.

461 It is, however, clear from the grounds of the application and the reply, and it is confirmed by the letter of formal notice and the reasoned opinion, that, in respect of that period, the Commission intended to limit its complaint regarding the United Kingdom's failure to make EU own resources available to the resources corresponding to the customs debts established in the Snake C18s, which implies that the Commission is claiming resources only in respect of undervalued imports below the LAP that are mentioned in those C18s. The total amount of those customs debts is, according to the United Kingdom and supported by evidence, GBP 192 568 694.30.

462 In those circumstances, it must be held that, in so far as there is considerable uncertainty regarding the accuracy of the amounts of own resources claimed by the Commission pursuant to the third paragraph of the first head of claim in the application for the period from November 2011 to November 2014, the Commission has not established the full amounts to the requisite legal standard.

463 Accordingly, with regard to the first period, from November 2011 to November 2014, the second plea in law must be rejected in so far as it relates to the complaint referred to in the third paragraph of the first head of claim in the application, according to which the United Kingdom failed to comply with EU law in that it did not make available to the Commission the amounts of resources listed therein, amounting in total to EUR 1 001 511 991.60.

(6) Estimate of the amount of traditional own resources losses for the period from 1 January 2015 to 11 October 2017 inclusive

464 As regards, in the second place, the period from 1 January 2015 to 11 October 2017 inclusive, it is common ground that the Commission determined the amounts of traditional own resources lost which it claims pursuant to the third paragraph of the first head of claim in the application, that is,

a total sum of EUR 1 678 125 097, on the basis of the OLAF-JRC method without deducting from them those claimed by the United Kingdom customs authorities in the post-clearance duty recovery demands contained in the Breach C18s covering that period.

465 Consequently, it is necessary to examine, first of all, the different arguments relied on by the United Kingdom, supported by the intervening Member States, against the OLAF-JRC method as used by the Commission to estimate the amount of own resources losses which it claims in respect of that period, and then the possible effect on that estimate of taking into consideration the duty recovery demands contained in the Breach C18s relating to that same period.

(i) The criticism that the OLAF-JRC method leads to overestimates of the volume of imports that must considered to be undervalued

466 As regards, first of all, the criticisms levelled against the OLAF-JRC method, it is appropriate to examine, in the first place, the criticism that, in so far as that method uses the LAP as the criterion for calculating the volume of undervalued imports, it overestimates that volume, since it is an arbitrary and imprecise criterion, the application of which has the effect of including a substantial volume of legitimate very low-priced imports.

467 As to the general criticism that the LAP is an 'arbitrary criterion', it must be recalled that LAPs were established at 50% of CAPs on the basis of JRC studies of histograms to identify, using statistical data, categories of very low-priced imports. In so far as it analyses statistics concerning import prices, such an approach is comparable to that taken in the HMRC method to determine the compliance threshold.

468 The United Kingdom criticises the method used by the Commission to calculate the amount of own resources lost in so far as, inter alia, unlike the HMRC method, it uses daily aggregated data for imports into the United Kingdom rather than data at the level of the item concerned, that is to say, for each customs declaration, and eight-digit CN product codes rather than ten-digit CN product codes (codes of the integrated Tariff of the European Union (TARIC)).

469 The Commission submits that it did so because it only had those daily aggregated data and data at the level of eight-digit product codes. It also argues that the use of those daily aggregated data had an overcompensating effect, and that consequently that use tends to reduce the volume of imports considered to be undervalued and is favourable to the United Kingdom.

470 It submits that if the OLAF-JRC method was, for example, applied to the United Kingdom import data at the level of each customs declaration for the second and third quarters of 2017, the estimated losses would be around 40% higher than the estimates obtained using daily aggregated data. It also argues that if data at TARIC code level were used, the only effect of that additional granularity would be to increase the number of products from 495 to 677, so that no effect on CAPs would be demonstrated.

471 In reply to a question put by the Court, the United Kingdom maintained that it could not calculate the impact on the own resources losses estimate of using the additional granularity of 10-digit CN product codes, but accepted that a calculation at item-level rather than on the basis of daily aggregated United Kingdom import data would increase the amount of losses claimed by the Commission in respect of the second period, from 1 January 2015 to 11 October 2017 inclusive, from EUR 1 678 125 097 to EUR 1 725 981 951, which confirms that, on that point, the OLAF-JRC method is more favourable to the United Kingdom than its own method.

472 Furthermore, in reply to another question from the Court, the United Kingdom stated that it was now clear, in the light of explanations that had since been given by the Commission, that the sole reason for such a large difference between the Commission's estimate of losses and its own estimate is that the CAPs used by the Commission to 'revalue' the imports regarded as being undervalued under the OLAF-JRC method are much higher than the prices corresponding to the compliance thresholds of the HMRC method which, in the United Kingdom's view, should be used to revalue those imports.

473 In addition, replying to another question put by the Court, the United Kingdom indicated that, if the prices corresponding to the compliance thresholds of its own method of estimating losses were applied in order to calculate the volume of undervalued imports rather than the LAP, the resulting percentage reduction in the amount of own resources losses claimed by the Commission for the second period, from 1 January 2015 to 11 October 2017 inclusive, would be 4.4 or 4.7%.

474 While, as the Advocate General also stated in point 301 of his Opinion, such a difference between the method used by the Commission and that used by the United Kingdom to estimate the volume of undervalued imports seems still, as such, to be within reasonable limits, the fact remains that the LAP appears to lead to a certain extent to overestimates of the volume of imports that must be considered to be undervalued.

475 In that regard, it must be recalled that that price was originally developed as a risk profile, which means that it may generate a certain number of false positives made up, in particular, of legitimate imports by high street retailers, as the United Kingdom has pointed out.

476 As is noted in paragraph 296 of the present judgment, the United Kingdom claims that 11.2% by volume of legitimate imports made by certain well-known high street retailers were declared at values below the LAP.

477 While such a proportion of false positives does not in itself affect the reliability of the LAP used as a risk profile in so far as it must be considered reasonable in that context, it must be taken into account in the analysis and calculation of the amount of own resources losses in order to determine with a reasonable degree of precision the volume of imports that must be considered to be undervalued and to result in such losses.

478 Accordingly, the amount of traditional own resources losses must in this case be calculated on the basis of what the United Kingdom called, in reply to a question put by the Court, the 'common volume' of imports deemed to be undervalued, that is to say, the volume of imports considered to be undervalued irrespective of whether it is the OLAF-JRC method or the HMRC method that is applied.

(ii) The criticism that the OLAF-JRC method leads to overestimates of the value of imports that must be considered to be undervalued

479 As regards, in the second place, the different criticisms levelled against the OLAF-JRC method in that, when used as a tool for determining the amount of traditional own resources losses, it relies on CAPs as the reference value for estimating the value of undervalued imports, it is appropriate to examine, first of all, the argument that that reference value should have been calculated on the basis only of prices on importation into the United Kingdom and not on the basis of the arithmetical average of import prices of all the Member States.

480 In the present case, that choice of methodology on the part of the Commission is justified by one of the essential characteristics of the undervaluation fraud at issue, namely the fact, not in itself contested by the United Kingdom, that the great majority of the relevant imports were made under customs procedure 42 and were therefore necessarily destined for other Member States. In addition, the relevant imports that were made under customs procedure 40 could also be transported to other Member States once the goods concerned had been cleared through customs in the United Kingdom.

481 In that regard it is apparent, for example, from the OLAF report that, in 2016, 87% of low-value imports of relevant products into the United Kingdom were made under customs procedure 42.

482 It follows that, as the Advocate General also noted, in essence, in point 304 of his Opinion, the great majority of the relevant imports during the infringement period were steered towards the market for the relevant products in the European Union as a whole.

483 Consequently, the Commission cannot be criticised for the fact that a reference value reflecting the level of import prices of the relevant products in the European Union as a whole was applied for the purposes of estimating the value of those imports in the context of quantifying losses of own resources.

484 It must be noted that such an approach appears to be consistent with the modus operandi of the undervaluation fraud at issue.

485 In addition, the use of average import prices across all the Member States, in the form of an arithmetical average of those prices, is warranted also in view of the need to reduce the distorting effect on reference prices generated by the particularly large volume of undervalued imports at very low prices into the United Kingdom during the infringement period.

486 In that regard, it must be recalled, first, that 78.1% by value and 69.8% by volume of relevant imports during the infringement period at prices below the LAP, that is, 50% of the CAP, were within a range of 0-10% of the CAP, and that very low-priced imports within that range gradually and significantly increased during the infringement period, reaching a share of approximately 80% and thus a substantial majority of undervalued imports. Secondly, while the undervaluation fraud at issue originally affected several Member States, during the infringement period it concerned first and foremost, and increasingly, the United Kingdom, as the Commission's agents indicated moreover during various meetings with the United Kingdom customs authorities. At those meetings, the existence of corresponding growing losses of own resources was repeatedly brought to the attention of those authorities in order that they might take appropriate measures to bring those losses to an end.

487 While the aim of reducing the distorting effect on reference prices generated by the particularly large volume of undervalued imports at very low prices into the United Kingdom during the infringement period could, theoretically, be achieved by applying different methods, the method selected by the Commission appears to be sufficiently precise and reliable, in that, in particular, it is based on criteria that are neither arbitrary nor biased and on an objective and coherent analysis of all the relevant data available, and accordingly does not lead to a clear overestimate of the amount of own resources losses.

488 In that context, the Commission, as it admitted in reply to a question put to it by the Court, would, for example, also have been able to eliminate, for the purposes of calculating the arithmetical average prices of the Member States, all imports made at prices below the LAP in all the Member States. However, that method would have disadvantaged the United Kingdom since it would have resulted in the amount of own resources losses increasing considerably.

489 Next, it is necessary to examine the criticism that the use of CAPs as reference values in the context of the application of the OLAF-JRC method leads to overestimates of the level of own resources losses and is not legitimate, therefore, since it does not take into account the fact that the relevant products involved in the undervaluation fraud at issue were of a lower value and quality than those legitimately imported from China at prices above the LAP or the compliance threshold of the HMRC method.

490 In addition, the nature of the goods concerned is such that they would be destined for the low-value segment of the market since they are imported by criminal organisations to be traded illegally and clandestinely in other Member States.

491 Consequently, in view of that essential characteristic of the modus operandi of the undervaluation fraud at issue, the reference value to be used to determine the value of imports considered to be undervalued should be fixed at the level of the LAP.

492 In that context, the Commission maintains that the United Kingdom has no relevant evidence for the distribution of price and quality as regards the relevant imports, since, before the launch of Operation Swift Arrow, the United Kingdom had chosen not to carry out physical checks or to take any samples.

493 The United Kingdom relies on the report of a consultancy firm which analyses a main sample of 94 items of undervalued products, 70 of which were collected during Operation Swift Arrow, launched after the infringement period, and compares that sample with a control sample of very low-priced items from a legitimate and well known United Kingdom retailer of very low-value products from which it is apparent that the great majority of items from that main sample were low-quality items and inferior in quality to the items in the control sample. In its view it follows that the true value of the undervalued goods must be lower than the lowest price at which those retailers import equivalent items.

494 In that regard, even on the assumption that, as the United Kingdom contends, all the samples collected during Operation Swift Arrow and analysed in that report could be taken into account in the present proceedings, albeit that many of them seem to involve imports made after the infringement period, the United Kingdom has not demonstrated that the samples in question can be considered to be representative of all of the large volumes of undervalued goods imported into its territory throughout that period.

495 Consequently, in the absence of sufficiently representative data relating to the quality of the goods involved in the relevant imports during the infringement period, the United Kingdom having failed to carry out adequate customs controls, the Commission was justified in presuming that the goods concerned were of average quality and therefore covered all segments of the market in proportions similar to those of goods deemed not to have been fraudulently undervalued.

496 According to the United Kingdom, the modus operandi of the undervaluation fraud at issue, as described, for example, in the OLAF report and not disputed by the parties, indicates that the goods concerned tend, for the most part, to be low-quality goods directed at the low-value segment of the market since they were imported and marketed by criminal organisations and were primarily intended to be illegally and clandestinely traded in Member States other than, at the time, the United Kingdom, in particular under customs procedure 42, without payment of VAT. In that regard, it must be stated that the reference value used to assess the relevant imports for the purposes of calculating the amount of traditional own resources losses is an estimated value which must approximate the customs value that would have been established by the United Kingdom customs authorities if they had applied appropriate customs control measures based on a risk profile enabling the nature and quality of the goods concerned to be assessed.

497 The United Kingdom must be treated, for the infringement period, as if its customs authorities had correctly determined the customs values after applying the appropriate customs controls and, therefore, had correctly established the own resources consisting in customs duties before entering them in the own resources accounts of the European Union (see, by analogy, judgment of 17 March 2011, *Commission* v *Portugal*, C-23/10, not published, EU:C:2011:160, paragraph 63 and the case-law cited).

498 As the Advocate General also noted, in essence, in point 306 of his Opinion, in accordance with the sequential methods provided for by EU customs law, the customs value is determined by the nature and quality of the goods concerned, such as a market segment in a Member State other than that of importation, and not by their destination. For the purposes of determining the value for customs purposes, the destination of those goods is thus in itself of no relevance. In addition, when those goods are being cleared for customs, their particular destination is, in the absence of direct evidence, largely a matter of speculation.

499 The Commission was therefore fully entitled, in the present case, not to draw any distinction based on the particular destination of the relevant products within the European Union in order to determine the amount of traditional own resources losses.

500 Consequently, in the case of the relevant imports, it was reasonable for the Commission to apply the CAPs as a reference value.

501 That approach is warranted in the light of the particular circumstances of the case and is sufficiently precise and reliable, in that, in particular, it is based on criteria that are neither arbitrary nor biased and on an objective and coherent analysis of all the relevant data available, and accordingly does not lead to a clear overestimate of the amount of those losses.

502 That is confirmed by the fact that, as the Advocate General also stated, in essence, in point 307 of his Opinion, the CAPs are calculated on the basis of customs values actually declared and recorded by the Member States in the Surveillance 2 database for all the relevant imports during the infringement period; therefore those prices reflect the nature and quality of all the relevant products.

503 The precision and reliability of the Commission's approach of using the CAPs to estimate the value of the relevant imports are also borne out by the fact, highlighted by the Commission in its replies to questions put by the Court and not disputed by the United Kingdom, that those prices

take full account of the prices of the considerable quantities of undervalued imports into the United Kingdom, in such a way as to write down the 'fair price' of those imports and, therefore, to underestimate the amount of own resources losses.

504 In other words, since the CAP is an average of prices declared for all the relevant products imported into all the Member States, including the very many that were fraudulently undervalued and imported into the United Kingdom, that average price is written down by those fraudulent undervaluations, which confirms the precision and reliability of the Commission's approach.

505 In conclusion, the Commission was entitled, in principle, to apply the OLAF-JRC method to estimate the amount of traditional own resources losses for the second period, from 1 January 2015 to 11 October 2017 inclusive, since that method was justified in the light of the particular circumstances of the present case and proved to be sufficiently precise and reliable, in that, in particular, it is based on criteria that are neither arbitrary nor biased and on an objective and coherent analysis of all the relevant data available, and accordingly does not lead to a clear overestimate of the amount of those losses.

506 Consequently, in respect of that period, the volume of relevant imports could be determined on the basis of the LAP, albeit that that volume must be limited to the 'common' volume, that is, the volume of imports which are considered to be undervalued both under the OLAF-JRC method and under the HMRC method. The Commission was entitled to rely on the CAPs in order to determine the value of that common volume of imports considered to be undervalued.

(7) Effect of the Breach C18s on the estimate of the amounts of own resources losses claimed by the Commission in respect of the period from 1 January 2015 to 11 October 2017 inclusive

507 Next, the question arises as to the effect that the duty recovery demands mentioned in the Breach C18s might have on the estimate of the amounts of own resources losses which the Commission claims in the third paragraph of the first head of claim in the application in respect of the period from 1 January 2015 to 11 October 2017 inclusive, on the basis of the OLAF-JRC method.

508 In that regard, the United Kingdom maintains in the defence that, in so far as the Commission was aware, as early as May 2018, of eight Breach C18s that had been issued and entered in the B account in the course of that month in relation to imports considered to be undervalued that were made as from 1 May 2015 for a sum of approximately GBP 25 million, and did not challenge those C18s either in the reasoned opinion or in the application, the Commission should have deducted that amount from the amounts of losses of traditional own resources referred to in the third paragraph of the first head of claim in the application in respect of the years 2015 to 2017.

509 In the rejoinder, the United Kingdom contends that, according to the updated data, the amounts claimed in the Breach C18s previously notified to 34 traders for a total amount of GBP 44 296 285.04 should be deducted from the losses of traditional own resources.

510 In the annexes to its replies to questions put by the Court, the United Kingdom again updated that total amount, attaching all the Breach C18s previously notified together with details of related calculations. According to the summary table included in those annexes, there are, according to the latest available data, 64 C18s for a total amount of additional customs duties claimed of GBP 50 559 159.89 (approximately EUR 59 391 845).

511 It is also apparent from those calculations and the explanations provided by the United Kingdom in response to questions put by the Court that those duties were calculated on the basis of the lowest prices considered to be legitimate and fixed according to the 'spike' methodology, that is to say, a methodology that is essentially statistical in nature, comparable to that used in the context of the HMRC method for determining compliance thresholds for the purposes of calculating the level of losses of traditional own resources, the essential difference between those methods being that the reference period used is different.

512 According to the United Kingdom, recovery of the debts claimed in the Breach C18s remains possible and, unlike the Snake C18s, they have not been cancelled.

513 While the Commission does not dispute the fact that the Breach C18s might relate to undervalued imports made during the infringement period, it maintains that, since the United Kingdom has always refused to communicate the details of the calculations relating to those C18s, namely, in particular, the customs declarations concerned, the volumes in question and the replacement values used, it was not in a position to distinguish the imports covered by those C18s from the total volume of imports in respect of which it had calculated the amount of traditional own resources losses on the basis of daily aggregated data from the Surveillance 2 database.

514 In that regard, it must be recalled that the Court has repeatedly held that it is apparent from the second paragraph of Article 258 TFEU that, if a Member State does not comply with the reasoned opinion within the period laid down therein, the Commission may bring an action for failure to fulfil obligations under that article before the Court and that, therefore, the question whether the Member State concerned has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of that period (judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 54 and the case-law cited).

515 In the present case, the period within which the United Kingdom was required to comply with the reasoned opinion expired on 24 November 2018.

516 The Commission does not dispute that it was aware, before issuing the reasoned opinion to the United Kingdom, of the existence of eight Breach C18s, issued in May 2018 and relating to the imports of relevant products from China during the infringement period, since the debts claimed in those C18s had been communicated to their debtors and had been entered in the B account in May 2018. It is also common ground that those debts remained entered in that account at the end of the period laid down in the reasoned opinion and at the time when the application was lodged.

517 It must be noted that, in the context of the application, in particular in the context of the calculation of the amounts of traditional own resources losses claimed in the third paragraph of the first head of claim in the application in respect of the years 2015 to 2017, the Commission failed to take into account the debts claimed in the Breach C18s of which it had been aware before the expiry of the period laid down in the reasoned opinion.

518 In addition, the United Kingdom has not, to date, taken a decision finding that those debts cannot be recovered, nor has it initiated the procedure provided for in Article 13(3) and (4) of Regulation No 609/2014 in order to be released from the obligation to place at the disposal of the Commission the amounts corresponding to those debts for one of the reasons referred to in Article 13(2) of that regulation. Those debts have not been cancelled and remain entered in the B

account. It is moreover not apparent from the file submitted to the Court, nor has it been alleged, that the claims involved are time barred in accordance with Article 103 of the Union Customs Code.

519 Accordingly, at the end of the period fixed in the reasoned opinion, those claims could not yet be considered to constitute losses of own resources of the European Union.

520 That is not called into question by the Commission's argument that it appears unlikely that the debts claimed in the Breach C18s concerned or even a fraction of them may actually be recovered, since their debtors are for the most part phoenix undertakings which are insolvent and which have been wound up following notification of those C18s, as was confirmed moreover by the United Kingdom, which has already invoked that fact as justification for its being released from the obligation to place the corresponding resources at the disposal of the Commission under Article 13(2) of Regulation No 609/2014.

521 Consequently, in the application, the Commission was required to deduct from the traditional own resources claimed in the third paragraph of the first head of claim, in respect of the period from 1 January 2015 to 11 October 2017 inclusive, the debts claimed in the Breach C18s relating to undervalued imports of relevant products from China during that period which had been entered in the B account before the expiry of the period fixed in the reasoned opinion and of which the Commission was therefore aware.

522 In so far as the Commission failed to make that deduction in the application, the claim for the amounts of traditional own resources set out in the third paragraph of the first head of claim in the application in respect of the years 2015 to 2017 to be made available cannot be upheld.

523 Consequently, the second plea in law must be rejected in so far as it relates to the Commission's request for a declaration from the Court that the United Kingdom has failed, contrary to EU law, to make available to the Commission the amounts of traditional own resources set out in the third paragraph of the first head of claim in the application.

524 In that context, as the Advocate General also noted in point 312 of his Opinion, in infringement proceedings under Article 258 TFEU, it is not for the Court to take the place of the Commission by calculating the precise amounts of traditional own resources that are payable by the United Kingdom.

525 Indeed, although, in the context of such proceedings, the Court can either grant or reject, in whole or in part, the claims set out in the form of order sought in the application, it is not for the Court to modify the scope of those claims.

526 However, it must be made clear that, in recalculating the amount of traditional own resources payable by the United Kingdom, as the Commission will be called upon to do in accordance with this judgment, the Commission, as is apparent from paragraph 505 of the present judgment, will be able to apply the OLAF-JRC method in respect of all or part of the infringement period in order to estimate that amount. It will however be required, in particular, as has been explained in paragraphs 475 to 478 of the present judgment, to proceed in its calculation on the basis of the 'common volume' of imports which must be considered to be undervalued irrespective of whether it is the OLAF-JRC method or the HMRC method that is applied. In addition, in the light of what is stated in paragraphs 517 to 519 of the present judgment, the Commission will have to take account, first of all, of the debts claimed by the United Kingdom in the Breach C18s

of which the Commission was aware before the expiry of the period laid down in the reasoned opinion, that is to say, 24 November 2018, and which could not yet be considered to constitute losses of own resources of the European Union as at that date. Next, it will also have to take account of any other debts claimed by the United Kingdom in post-clearance duty recovery demands relating to the relevant imports made during the infringement period, which also cannot be considered to constitute losses of own resources of the European Union at the time when the Commission recalculates those debts as it will be called upon to do in accordance with the present judgment. Lastly, account will also have to be taken, in that recalculation, of debts relating to the relevant imports made during the infringement period in respect of which the United Kingdom has adopted a decision finding that they cannot be recovered and in respect of which the United Kingdom is released from the obligation to place the corresponding amounts at the disposal of the Commission under Article 13(2) of Regulation No 609/2014.

527 It must be borne in mind in that context that the duty of sincere cooperation with the Commission, as laid down in Article 4(3) TEU, means that every Member State is under a duty to facilitate the Commission's accomplishment of its task consisting, in accordance with Article 17 TEU, in ensuring, as guardian of the Treaties, the application of EU law under the control of the Court of Justice. In particular, in so far as, in order to ensure the proper performance by the Member States of their obligations in relation to the European Union's own resources, the Commission is largely dependent on the information provided by the Member States, those Member States are required to make supporting documents and other relevant documentation available to the Commission under reasonable conditions, to enable it to verify whether, and, as the case may be, to what extent certain amounts are to accrue to the Union budget as own resources (see, to that effect, judgments of 7 March 2002, *Commission* v *Italy*, C-10/00, EU:C:2002:146, paragraphs 88 and 91, and of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 65).

528 It must be added that, having regard also to the provisions of the Withdrawal Agreement referred to in paragraphs 119 to 121 of the present judgment, the result of the recalculation referred to in paragraph 526 of the present judgment could give rise to an infringement procedure at the end of which the Court might be called upon to determine whether the United Kingdom has failed to fulfil its obligations under EU law by failing to make available to the Union budget an amount of own resources and default interest relating thereto that corresponds to all or part of the sum arising from that calculation and payment of which is required by the Commission.

(8) Exchange rate to be applied in order to calculate the amount of own resources lost

529 As regards, lastly, the exchange rate to be applied to calculate the amount of own resources lost, the United Kingdom contends that, since it accounts to the European Union for own resources in GBP, the only amount that can be claimed from it is an amount, expressed in GBP, that would have been paid at the time when the sums were payable to the Commission. The only relevant exchange rate is the GBP-euro rate applicable on the date when the transactions constituting the Commission's claim took place, and not the rate applicable on the date when the United Kingdom might be held liable by the Court for the losses of own resources. It follows that the Commission could not claim an amount of own resources expressed in euro in the application, and should have expressed that amount in GBP.

530 The Commission submits that, since its calculation of the amount of own resources losses is based on data transmitted by the Member States and then recorded in the Surveillance 2 database, there is an automatic conversion into euro of the amounts thus transmitted, using the most recent exchange rate set by the ECB prior to the penultimate day of the month in question, in accordance with Article 53(1) of the Union Customs Code and Article 48(1) of Implementing Regulation II.

531 The Commission therefore agrees with the United Kingdom that the relevant exchange rate is not that applicable on the date of the present judgment, but that prevailing at the time when the various relevant imports were made, which gave rise during the infringement period to the losses of own resources.

532 It must be concluded from this that the Commission cannot be criticised for the fact that, in line with Article 53(1) of the Union Customs Code and Article 48(1) of Implementing Regulation II, it used the exchange rate applicable at the time when the relevant imports took place, so as to convert into euro the amounts of duty expressed in GBP. In so doing, it did not overstate the amounts claimed in the application as losses of traditional own resources compared to the amounts that would have been claimed if they had been expressed in GBP. Accordingly, there was nothing to preclude the Commission from expressing those amounts in the application in euro instead of in GBP. In addition, when the Commission recalculates the amount of traditional own resources payable by the United Kingdom, it will be open to the Commission to apply that method of conversion.

(9) Conclusion

533 In the light of the foregoing considerations, the second plea in law must be upheld in so far as it concerns the request in the first paragraph of the first head of claim in the application, and, therefore, the Court must declare that, by failing to make available the correct amount of traditional own resources relating to the relevant imports, the United Kingdom has failed to fulfil its obligations under Articles 2 and 8 of Decisions 2007/436 and 2014/335, Articles 2, 6, 9, 10, 11 and 17 of Regulation No 1150/2000 and Articles 2, 6, 9, 10, 12 and 13 of Regulation No 609/2014. By contrast, the second plea in law must be rejected in so far as it concerns the request in the third paragraph of the first head of claim in the application that the Court declare that the amounts of the corresponding losses of traditional own resources to be made available to the Commission, less the costs of collection, are as follows:

– EUR 496 025 324.30 in 2017 (until 11 October 2017 inclusive);

– EUR 646 809 443.80 in 2016;

– EUR 535 290 329.16 in 2015;

– EUR 480 098 912.45 in 2014;

– EUR 325 230 822.55 in 2013;

– EUR 173 404 943.81 in 2012;

– EUR 22 777 312.79 in 2011.

3. Failure to fulfil obligations under the legislation on VAT and obligations to make available the corresponding own resources

(a) Arguments of the parties

534 By the third plea in law, which relates to certain of the complaints set out in the first and second paragraphs of the first head of claim in the application, the Commission claims that the United Kingdom failed to make available to it the correct amount of VAT-based own resources in respect of the relevant imports made during the infringement period, contrary to Articles 2 and 8 of Decisions 2007/436 and 2014/335, Articles 2, 6, 9, 10, 11 and 17 of Regulation No 1150/2000, Articles 2, 6, 9, 10, 12 and 13 of Regulation No 609/2014 and Article 2 of Regulation No 1553/89, as a consequence of its failure to fulfil its obligations under Article 325 TFEU, and under Article 2(1)(b) and (d), Articles 83 and 85 to 87 and Article 143(1)(d) and (2) of Directive 2006/112.

535 As regards, in the first place, relevant products imported into the United Kingdom during the infringement period under customs procedure 40, the Commission recalls that, in accordance with Article 2(1)(d) and Articles 85 to 87 of Directive 2006/112, under that procedure, VAT is to be collected by the Member State of importation and the taxable amount for VAT purposes includes the customs value as well as customs duties and incidental expenses.

536 The Commission maintains that, since the United Kingdom customs authorities failed to ensure, contrary to Article 325 TFEU and EU customs legislation, that the customs value of the relevant imports made during the infringement period had been correctly determined, given, essentially, the non-implementation of effective customs control measures prior to clearance of those products, the taxable amount for VAT purposes was also incorrectly determined by those authorities.

537 Accordingly, not all of the VAT due was collected, in consequence of which, contrary to Articles 2 and 8 of Decisions 2007/436 and 2014/335, Articles 2, 6, 9, 10, 11 and 17 of Regulation No 1150/2000, Articles 2, 6, 9, 10, 12 and 13 of Regulation No 609/2014 and Article 2 of Regulation No 1553/89, the corresponding amounts were also not taken into account in determining the VAT own resources base and the full amount of those resources was not made available to the Commission.

538 As regards, in the second place, customs procedure 42, the Commission recalls that, according to the OLAF report, in 2016, 87% of the goods concerned were imported into the United Kingdom under that customs procedure which is characterised by the fact that customs duties are payable in the Member State of importation whereas VAT must be paid in the Member State of destination.

539 The Commission submits that, in so far as the taxable amount for VAT purposes in respect of those imports is, in accordance with Article 83 of Directive 2006/112, to be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price determined at the time of the supply, the incorrect determination of the customs value of the goods concerned because of inadequate customs controls by the United Kingdom customs authorities resulted in the calculation of the VAT to be levied on those goods by the Member State of destination also being incorrect, so that the full amount of VAT was not collected, thus depriving the European Union of part of the own resources derived from that tax.

540 According to the Commission, by failing to take appropriate measures to ensure the recovery of the VAT due under customs procedure 42, the United Kingdom undermined the capacity of the authorities of the other Member States to collect the VAT and hindered them from making available the corresponding VAT-based own resources to the Commission.

541 The United Kingdom contends that, in so far as VAT-based own resources are calculated, in accordance with Regulation No 1553/89, on the basis of net VAT receipts, the amount of the import or acquisition VAT does not give rise to a change in net VAT receipts since that VAT is recoverable by the importing or acquiring taxpayer as against the onward sale of the relevant products.

542 As regards relevant imports made under customs procedure 42 during the infringement period, there could not be any VAT losses in so far as, in the Member State of final destination of the goods, the retailer accounts to the tax administration of that Member State for the full consideration actually paid by the final consumer.

543 As the OLAF report confirms, the undervaluation fraud at issue is due not to the fact that the amount of VAT paid and deducted in the Member State into which the goods concerned are brought under customs procedure 42 is wrong, but to the fact that that tax is not paid in the Member State of destination of those goods because they have disappeared and are being traded illegally and clandestinely.

544 Furthermore, as regards relevant imports made under customs procedure 42 during the infringement period, the United Kingdom argues that there is no legal basis for a Member State to be held liable for losses of VAT-based own resources sustained in another Member State.

545 The United Kingdom also maintains that there is no factual basis for the claim that it is liable for losses of VAT-based own resources. The Commission's claim that the United Kingdom prevented other Member States from collecting that tax thus has no basis in fact. In addition to the general steps which the United Kingdom took to counter the undervaluation fraud at issue, it also took specific steps against abuse of customs procedure 42, both on its own and in collaboration with other Member States. In that regard, the United Kingdom maintains that it took measures during Operations Badminton, Octopus, Samurai and Breach to prevent the loss of VAT-based own resources in other Member States.

(b) Findings of the Court

546 The Court must examine, in the first place, the Commission's claim that, because of ineffective customs controls in the United Kingdom, contrary to Article 325 TFEU and EU customs legislation, the United Kingdom customs authorities did not determine correctly the taxable amount for VAT purposes of the relevant imports during the infringement period, so that that tax was not collected in full in the United Kingdom.

547 As regards, first, relevant imports made under customs procedure 40 under which both customs duties and VAT were required to be collected in the United Kingdom, it must be noted that, in accordance with Article 2(1)(d) and Articles 85 to 87 of Directive 2006/112, where the VAT is payable on importation, the taxable amount for VAT purposes is defined as the value for customs purposes, to which customs duties and other charges as well as incidental expenses must be added.

548 It follows that a customs value that is declared below its true value necessarily means, if it is not disputed by the customs authorities and the correct level determined, that the taxable amount for VAT purposes is also determined incorrectly, so that the full amount of VAT cannot be collected, in breach of the provisions mentioned in the preceding paragraph.

549 Therefore, the inadequate nature of the customs controls conducted by the United Kingdom customs authorities led to both the customs value of the goods concerned and the taxable amount of the relevant imports for the purposes of VAT being determined incorrectly, for which the United Kingdom must be held liable.

550 Consequently, as regards relevant imports made during the infringement period under customs procedure 40, it must be declared that there has been a failure to fulfil obligations under Article 2(1)(d) and Articles 85 to 87 of Directive 2006/112, as alleged by the Commission.

551 As regards, secondly, relevant imports made during the infringement period under customs procedure 42, under which, according to the exemption mechanism provided for in Article 138(1) and (2)(c) and Article 143(1)(d) and (2) of Directive 2006/112, only customs duties were paid in the United Kingdom and VAT had to be paid in the Member State of destination of the goods concerned, it must be recalled that the vast majority of relevant products were imported under that procedure, namely 87% of total volume in 2016 according to the OLAF report, and that it was one of the essential characteristics of the undervaluation fraud at issue that those products were generally intended to be traded illegally and clandestinely, so that no VAT was invoiced to the final consumer in the Member State of destination and, therefore, that tax generally remained unpaid.

552 Under customs procedure 42, the taxable amount for VAT purposes is not based on the customs value of the goods concerned, as is the case under customs procedure 40, but, in accordance with Article 2(1)(b), Article 83, Article 138(1) and (2)(c), and Article 143(1)(d) and (2) of Directive 2006/112, on the purchase price of those goods, as invoiced in the Member State of their final destination.

553 In the present case, it was therefore for the authorities of the Member States of destination of the goods concerned, not for those of the United Kingdom as Member State of importation, to ensure that the taxable amount for the purposes of VAT was correctly determined so that the full VAT due on the intra-Community acquisitions in question would be paid.

554 In so far as, under customs procedure 42, there is no link between the customs value of the goods concerned and the taxable amount for VAT purposes of the relevant imports, any liability on the part of the United Kingdom, the Member State of importation, for a failure to ensure the effective and comprehensive collection of customs duties as a result of inadequate controls by its customs authorities of the accuracy of the declared customs values of those goods cannot, in principle, be extended to the lack of effective and comprehensive collection of VAT on the territory of another Member State, namely the Member State of destination.

555 The Commission did not moreover specifically claim, nor, therefore, demonstrate that the United Kingdom customs authorities had not adequately checked compliance with the information obligations to which the exemption provided for in Article 138(1) of Directive 2006/112 is subject, under Article 138(2) thereof.

556 Under customs procedure 42, any claim regarding the possible insufficiency of the checks aimed at ensuring that the taxable amount for VAT purposes of the relevant imports is determined correctly, if established, should therefore be directed in the first instance to the customs authorities of the Member State of final destination of those goods.

557 The Court must also reject the Commission's argument that, by failing to take appropriate measures to ensure the recovery of the VAT due under customs procedure 42 according to the exemption mechanism provided for in Article 143(1) of Directive 2006/112, the United Kingdom prevented the authorities of other Member States from determining correctly the taxable amount for VAT purposes of the relevant imports, and, therefore, from receiving full payment of that tax.

558 Even if, as the Commission maintains, the various measures taken by the United Kingdom during Operations Badminton, Octopus, Samurai and Breach to prevent the losses of VAT-based own resources in other Member States ultimately had only limited effects on the prevention of those losses, it does not follow, and the Commission moreover has not in any event demonstrated, that the United Kingdom prevented the authorities of Member States of destination from calculating the VAT due correctly and collecting that tax in full.

559 While, as is apparent in particular from the OLAF report, the criminal organisations concerned engaged in the fraudulent use of customs procedure 42 to evade, on a large scale, the payment of VAT in the Member States of destination of the goods concerned, and that has undoubtedly resulted in consequential financial losses both for the Member States and for the European Union itself, the United Kingdom cannot be held solely liable for the inadequacy of the controls that made that fraud and the ensuing VAT losses possible.

560 As the Advocate General also noted in point 351 of his Opinion, such a fraud and the financial losses arising from it must be assessed in the context of the well-known problem of the inadequacies of checks under that customs procedure, as applied by the Member States, inadequacies which fraudsters have fully exploited and which the Court of Auditors has denounced on a number of occasions, notably in its Special Report No 24/2015.

561 Consequently, with regard to relevant imports made during the infringement period under customs procedure 42, the Commission's claim that the United Kingdom failed to fulfil its obligations under Article 2(1)(b), Article 83, Article 138(1) and (2)(c) and Article 143(1)(d) and (2) of Directive 2006/112, must be rejected.

562 In the second place, the Court must examine the Commission's claim that, in so far as, owing to the inadequacies of the customs controls carried out in the United Kingdom on the relevant imports during the infringement period, the United Kingdom customs authorities failed, in respect of the goods concerned, to determine correctly the taxable amount of those imports for the purposes of VAT and did not therefore collect the tax due in full, the United Kingdom has failed to make available to the Commission the correct amount of VAT-based own resources contrary to Articles 2 and 8 of Decisions 2007/436 and 2014/335, Articles 2, 6, 9, 10, 11 and 17 of Regulation No 1150/2000, Articles 2, 6, 9, 10, 12 and 13 of Regulation No 609/2014 and Article 2 of Regulation No 1553/89.

563 In so far as that complaint is based on the premiss that the United Kingdom has failed to fulfil its obligations, under EU law on VAT, to determine correctly the taxable amount of those imports for the purposes of VAT and to collect all of the VAT due, it must be examined only in respect of

relevant imports made under customs procedure 40, since it follows from the foregoing that the accuracy of that premiss has been established only in respect of those imports and not for those made under customs procedure 42.

564 In that respect, certain characteristics of the system of own resources of the European Union must, first of all, be recalled with regard specifically to resources accruing from VAT.

565 In accordance with Article 2(1) of Decisions 2007/436 and 2014/335, which are applicable in the present case, the European Union's own resources include, in addition to traditional own resources, revenue from the application of a uniform rate to the harmonised VAT assessment bases determined according to EU rules.

566 It is also apparent from Article 2(1) of Regulation No 1553/89 that the VAT-based own resources base is to be determined from the taxable transactions referred to in Article 2 of Directive 2006/112.

567 Without prejudice to various adjustments provided for by Regulation No 1553/89, Article 3 of that regulation provides that the VAT resources base is to be calculated by dividing the total net VAT revenue collected by a Member State during the year by the rate at which VAT is levied during that same year; a weighted average rate of VAT is used for the purposes of that division if more than one VAT rate is applied in a Member State (judgment of 15 November 2011, *Commission* v *Germany*, C-539/09, EU:C:2011:733, paragraph 67).

568 The system of own resources of the European Union is designed, as regards resources accruing from VAT, to impose an obligation on Member States to make available to the Commission as own resources a proportion of the amounts which they collect as VAT (see, to that effect, judgment of 15 November 2011, *Commission* v *Germany*, C-539/09, EU:C:2011:733, paragraph 71).

569 There is thus a direct link between, on the one hand, the collection of VAT revenue in compliance with the EU law applicable and, on the other, the availability to the Commission of the corresponding VAT-based resources, since any lacuna in the collection of that revenue potentially causes a reduction in those resources (judgment of 15 November 2011, *Commission* v *Germany*, C-539/09, EU:C:2011:733, paragraph 72).

570 The Court has also ruled that it is for the Member States to ensure effective and comprehensive collection of the European Union's own resources including VAT-based own resources and that, on that basis, they are obliged to collect sums corresponding to the own resources which, because of fraud, have been withheld from the Union budget (see, to that effect, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paragraph 32).

571 In the present case, as regards relevant imports made under customs procedure 40 during the infringement period, it is noted in paragraph 550 of the present judgment that, since the United Kingdom customs authorities failed to carry out the controls necessary to determine the correct customs value of the relevant products and, therefore, did not ensure effective and comprehensive collection of customs duties due, the full VAT relating to those imports was also not effectively collected, since the taxable amount of those imports for the purposes of VAT was determined on the basis of incorrect customs values, as they are below the true value of the relevant products.

572 However, as the Advocate General also noted in point 344 of his Opinion, it must be held that the Commission has not demonstrated to the requisite legal standard that that failure on the part of the United Kingdom customs authorities to ensure the effective and comprehensive collection of VAT on importation of those products has actually given rise to losses of own resources accruing from VAT.

573 As is noted in paragraph 567 of the present judgment, Article 3 of Regulation No 1553/89 provides that the VAT resources base is, in essence, calculated by dividing the total net VAT revenue collected by a Member State during the year by the rate at which VAT is levied during that same year.

574 Even if, in the case of relevant imports made under customs procedure 40, the importers did not pay the VAT in full because the taxable amount of those imports for the purposes of VAT was too low, that has not necessarily meant that the net VAT revenue has been affected.

575 Importers, like others operating downstream in the sale of the relevant products before these are invoiced to the final consumer, can recover the VAT which they have paid. The question whether net VAT revenue is affected by the undervaluation that took place when those imports were made depends therefore on the price invoiced to the final consumer.

576 Accordingly, a mere finding that the customs value of the relevant products has been undervalued does not necessarily lead to a reduction in the assessment base from which own resources accruing from VAT are calculated.

577 In the light of the foregoing considerations, the third plea in law must be upheld to the extent that it relates to an infringement of Article 2(1)(d) and Articles 85 to 87 of Directive 2006/112, and must be rejected as to the remainder.

4. Breach of the duty of sincere cooperation laid down in Article 4(3) TEU

(a) Arguments of the parties

578 By the complaint raised in the second head of claim in the application, the Commission submits that, by failing to provide all the information necessary for determining the amount of traditional own resources losses, and by not providing as requested the content of the advice of HMRC's legal department or the reasons for the decisions cancelling the customs debts established, the United Kingdom has failed to fulfil its obligations under Article 4(3) TEU and Article 2(2) and (3)(d) of Regulation No 608/2014.

579 In that regard, in the first place, the Commission complains that the United Kingdom refused to provide a copy of the advice of HMRC's legal department or any other indication of the content of the legal assessment that led to the cancellation of the customs debts established during JCO Snake, on the ground that that legal assessment was confidential and subject to legal professional privilege.

580 In the second place, the Commission submits that the United Kingdom customs authorities did not provide the information required by the Commission services to establish the amount of the losses of traditional own resources payable.

581 The United Kingdom contends that, as it had previously indicated during the pre-litigation procedure, the debts established in the Snake C18s were cancelled not on the basis of any legal advice, which it maintains does not exist, but on the basis of decisions taken by the independent HMRC department responsible for customs reviews and appeals. That department cancelled those C18s for the reasons stated in those decisions, which were communicated to the Commission.

582 Furthermore, according to the United Kingdom, apart from that claim relating to the failure to provide it with that non-existent legal advice, the Commission had not been able generally to raise any other complaint against the United Kingdom with regard to its duty of sincere cooperation on the ground of its alleged failure to provide the Commission with all the information necessary for determining the amount of traditional own resources losses.

(b) Findings of the Court

583 As a preliminary point, it must be observed that although, in the second head of claim in the application, the Commission invokes in addition to an infringement of Article 4(3) TEU an infringement of Article 2(2) and (3)(d) of Regulation No 608/2014, the Commission did not explain in the grounds of the application how the United Kingdom had infringed the latter provision; therefore the complaint in that head of claim must be examined only with regard to Article 4(3) TEU.

584 According to the settled case-law of the Court, it follows from the principle of sincere cooperation laid down in Article 4(3) TEU that the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law (judgment of 31 October 2019, *Commission* v *United Kingdom*, C-391/17, EU:C:2019:919, paragraph 93 and the case-law cited).

585 In addition, the Court has held that, in accordance with the Commission's role as guardian of the Treaties, conferred on it under Article 17(1) TEU, it is for that institution to ensure the proper performance by the Member States of their obligations in relation to the European Union's own resources (judgment of 9 July 2020, *Czech Republic* v *Commission*, C-575/18 P, EU:C:2020:530, paragraph 65), and that, under Article 4(3) TEU, the Member States are required to facilitate the achievement of that Commission task of supervision (see, to that effect, judgment of 7 March 2002, *Commission* v *Italy*, C-10/00, EU:C:2002:146, paragraph 88).

586 Furthermore, where, as is the case for the Commission's supervision of the proper performance by the Member States of their obligations in relation to the European Union's own resources, the Commission is largely dependent on the information provided by the Member States, those Member States are required to make supporting documents and other relevant documentation available to the Commission under reasonable conditions, to enable it to verify whether the European Union's own resources have been correctly made available in accordance with those obligations (see, to that effect, judgment of 7 March 2002, *Commission* v *Italy*, C-10/00, EU:C:2002:146, paragraphs 88 and 91).

587 In the present case, the Commission claims that the United Kingdom failed to comply with the duty of sincere cooperation laid down in Article 4(3) TEU in so far as the United Kingdom did not provide it in good time with (i) full details of the calculations relating to the debts claimed in

the Snake C18s which it had repeatedly been asked to provide and which were necessary for calculating the amount of traditional own resources losses, and (ii) the advice of HMRC's legal department or the reasons for the decisions cancelling the Snake C18s.

588 In that regard, it is common ground that, throughout the pre-litigation procedure, the United Kingdom refused to provide a document described, on several occasions, by its own authorities as 'legal advice', on the ground that that document was protected by legal professional privilege.

589 The Commission explains that it requested that document because it had been given to understand that it contained a legal assessment of the reasons that led the United Kingdom to cancel the Snake C18s.

590 However, subsequently and, in particular, during inspection 18-11-1 in April 2018 and in its reply of 22 June 2018 to the letter of formal notice, the United Kingdom asserted that there was no such 'legal advice' and that the reasons that led it to cancel the Snake C18s were those mentioned in the decisions cancelling those C18s, which had been taken by an independent entity, namely the HMRC department dealing with customs reviews and appeals, in the context of appeals against those C18s. According to the United Kingdom, it is apparent from those decisions that those C18s were cancelled essentially because there was no acceptable revaluation methodology that could be supported by evidence in respect of the relevant imports.

591 The Commission maintains that the copies of 6 of the 24 decisions cancelling the Snake C18s, obtained during inspection 18-11-1, did not enable it to understand the reasons for the cancellation of those C18s.

592 In the defence, the United Kingdom stated that there was advice from the legal department of HMRC, but only in relation to liquidation proceedings against certain traders, not to the reasons that led it to cancel the Snake C18s. That advice would, in its submission, however be protected by legal professional privilege.

593 It must also be noted that, during the pre-litigation procedure, the United Kingdom customs authorities indicated that the validity of the Snake C18s could be called in question because the CAP had been used in those C18s to determine the customs value of the relevant products and, as notified to the undertakings concerned, those C18s did not enable a direct link to be established between the duties claimed and the individual customs declarations concerned.

594 It is also apparent from the file submitted to the Court that the Commission repeatedly asked the United Kingdom to provide it with details of the calculations relating to the debts claimed in the Snake C18s since that information was necessary in order to verify whether those debts duly reflected the amounts of the own resources losses relating to the imports covered by those C18s.

595 The Commission explains that, without that information, it had presumed, without being corrected on this point by the United Kingdom during the pre-litigation procedure, that the duties claimed in the Snake C18s had been calculated on the basis of the LAP and had therefore been determined at a level that was clearly too low. That had led it to claim in the application, in respect of the period from November 2011 to November 2014, amounts corresponding to the losses of traditional own resources calculated in accordance with the OLAF-JRC method, rather than on the basis of those C18s, thus taking into account all imports made at prices below the LAP and attributing to those imports a value equal to the CAP.

596 It explains that details of the calculations of the debts claimed in the Snake C18s were finally provided by the United Kingdom in the annexes to the rejoinder, making it possible to determine that the relevant imports had been revalued on the basis of the CAP rather than the LAP, and to establish a direct link between the duties claimed and the individual customs declarations concerned.

597 When questioned on this point by the Court, the United Kingdom explained that its authorities had not refused to provide the Commission with details of those calculations following the inspection visit in November 2017, but had been unable to access them at that time. Those calculations had been 'rediscovered' shortly before the defence was lodged in June 2019. It had then taken a significant amount of time and resource to analyse and process the very large amounts of information obtained during the information gathering exercise, so that the United Kingdom had been unable to provide them before lodging the rejoinder.

598 Having regard to all of those factual matters and in view of the principles affirmed by the case-law recalled in paragraphs 584 to 586 of the present judgment, it must be held that the United Kingdom has failed to comply with the duty of sincere cooperation as laid down in Article 4(3) TEU, in so far as it did not provide in good time (i) full details of the calculations relating to the debts claimed in the Snake C18s which the Commission repeatedly asked it to disclose and which were necessary for the purpose of calculating the amount of traditional own resources losses, and (ii) the reasons for the decisions cancelling the Snake C18s which the Commission also repeatedly asked it to provide.

599 However, it is not necessary to rule on the question whether the United Kingdom breached the duty of sincere cooperation by refusing to provide the legal advice of HMRC. It is sufficient to note that, by the use of the coordinating conjunction 'or' in the second part of the second head of claim in the application, the United Kingdom has in any event failed to fulfil that obligation by not providing in good time the reasons for the decisions cancelling the Snake C18s.

600 Consequently, subject to what is stated in paragraph 599 of the present judgment, the complaint raised in the second head of claim in the application must be upheld in so far as it relates to an infringement of Article 4(3) TEU.

601 Having regard to all of the foregoing considerations, it must be declared that:

– by failing to enter in the accounts the correct amounts of customs duties and to make available the correct amount of traditional own resources in respect of the relevant imports, the United Kingdom has failed to fulfil its obligations under Articles 2 and 8 of Decision 2014/335, Articles 2 and 8 of Decision 2007/436, Articles 2, 6, 9, 10, 12 and 13 of Regulation No 609/2014, Articles 2, 6, 9, 10, 11 and 17 of Regulation No 1150/2000, as well as Article 105(3) of the Union Customs Code and Article 220(1) of the Community Customs Code, as a consequence of its failure to fulfil its obligations under Article 325 TFEU, Article 46 of the Union Customs Code, Article 13 of the Community Customs Code, Article 248(1) of Implementing Regulation I, Article 244 of Implementing Regulation II, and Article 2(1)(d) and Articles 85 to 87 of Directive 2006/112;

– and by failing to provide the Commission with all the information necessary to determine the amount of traditional own resources losses, and by not providing as requested the reasons for the decisions cancelling the customs debts established, the United Kingdom has failed to fulfil its obligations under Article 4(3) TEU.

602 The action is dismissed as to the remainder.

Costs

603 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. Under Article 138(3) of those rules of procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs unless, if it appears justified in the circumstances of the case, the Court orders that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

604 In the present case, since the Commission has applied for costs to be awarded against the United Kingdom and the latter has, for the most part, been unsuccessful, the United Kingdom must, in the circumstances of the case, be ordered to bear its own costs and to pay four fifths of the costs of the Commission. The Commission shall bear one fifth of its own costs.

605 In accordance with Article 140(1) of those rules of procedure, under which the Member States which have intervened in the proceedings are to bear their own costs, the Kingdom of Belgium, the Republic of Estonia, the Hellenic Republic, the Republic of Latvia, the Portuguese Republic and the Slovak Republic are to bear their own costs.

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

1. **Declares that, by failing to enter in the accounts the correct amounts of customs duties and to make available the correct amount of traditional own resources in respect of certain imports of textiles and footwear from China, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 2 and 8 of Council Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union, Articles 2 and 8 of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources, Articles 2, 6, 9, 10, 12 and 13 of Council Regulation (EU, Euratom) No 609/2014 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, as amended by Council Regulation (EU, Euratom) 2016/804 of 17 May 2016, Articles 2, 6, 9, 10, 11 and 17 of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources, as well as Article 105(3) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, and Article 220(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council of 13 April 2005, as a consequence of its failure to fulfil its obligations under Article 325 TFEU, Article 46 of Regulation No 952/2013, Article 13 of Regulation No 2913/92, as amended by Regulation No 648/2005, Article 248(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, as amended by Commission Regulation (EC) No 3254/1994 of 19 December 1994, Article 244 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation No 952/2013, and Article 2(1)(d) and**

Articles 85 to 87 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/69/EC of 25 June 2009;

and by failing to provide the European Commission with all the information necessary to determine the amount of traditional own resources losses, and by not providing as requested the reasons for the decisions cancelling the customs debts established, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 4(3) TEU;

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

3. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs and to pay four fifths of the costs incurred by the European Commission;**

4. **Orders the European Commission to bear one fifth of its own costs;**

5. **Orders the Kingdom of Belgium, the Republic of Estonia, the Hellenic Republic, the Republic of Latvia, the Portuguese Republic and the Slovak Republic to bear their own costs.**

Lenaerts	Bay Larsen	Arabadjiev
Prechal	Jarukaitis	Jääskinen
Ziemele	Passer	Bonichot
von Danwitz	Safjan	Kumin
	Wahl	

Delivered in open court in Luxembourg on 8 March 2022.

A. Calot Escobar	K. Lenaerts
Registrar	President