



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

31 October 2019*

(Failure of a Member State to fulfil obligations — Own resources — Association of the Overseas Countries and Territories (OCT) with the European Union — Decision 91/482/EEC — Article 101(2) — Acceptance for import into the European Union free of customs duties of products not originating in the OCT but which are in free circulation in an OCT and are re-exported as such to the European Union — Export certificates EXP — Wrongful issue of certificates by the authorities of an OCT — Article 4(3) TEU — Principle of sincere cooperation — Liability of the Member State having special relations with the OCT concerned — Obligation to compensate the loss of the European Union's own resources caused by the wrongful issue of export certificates EXP — Imports of aluminium from Anguilla)

In Case C-391/17,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 30 June 2017,

European Commission, represented by A. Caeiros, J.-F. Brakeland, L. Flynn and S. Noë, acting as Agents,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented initially by J. Kraehling, G. Brown, R. Fadoju and S. Brandon, acting as Agents, and by K. Beal QC and P. Luckhurst, Barristers, and subsequently by S. Brandon and F. Shibli, acting as Agents, and by K. Beal QC and P. Luckhurst, Barristers,

defendant,

supported by:

Kingdom of the Netherlands, represented by M.K. Bulterman, P. Huurnink and J. Langer, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, M. Safjan, S. Rodin, Presidents of Chambers, J. Malenovský, L. Bay Larsen, T. von Danwitz (Rapporteur), C. Toader, C. Vajda, F. Biltgen and K. Jürimäe, Judges,

* Language of the case: English.

Advocate General: M. Bobek,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 October 2018,

after hearing the Opinion of the Advocate General at the sitting on 6 February 2019,

gives the following

Judgment

- 1 By its application, the European Commission asks the Court to declare that, by failing to compensate the loss of own resources which should have been established and made available to the EU budget in accordance with Articles 2, 6, 10, 11 and 17 of Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155, p. 1), had export certificates not been issued in breach of Article 101(2) 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, 'the OCT Decision') for the imports of aluminium from Anguilla during the period 1999/2000, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 5 of the EC Treaty (subsequently Article 10 EC, now Article 4(3) TEU).

Legal context

International law

- 2 The Charter of the United Nations was signed in San Francisco on 26 June 1945. Article 73(b) of that Charter, in Chapter XI, headed 'Declaration regarding non-self-governing territories', provides:

'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

...

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement'.

European Union law

The EC Treaty

- 3 The facts of the alleged failure to fulfil obligations both predate and postdate the entry into force of the Treaty of Amsterdam which amended the EC Treaty. However, the provisions relevant to the present action for failure to fulfil obligations have remained essentially the same. Article 5 of the EC Treaty (subsequently Article 10 EC) was worded as follows:

‘Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.’

- 4 That provision was, in essence, replaced by Article 4(3) TEU.
- 5 Part Four of the EC Treaty, headed ‘Association of the overseas countries and territories’, grouped together Articles 131 to 137 (subsequently, after amendment, Articles 182 EC to 188 EC, now Articles 198 to 204 TFEU). According to Article 131 (subsequently, after amendment, Article 182 EC, now Article 198 TFEU):

‘The Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, Denmark, France, Italy, the Netherlands and the United Kingdom. These countries and territories (hereinafter called the “countries and territories”) are listed in Annex IV to this Treaty.

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.

In accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.’

- 6 Article 133(1) of the EC Treaty (subsequently, after amendment, Article 184(1) EC, now Article 200(1) TFEU) provided:

‘Customs duties on imports into the Member States of goods originating in the countries and territories shall be completely abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty.’

- 7 According to Article 136 of the EC Treaty (subsequently, after amendment, Article 187 EC, now Article 203 TFEU):

‘For an initial period of 5 years after the entry into force of this Treaty, the details of and procedure for the association of the countries and territories with the Community shall be determined by an Implementing Convention annexed to this Treaty.

Before the Convention referred to in the preceding paragraph expires, the Council shall, acting unanimously, lay down provisions for a further period, on the basis of the experience acquired and of the principles set out in this Treaty.’

- 8 Article 227(1) and (3) of the EC Treaty (subsequently, after amendment, Article 299(1) and (3) EC, now Article 52(1) TEU and Article 355(2) TFEU) provided:

‘1. This Treaty shall apply to the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

...

3. The special arrangements for association set out in Part Four of this Treaty shall apply to the overseas countries and territories listed in Annex IV to this Treaty.

This Treaty shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.’

- 9 The list in Annex IV to the EC Treaty (subsequently, after amendment, Annex II to the EC Treaty, now Annex II to the FEU Treaty), headed ‘Overseas countries and territories to which the provisions of Part IV of this Treaty apply’, included Anguilla.

Regulation No 1552/89

- 10 Articles 2, 6, 10, 11 and 17 of Regulation No 1552/89 governed, at the material time, the conditions under which the Member States were required to establish and to make available to the EU budget the European Union’s own resources, which included customs duties.

The OCT Decision

- 11 The first and third recitals of the OCT Decision were worded as follows:

‘Whereas the provisions applicable to the association of the overseas countries and territories (hereinafter referred to as “the OCT”) with the European Economic Community must be laid down for a further period; whereas these provisions apply to the territories for which the French Republic has responsibility, the countries and territories for which the United Kingdom has responsibility, the countries for which the Kingdom of the Netherlands has responsibility and, in part, to Greenland;

...

Whereas the Community market has long been open to products originating in the OCT and in the ACP States; whereas, having regard to the special relationship between the Community and the OCT, based on the provisions of the Treaty and in particular on Part Four thereof, the said provisions should be improved by affording the OCT a greater degree of flexibility with regard to the rules of origin for products originating in the OCT by adopting new provisions for certain products not originating in the OCT’.

- 12 In accordance with Article 1 of the OCT Decision, the aim of that decision was to promote and accelerate the economic, cultural and social development and to strengthen the economic structures of the OCT listed in Annex I to the decision. Point 5 of that annex referred to Anguilla as an OCT ‘of the [United Kingdom]’.

13 The first paragraph of Article 6 of the OCT Decision provided:

‘Within the scope of their respective responsibilities, the authorities participating in the partnership framework referred to in Article 10 shall examine periodically the results of the implementation thereof and provide any necessary impetus and opinions for the attainment of the objectives of this Decision.’

14 According to Article 10 of that decision:

‘With the aim of enabling the competent local authorities of the OCT to take greater part, in the framework of the respective constitutions of the Member States having responsibility for them, in giving effect to the principles of the EEC-OCT association, while respecting the powers of the respective central authorities of the Member States concerned, a consultation procedure based on the principle of partnership between the Commission, the Member State and the OCT is hereby set up.

This partnership, the detailed provisions for which are set out in Articles 234 to 236 of this Decision, shall provide the opportunity for examining what has been achieved in the association and discussing any problems arising in relations between the OCT and the Community.’

15 Article 101(2) of the OCT Decision was worded as follows:

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

- have paid, in the OCT concerned, customs duties or taxes having equivalent effect of a level equal to, or higher than, the customs duties applicable in the Community on import of these same products originating in third countries eligible for the most-favoured-nation clause,
- have not been the subject of an exemption from, or a refund of, in whole or in part, customs duties or taxes having equivalent effect,
- are accompanied by an export certificate.’

16 In accordance with the second indent of Article 108(1) of the OCT Decision, the conditions for entry, into the European Union, of products not originating in the OCT but in free circulation in an OCT, and the methods of administrative cooperation relating thereto, were laid down in Annex III to that decision.

17 According to Article 234 of that decision:

‘Community action shall be based as far as possible on close consultation between the Commission, the Member State responsible for a country or territory and the relevant local authorities of such countries or territories.

This consultation shall hereinafter be referred to as “partnership”.’

18 Article 235(1) and (2) of the OCT Decision provided:

‘1. Partnership shall cover the programming, preparation, financing, monitoring and evaluation of operations carried out by the Community under this Decision, and any problem arising in relations between the OCT and the Community.

2. To this end, working parties in association with the OCT, of an advisory nature and made up of the three partners referred to in Article 234, may be set up either on the basis of geographical area or by group of OCT under the responsibility of a single Member State, notably at the request of the OCT concerned. These working parties shall be set up:

- on an ad hoc basis to deal with specific problems, or
- on a permanent basis for the period remaining of the life of this Decision; in this case they shall meet at least once a year to examine progress in implementing this Decision or deal with other matters arising under paragraph 1.'

19 According to Article 237 of the OCT Decision:

'Subject to the special provisions regarding relations between the OCT and the French overseas departments provided for herein, this Decision shall apply, on the one hand, to the territories in which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty and, on the other, to the territories of the OCT.'

20 Article 2 of Annex III to the OCT Decision, headed 'Export Certificate EXP', provided, in paragraphs 1 and 6:

'1. Evidence of compliance with the provisions of Article 101(2) of the Decision shall be given by an export certificate EXP, a specimen of which appears in Annex 1 to this Annex.

...

6. The export certificate EXP shall be issued by the customs authorities of the exporting country or territory, if the goods can be considered as having been in free circulation within the meaning of Article 101(2) of the Decision.'

21 Article 7 of that annex, headed 'Verification of export certificates EXP', provided:

'1. Subsequent verification of export certificates EXP shall be carried out at random or whenever the customs authorities of the importing State have reasonable doubts as to the authenticity of the document or the accuracy of the information regarding the true origin of the products in question.

...

6. Where the verification procedure or any other available information appears to indicate that the provisions of this Annex are being contravened, the country or territory on its own initiative or at the request of the Community shall carry out appropriate enquiries or arrange for such enquiries to be carried out with due urgency to identify and prevent such contraventions. The Commission may participate in these enquiries.

...

7. Disputes which cannot be settled between the customs authorities of the importing State and those of the exporting country or territory, or those which raise a question as to the interpretation of this Annex, shall be submitted to the Committee on Customs Legislation.

...'

- 22 As is apparent, in particular, from Commission Communication COM(77)210 final of 13 June 1977 on the State of the Customs Union of the European Economic Community, the Customs Legislation Committee, established by the Council and chaired by a Commission representative, is composed of representatives of the Member States.

The Customs Code and the implementing regulation

- 23 Article 220(2)(b) 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 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17) ('the Customs Code'), provided:

'Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where:

...

- (b) the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration.

...'

- 24 Under Article 239(1) of the Customs Code:

'Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238:

- to be determined in accordance with the procedure of the committee;
- resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the committee procedure. Repayment or remission may be made subject to special conditions.'

- 25 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 1335/2003 of 25 July 2003 (OJ 2003 L 187, p. 16) ('Implementing Regulation No 2454/93'), contained, in Title III of Part IV, headed 'Recovery of the amount of the customs debt', Articles 868 to 876a, which governed requests submitted pursuant to Article 220(2)(b) of the Customs Code. The first paragraph of Article 873 of Implementing Regulation No 2454/93 was worded as follows:

'After consulting a group of experts composed of representatives of all Member States, meeting within the framework of the Committee to consider the case in question, the Commission shall decide whether the circumstances under consideration are such that the duties in question need not be entered in the accounts.'

- 26 Article 874 of Implementing Regulation No 2454/93 provided:

'The Member State concerned shall be notified of the decision referred to in Article 873 as soon as possible and in any event within 1 month of the expiry of the period specified in that Article.'

The Commission shall notify the Member States of the decisions it has adopted in order to help customs authorities to reach decisions in situations involving comparable issues of fact and law.’

27 Article 875 of Implementing Regulation No 2454/93 provided:

‘Where it is established by the decision referred to in Article 873 that the circumstances under consideration are such that the duties in question need not be entered in the accounts, the Commission may specify the conditions under which the Member States may refrain from post-clearance entry in the account in cases involving comparable issues of fact and of law.’

28 Chapter 3 of Title IV, concerning repayment or remission of import or export duties, in Part IV of Implementing Regulation No 2454/93 was headed ‘Specific provisions relating to the application of Article 239 of the [Customs] Code’. It included a section 2, relating to decisions to be taken by the Commission, which contained Articles 905 to 909 of that regulation. Article 907 provided, in the first paragraph:

‘After consulting a group of experts composed of representatives of all Member States, meeting within the framework of the Committee to consider the case in question, the Commission shall decide whether or not the situation which has been considered justifies repayment or remission.’

29 Article 908 of Implementing Regulation No 2454/93 provided:

‘1. The Member State concerned shall be notified of the decision referred to in Article 907 as soon as possible and in any event within 1 month of the expiry of the period specified in that Article.

The Commission shall notify the Member States of the decisions it has adopted in order to help customs authorities to reach decisions on cases involving comparable issues of fact and law.

2. The decision-making authority shall decide whether to grant or refuse the application made to it on the basis of the Commission’s decision notified in accordance with paragraph 1.

3. Where it is established by the decision referred to in Article 907 that the circumstances under consideration justify repayment or remission, the Commission may specify the conditions under which the Member States may repay or remit duties in cases involving comparable issues of fact and of law.’

Regulation (EC, Euratom) No 1605/2002

30 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1) (‘the Financial Regulation’), provides, in Article 73a:

‘Without prejudice to the provisions of specific regulations and the application of the Council Decision relating to the Communities’ own resources system, entitlements of the Communities in respect of third parties and entitlements of third parties in respect of the Communities shall be subject to a limitation period of 5 years.

The date for calculating the limitation period and the conditions for interrupting this period shall be laid down in the implementing rules’.

Regulation (EC, Euratom) No 2342/2002

- 31 Article 85b of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1), as amended by Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ 2007 L 111, p. 13) ('Implementing Regulation No 2342/2002'), headed 'Rules for limitation periods', states, in the first subparagraph of paragraph 1:

'The limitation period for entitlements of the Communities in respect of third parties shall begin to run on the expiry of the deadline communicated to the debtor in the debit note ... '

United Kingdom law

- 32 Under United Kingdom law, Anguilla is a British overseas territory which forms a single area with the other United Kingdom overseas territories and the United Kingdom, but which does not form part of the United Kingdom.
- 33 Anguilla has a constitution providing for the institution of a Governor, an Executive Council, a House of Assembly, a Public Service Commission and a Judicial Service Commission.
- 34 The United Kingdom government is internationally responsible for the external relations of British overseas territories, such as Anguilla. In addition, according to a constitutional principle, the United Kingdom Parliament has the power to legislate with respect to those territories.

Background to the dispute

- 35 In 1998, Anguilla and Corbis Trading (Anguilla) Ltd ('Corbis'), a company established in Anguilla, set up a transshipment scheme under which imports of aluminium from third countries were declared for customs purposes in Anguilla and then transported to the European Union.
- 36 In the course of 1998 and 1999 the Anguillan authorities issued export certificates EXP ('EXP certificates') for the re-export to the European Union of shipments of aluminium originating in third countries that had been transhipped through Anguilla.
- 37 Doubts having been raised as to whether the transshipment scheme set up in Anguilla was in conformity with Article 101(2) of the OCT Decision, the Commissioners for Her Majesty's Revenue and Customs (United Kingdom) ('HMRC') conducted an investigation in November 1998, following which they drew up a report which found that the European undertakings acting as importers of aluminium into Anguilla were initially paying customs duties in Anguilla and obtaining an EXP certificate for those aluminium imports, and were subsequently being granted 'transport aid'. According to the findings in that report, the 'transport aid' was paid to those undertakings by Corbis, which obtained a refund of the amounts paid by way of that aid from the Anguillan authorities. The report found that the transshipment scheme set up in Anguilla had, in essence, been established for the purposes of refunding customs duties, and concluded that the payment of such 'transport aid' had to be considered a partial refund of the customs duties paid in Anguilla, contrary to Article 101(2) of the OCT Decision.
- 38 The results of the investigation conducted by HMRC were sent to the Commission's Anti-Fraud Coordination Unit (UCLAF).

39 On 18 February 1999, UCLAF published a communication under Article 45 of Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1) ('the Communication on Mutual Assistance'). In that communication, UCLAF provided information received by HMRC regarding the transshipment scheme set up in Anguilla, as summarised in paragraph 37 of the present judgment. UCLAF concluded that EXP certificates issued under those conditions were incompatible with Article 101(2) of the OCT Decision and recommended to the authorities of the Member States that they reject all EXP certificates issued by the Anguillan authorities and take precautionary measures by asking importers for a guarantee or a deposit in respect of customs duties owed on entry into the European Union.

40 On 28 May 2003, the European Anti-Fraud Office (OLAF) drew up a Joint Mission Report ('the 2003 OLAF report') on the EXP certificates issued by the Anguillan authorities in 1998 and 1999. In point 4.2 of that report, OLAF noted that, throughout that period, the customs procedures in force in Anguilla had remained unchanged and that the undertakings that acted as importers of aluminium shipments into Anguilla were mentioned, in the EXP certificates issued by the Anguillan authorities, as exporters of those goods. According to the findings in point 4.2 of that report, the 'transport aid' paid to EU importers had also remained unchanged during that period, although Corbis had changed the content of the invoices addressed to the Anguillan authorities, which no longer mentioned the 'transport aid' paid by Corbis separately. Point 4.3 of the 2003 OLAF report added that the economic incentive paid in the form of such aid amounted, as a general rule, to 25 US dollars (USD) per tonne of aluminium imported into the European Union via Anguilla and could, in certain cases, exceed that amount. Also stated in point 4.3 were the names of the companies importing into the European Union which had received payments of that 'transport aid', as well as the total amount of those payments.

41 By Decision REC 03/2004 (C/2004/5358) of 28 December 2004 ('Decision REC 03/2004'), the Commission found, with regard to the particular case of the import into Italy, by an Italian undertaking, of 41 unwrought non-alloy aluminium bars originating in third countries, on 1 April 1999 and covered by an EXP certificate issued by the Anguillan authorities, that post-clearance entry in the accounts of import duties was not necessary. In that decision, the Commission noted that, in the context of the investigation by the European Union and certain Member States of the transshipment scheme in Anguilla from 1998, it had been established that economic operators releasing aluminium for free circulation in Anguilla were eligible for the payment of 'transport aid' of USD 25 per tonne of aluminium, aid that was paid on the basis of an individual decision adopted by the Anguillan authorities. As regards the compatibility of EXP certificates issued in the context of the grant of such aid with Article 101(2) of the OCT Decision, the Commission stated the following, in paragraph 9 of Decision REC 03/2004:

'After examining Anguilla's application of Article 101(2) of the OCT Decision, the Commission concluded that there was a link between the payment of the customs duties and the subsequent transport aid, that the system established in the OCT (collection of customs duties followed by payment of transport aid) did not comply with Article 101(2) and that the transport aid should therefore be considered a partial refund of customs duties. The goods were not therefore eligible for duty-free import into the Community.'

42 In Decision REC 03/2004, the Commission also considered that Anguilla's authorities had issued the EXP certificates when they knew or should reasonably have known that the system they had established did not comply with those provisions. In that regard, paragraphs 21 and 22 of Decision REC 03/2004 stated as follows:

'(21) In the case in point, there is evidence to suggest that Anguilla's competent authorities knew or, at the very least, should have known that the goods for which they were issuing EXP certificates did not fulfil the conditions laid down for favourable treatment on import into the Community.'

(22) Furthermore, Anguilla's authorities could not have been unaware of the relationship between the considerable increase in aluminium exports from Anguilla to the [European Union] in 1998 and 1999 and the granting of transport aid, even if that aid was paid by a different department to the one responsible for collecting customs duties on goods released for free circulation in Anguilla and for issuing EXP certificates.'

43 The Commission nevertheless found, in paragraphs 24 to 28 of that decision, that the error on the part of Anguilla's authorities could not have been detected by an operator acting in good faith, within the meaning of Article 220(2)(b) of the Customs Code, as was the case for the Italian importer concerned.

44 In paragraph 31 of that decision, the Commission, in accordance with Article 875 of Implementing Regulation No 2454/93, specified in the following terms the conditions under which Member States may, under Article 220(2)(b) of the Customs Code, waive post-clearance entry in the accounts of import duties in cases that are comparable in fact and law:

'Cases comparable in fact and law to this one are requests to waive post-clearance entry in the accounts lodged within the legal time limits in respect of imports into the Community from Anguilla, where those import operations were carried out in circumstances comparable in fact and law to those which gave rise to this case. The persons concerned must in no way have been involved in the shipment of the goods from the country of export, via Anguilla, to the point of entry in the Community customs territory. They must have purchased the goods under a DDP (delivered duty paid) contract. They must not have been involved as the importer of the goods into the Community or as the importer's representative. Lastly, they must not be deemed related persons to their supplier, the exporter to Anguilla, persons involved in the shipment of the goods from the country of export to the Community or the Government of Anguilla. ... There must have been no deception or obvious negligence on the part of the firms concerned.'

45 In Decision REM 03/2004 ((2006) 2030) of 24 May 2006 ('Decision REM 03/2004'), the Commission ruled on a transshipment scheme established in Saint Pierre and Miquelon for imports into the European Union of aluminium originating in third countries via that OCT, which also involved the collection of customs duties followed by payment of 'transport aid' of USD 25 per tonne of that metal to the economic operators releasing the aluminium for free circulation in that OCT. The Commission again considered that that scheme did not comply with Article 101(2) of the OCT Decision and that the authorities of that OCT knew or should reasonably have known that the conditions for issuing an EXP certificate were not fulfilled. In those circumstances, it concluded that the remission of import duties was justified, under Article 239 of the Customs Code. The Commission, moreover, confirmed its assessment of the transshipment scheme set up in Anguilla, stating, on the basis of Article 908 of Implementing Regulation No 2454/93, that the Member States may repay or remit import duties 'in respect of imports into the [European Union] from Saint Pierre and Miquelon, Anguilla and the Dutch Antilles, where those import operations were carried out in circumstances comparable in fact and law to those which gave rise to this case'.

46 During the period from March 1999 to June 2000, aluminium originating in third countries was imported into Italy upon submission of EXP certificates issued by the Anguillan authorities in 1999. In that year, the Anguillan authorities issued 12 EXP certificates.

47 In 2006 and 2007, the Italian authorities informed the Commission that they had taken a number of decisions granting remission of import duties in respect of aluminium imports from Anguilla on the basis of Decisions REC 03/2004 and REM 03/2004. At the Commission's request, the Italian authorities provided it with additional information in the course of 2010.

48 By letter of 8 July 2010, the Commission called on the United Kingdom, on the basis of Article 5 of the EC Treaty (subsequently Article 10 EC, now Article 4(3) TEU), to provide compensation for the loss of the European Union's own resources which, according to the Commission, arose as a result of the fact

that the Anguillan authorities had issued EXP certificates that were incompatible with Article 101(2) of the OCT Decision, hindering the Italian authorities in the collection of customs duties on the imports in question. In that letter, the Commission made clear that any delay in providing the compensation for that loss would give rise to interest.

- 49 The letter was followed by an exchange of correspondence between the Commission and the United Kingdom.

The pre-litigation procedure

- 50 On 27 September 2013, the Commission sent to the United Kingdom a letter of formal notice requesting that the United Kingdom provide compensation for the loss of own resources corresponding to the customs duties which had been the subject of remission decisions issued by the Italian authorities, on the basis of Decisions REC 03/2004 and REM 03/2004.
- 51 By letter of 21 November 2013, the United Kingdom replied to that letter of formal notice, denying any liability for Anguilla's actions and any infringement of EU law.
- 52 On 17 October 2014, the Commission sent a reasoned opinion to the United Kingdom, to which the latter replied maintaining its position.
- 53 Since the United Kingdom did not provide the compensation requested, the Commission decided to bring the present action.

The action

Arguments of the parties

- 54 The Commission maintains that the United Kingdom is bound, pursuant to the principle of sincere cooperation enshrined in Article 5 of the EC Treaty (subsequently Article 10 EC, now Article 4(3) TEU), to compensate the loss of traditional own resources resulting from the fact that, according to the Commission, the Anguillan authorities issued 12 EXP certificates in 1999 in breach of the provisions of the OCT Decision and, in so doing, prevented the Italian authorities from recovering the customs duties relating to the imports in question. In that regard, it makes clear that the purpose of its action is to obtain a declaration that the United Kingdom has failed to fulfil that compensation obligation, irrespective of the amount of the loss, which it does not ask the Court to determine.
- 55 In the first place, the Commission takes the view that the United Kingdom must, as a Member State, assume responsibility for acts adopted by and negligence on the part of the Anguillan authorities contrary to the OCT Decision, in view of the special relationship with its OCT, which, according to the Commission, is not an independent State and is an integral part of the United Kingdom.
- 56 The Commission adds that the United Kingdom cannot invoke the administrative autonomy enjoyed by Anguilla to justify the failure to comply with its obligations under the principle of sincere cooperation. Furthermore, the United Kingdom retains the powers necessary to ensure that the acts or omissions of that OCT do not result in a loss of own resources for the EU budget. In particular, the United Kingdom Parliament has unlimited power to legislate for the OCTs of the United Kingdom.
- 57 In the second place, the Commission recalls that the principle of sincere cooperation requires Member States to take all appropriate measures to guarantee the application and effectiveness of EU law. In the present case, the wrongful issue of EXP certificates by the Anguillan authorities prevented the recovery

of customs duties and the transfer of those duties to the EU budget as own resources. By failing to compensate that loss of own resources, the United Kingdom hindered the proper functioning of the European Union's system of own resources, since that loss would have to be compensated by all Member States via an increase in the own resource based on gross national income. Therefore, protection of the EU budget requires that the United Kingdom may be held liable for the infringement, by the Anguillan authorities, of the OCT Decision and for compensating the resulting loss of resources.

- 58 The Commission maintains, in the third place, that, in the absence of compensation for the loss of own resources at issue, the United Kingdom is obliged to pay default interest on the amount equivalent to that loss. According to the Commission, the obligation to pay default interest is not based on EU legislation on own resources but is part of the obligation of sincere cooperation, in view of the inseparable link between the obligation to establish the European Union's own resources, the obligation to credit them to the Commission's account within the prescribed time limits and the obligation to pay default interest.
- 59 With regard to the facts of the infringement alleged against the United Kingdom, the Commission submits, on the basis of the 2003 OLAF report, that the Anguillan authorities issued 12 EXP certificates in 1999 whilst granting EU importers 'transport aid'. In so far as the grant of such aid would have to be considered, according to Decisions REC 03/2004 and REM 03/2004, a partial refund of customs duties by Anguilla, those certificates were issued in breach of Article 101(2) of the OCT Decision. In the light of the information given in those certificates and the import declarations sent by the Italian authorities, the certificates had been used for the purposes of importing aluminium free of customs duties and, therefore, caused a loss of EU own resources, a loss which the United Kingdom had failed to compensate.
- 60 The United Kingdom, supported by the Kingdom of the Netherlands, disputes the infringement of which it is accused. In the first place, it contends that neither the Customs Code nor EU legislation on own resources nor the OCT Decision enables Anguilla to be held accountable to the European Union for errors committed by its own authorities in the application of that decision or for the resulting loss of own resources. Nor, therefore, can the United Kingdom be considered liable for such errors merely because it is the Member State with which Anguilla is linked.
- 61 According to the case-law of the Court resulting from Opinion 1/78 (International Agreement on Natural Rubber) of 4 October 1979 (EU:C:1979:224, paragraph 62), a distinction should be made between the responsibility of the Member States for the international relations of an OCT and the obligations to which those States are subject under EU law. In that respect, the United Kingdom notes that, in accordance with Article 227(3) of the EC Treaty (subsequently Article 299(3) EC, now Article 355(2) TFEU), Anguilla is considered an entity distinct from that Member State and one to which the general provisions of the Treaties do not, failing express reference, apply. The Commission's case would, however, extend the obligations under Article 5 of the EC Treaty (subsequently Article 10 EC, now Article 4(3) TEU) to the actions or omissions of the OCTs, without any express reference in EU law, in particular in the OCT Decision, to that effect. In the absence of an express provision to that effect, the United Kingdom is not obliged to prevent any infringements of that decision by Anguilla and to account to the European Union for them.
- 62 The United Kingdom contends that, in view of Anguilla's self-governance according to national constitutional law, the suggestion that the United Kingdom is liable for the actions of the authorities of that OCT is contrary to Article 4(2) TEU and to the principle of customary international law reflected by Article 73 of the Charter of the United Nations. It argues that, under national constitutional law, Anguilla is not part of the United Kingdom but forms a constitutional unit that is distinct from the United Kingdom, with a large degree of autonomy, including in respect of customs

matters and the raising of revenue. Since Anguilla is governed in accordance with its own written constitution, the United Kingdom Parliament's power to legislate in respect of Anguilla does not enable that parliament to intervene in the day-to-day activities of the authorities of that territory.

- 63 In the second place, the United Kingdom maintains that the argument that it is liable for the actions of the Anguillan authorities and, therefore, obliged to compensate the losses of own resources resulting from an infringement of the OCT Decision by those authorities could not be founded on Article 5 of the EC Treaty (subsequently Article 10 EC, now Article 4(3) TEU). There is nothing in the wording of that article that provides for such liability. Accordingly, that argument is contrary to the principle of legal certainty, which must be observed all the more strictly in the case of rules liable to entail financial consequences.
- 64 In addition, in the United Kingdom's submission, since the OCT Decision recognises that OCT authorities have a significant part to play in association matters, the Anguillan authorities disputed the Commission's interpretation of that decision and requested that a working party to deal with any problem arising in relations between the OCT and the European Union be convened in accordance with Article 235 of the OCT Decision, and that the partnership procedure pursuant to Article 7(7) of Annex III to the OCT Decision be invoked. According to the United Kingdom, the Commission should have applied those measures which are provided for by the OCT Decision to deal with any errors on the part of the Anguillan authorities.
- 65 The United Kingdom adds that it cannot, moreover, be required to pay default interest, in the absence of any legal basis for doing so. It argues that Article 11 of Regulation No 1552/89 is inapplicable in the present case.
- 66 As regards, last, the facts of the alleged infringement, the United Kingdom disputes the irregularity of the EXP certificates issued in 1999, on the ground that the Commission had failed to establish that those certificates had resulted in the grant of 'transport aid'. In that regard, it notes that, from November 1998, the invoices sent by Corbis to the Anguillan authorities no longer mentioned any 'transport aid' but referred to 'services rendered' by that company. In addition, on 22 January 1999, the Anguilla House of Assembly adopted a resolution according to which any product transhipped through Anguilla to the European Union had to be subject to a rate of duty equivalent to that set out in the European Union's tariff for that product. In any event, the United Kingdom submits that such 'transport aid' cannot be considered to be a partial refund of the customs duties that is incompatible with Article 101(2) of the OCT Decision.
- 67 According to the United Kingdom, the Commission also failed to establish that any wrongful issue of those EXP certificates led to a loss of own resources. In that regard, not only does it dispute that those certificates were actually produced to the Italian authorities, but the United Kingdom also casts doubt on whether there was a causal link between any wrongful issue of those certificates and the loss of own resources invoked. In its view, if the Italian authorities had adopted the safeguard measures recommended in the Communication on Mutual Assistance, the relevant operators might have declined to import the goods concerned into the European Union. Further, if the requirements relating to the conduct of those operators, as set out in paragraph 31 of Decision REC 03/2004, were not met, the Italian authorities should have sought recovery of the relevant customs duties, and therefore the United Kingdom cannot be held liable in that respect.
- 68 Moreover, according to the United Kingdom, the case-law resulting from the judgment of 13 November 2014, *Nencini v Parliament* (C-447/13 P, EU:C:2014:2372, paragraphs 47 and 48) precludes, in the present case, any finding that the United Kingdom infringed an alleged obligation to compensate the amount, together with any interest, of the loss of own resources resulting from the wrongful issue of EXP certificates by the authorities of Anguilla. It submits that the Commission

brought the present action 17 years after the imports at issue and more than 12 years after the publication of Decision REC 03/2004 and, therefore, after the expiry of the reasonable period of time within which the Commission was required to take action, according to that case-law.

Findings of the Court

- 69 As a preliminary point it must be noted that although, at the time of the Anguillan authorities' conduct that gave rise to the present action for failure to fulfil obligations, the principle of sincere cooperation was laid down in Article 5 of the EC Treaty and subsequently in Article 10 EC, those provisions had been replaced by Article 4(3) TEU when the Commission requested the United Kingdom to compensate the loss of own resources which, in its view, resulted from that conduct. It follows that the present action must be examined in the light of the principle of sincere cooperation as laid down in Article 4(3) TEU.
- 70 In accordance with the second subparagraph of Article 4(3) TEU, the United Kingdom is required, as a Member State of the European Union, to take all appropriate measures, general or particular, to ensure fulfilment of its obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union.
- 71 While, to that end, all the authorities of that Member State must ensure the observance of the rules of EU law within the sphere of their competence, that Member State alone is, under Article 258 TFEU, responsible vis-à-vis the European Union for compliance with obligations arising under EU law (see, to that effect, judgments of 4 October 2012, *Byankov*, C-249/11, EU:C:2012:608, paragraph 64 and the case-law cited, and of 13 May 2014, *Commission v Spain*, C-184/11, EU:C:2014:316, paragraph 43 and the case-law cited).
- 72 As the Commission made clear in its reply, the present action for failure to fulfil obligations is based not on errors committed by the United Kingdom authorities but on the United Kingdom's liability for a loss of own resources following infringement of the provisions of the OCT Decision governing the issue of EXP certificates by the authorities of Anguilla.
- 73 As is apparent from Article 227(3) of the EC Treaty, read in conjunction with Annex IV thereto (subsequently Article 299(3) EC and Annex II to the EC Treaty, now Article 355(2) TFEU and Annex II to the FEU Treaty), Anguilla was among the OCTs listed in that annex and was, therefore, subject to the special arrangements for association set out in Part Four of the EC Treaty, which grouped together Articles 131 to 137 of that treaty (subsequently Articles 182 EC to 188 EC, now Articles 198 to 204 TFEU), the details and procedures of which were established by the OCT Decision on the basis of Article 136 of that treaty (subsequently Article 187 EC, now Article 203 TFEU).
- 74 In that context, it must be pointed out that, while the Court has ruled that the general provisions of the EC Treaty, namely those which are not referred to in Part Four of that treaty, are not applicable to OCTs in the absence of an express reference (judgment of 5 June 2014, *X and TBG*, C-24/12 and C-27/12, EU:C:2014:1385, paragraph 45 and the case-law cited), the infringement alleged against the United Kingdom is not covered by the situation envisaged by that case-law. The Commission does not argue that the principle of sincere cooperation applies to Anguilla, but maintains that the United Kingdom is bound, by virtue of that principle, to answer for the consequences of the wrongful issue of EXP certificates by the Anguillan authorities. As recalled in paragraph 70 of the present judgment, that principle is binding on the United Kingdom as Member State of the European Union.
- 75 In the light of those considerations, the Court must consider, first, whether the United Kingdom is, by virtue of its obligations as Member State under Article 4(3) TEU, liable, vis-à-vis the European Union, for any issue of EXP certificates by the authorities of Anguilla in breach of the OCT Decision; second,

whether it is required, pursuant to that provision, to compensate the amount, together with any default interest, of any resulting loss of own resources of the European Union; and, third, if so, whether the infringement alleged against the United Kingdom is well founded.

Liability of the United Kingdom as a result of any wrongful issue of EXP certificates by the authorities of Anguilla

- 76 The Commission maintains that it is by virtue of the special relations linking Anguilla to the United Kingdom that that Member State is accountable to the European Union for the acts and omissions of the authorities of Anguilla when they issued EXP certificates in breach of the OCT Decision.
- 77 The United Kingdom is among those Member States which, according to the first paragraph of Article 131 of the EC Treaty (subsequently the first paragraph of Article 182 EC, now the first paragraph of Article 198 TFEU), have ‘special relations’ with OCTs. Under that provision, those countries and territories were subject to the special arrangements for association set out in Part Four of the EC Treaty on the basis, at the time when the certificates were issued, of those special relations.
- 78 Those special relations are characterised by the fact that the OCTs are not independent States but countries and territories that depend on such a State, which is responsible, in particular, for representing them internationally (see, to that effect, Opinions 1/78 (International Agreement on Natural Rubber) of 4 October 1979, EU:C:1979:224, paragraph 62, and 1/94 (Agreements annexed to the WTO Agreement) of 15 November 1994, EU:C:1994:384, paragraph 17).
- 79 Under Article 131 of the EC Treaty (subsequently Article 182 EC, now Article 198 TFEU), application of the special arrangements for association set out in Part Four of that treaty, intended to promote the economic, social and cultural development of the OCTs, benefits only countries and territories having special relations with the Member State concerned, where that Member State requested that the special arrangements for association be made applicable to them. In the particular case of Anguilla, for which the United Kingdom is responsible, the territory was added to the list of OCTs in Annex IV to the EEC Treaty (subsequently Annex II to the EC Treaty, now Annex II to the FEU Treaty) pursuant to Article 24(2) of the Act concerning the Conditions of Accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the Adjustments to the Treaties (OJ 1972 L 73, p. 14).
- 80 Thus, the terms used notably in the first recital and in Article 234 and Article 235(2) of the OCT Decision to designate the Member State ‘responsible for’ an OCT are an expression of the special relations that exist between them, according to the first paragraph of Article 131 of the EC Treaty (subsequently the first paragraph of Article 182 EC, now the first paragraph of Article 198 TFEU). That interpretation is supported by Article 1 of the OCT Decision, read in conjunction with point 5 of Annex I thereto, from which it is apparent that Anguilla was an OCT ‘of the [United Kingdom]’.
- 81 In addition, in the context of those special arrangements for association, goods originating in Anguilla enjoyed, under Article 133(1) of the EC Treaty (subsequently Article 184(1) EC, now Article 200(1) TFEU), privileged access to the internal market free of customs duties, access which the OCT Decision extended, as stated in its third recital, to certain products not originating in that OCT. Under Article 101(2) of that decision, read in conjunction with the second indent of Article 108(1) and Annex III thereto, products not originating in the OCTs but which were in free circulation in an OCT and were re-exported as such to the European Union were to be accepted for import free of customs duties and taxes having equivalent effect providing that those products had paid, in that OCT, customs duties or taxes having equivalent effect of a level equal to, or higher than, the customs duties applicable in the European Union on import of these same products originating in third

countries eligible for the most-favoured-nation clause; had not been the subject of an exemption from, or a refund of, in whole or in part, customs duties or taxes having equivalent effect; and were accompanied by an EXP certificate.

- 82 The issuing of EXP certificates by the Anguillan authorities was governed by EU law. According to Article 2(1) and (6) of Annex III to the OCT Decision, which applied to the territories of the OCTs in accordance with Article 237, those certificates, constituting evidence of compliance with the provisions of Article 101(2) of that decision, were required to be issued by the authorities of the OCTs. Accordingly, when issuing such certificates, those authorities were obliged to comply with the requirements contained in Article 101(2).
- 83 In addition, the procedures laid down by the OCT Decision to settle disputes or problems that might arise in that context reflected the centrality, in terms of the arrangements for association set out in Part Four of the EC Treaty, of the special relations within the meaning of the first paragraph of Article 131 of the EC Treaty (subsequently the first paragraph of Article 182 EC, now the first paragraph of Article 198 TFEU) between the OCT concerned and the Member State responsible for it.
- 84 In that regard, account must be taken, in particular, of Article 7(7) of Annex III to the OCT Decision, according to which disputes about the legality of EXP certificates which could not be settled between the customs authorities of the importing State and those of the exporting OCT had to be settled at the level of the Committee on Customs Legislation, in the context of a procedure in which, *inter alia*, a representative of the Member State responsible for the exporting OCT would participate, but not the relevant local authorities of that OCT.
- 85 Furthermore, as regards the possible resolution of problems that might arise in connection with the wrongful issue of EXP certificates in the context of the partnership referred to in Articles 234 and 235 of the OCT Decision, it must be noted that that partnership could not be based on a bilateral dialogue between the OCT concerned and the Commission, but called for a trilateral consultation in which not only the Commission but also the Member State responsible for the OCT and the relevant local authorities of the OCT had to take part. According to the first paragraph of Article 10 of that decision, the participation in that trilateral consultation of the Member State responsible for the OCT was required in order to ensure that the ‘powers of the respective central authorities of the Member States concerned’ were respected.
- 86 In those circumstances, the existence of special relations, within the meaning of the first paragraph of Article 131 of the EC Treaty (subsequently the first paragraph of Article 182 EC, now the first paragraph of Article 198 TFEU), between the United Kingdom and Anguilla creates a specific liability on the part of that Member State vis-à-vis the European Union when the authorities of that OCT issue EXP certificates in breach of that decision.
- 87 The United Kingdom denies, however, that that liability exists. First, it maintains that a distinction must be made between Anguilla and the United Kingdom as Member State, in accordance with the case-law resulting from Opinion 1/78 (International Agreement on Natural Rubber) of 4 October 1979 (EU:C:1979:224, paragraph 62). Second, according to the United Kingdom, the system of administrative cooperation established by the OCT Decision enables the authorities of an OCT to be approached directly, so that the Commission cannot hold it liable for the actions of those authorities on the basis of Article 4(3) TEU. Third, recognition of such liability would undermine the constitutional self-governance of Anguilla, contrary to Article 4(2) TEU and Article 73 of the Charter of the United Nations.
- 88 As regards the first argument, the Court did indeed rule, in essence, in paragraph 62 of the opinion cited in the preceding paragraph, that when a Member State concludes an international agreement as international representative of an OCT for which that State is responsible, it is not acting in its

capacity as a Member State. However, that finding, on the basis of which the Court was able to conclude that such representation did not affect the ‘demarcation of spheres of competence within the Community’, is not relevant for the purposes of assessing the liability of a Member State in the context of the issue, by the authorities of an OCT for which that Member State is responsible, of EXP certificates in breach of the OCT Decision, that issue being governed by the rules of EU law applicable on the territory of the OCTs.

- 89 As regards the second argument of the United Kingdom, relating to the system of administrative cooperation established by the OCT Decision, it is true that, under Article 7(6) of Annex III to that decision, it was for the authorities of the OCT concerned, inter alia, to carry out appropriate enquiries where the verification procedure referred to in Article 7(1) of that annex or any other available information appeared to indicate that the provisions of that annex were being contravened. However, paragraph 6 of that provision stated that the Commission ‘may participate’ in the enquiries to detect and prevent contraventions of the provisions governing the issue of EXP certificates, but did not impose an obligation on it in that respect. Moreover, although Article 7(7) of that annex provided that disputes arising on the occasion of such enquiries or raising a question of interpretation ‘shall be submitted’ to a dispute resolution procedure, it is apparent from the actual terms of that provision that it covered only disputes arising between the importing State and the exporting OCT and, therefore, was not binding on the Commission.
- 90 Nor, furthermore, and contrary to the United Kingdom’s contention, do the provisions relating to the consultation referred to as ‘partnership’ preclude a Member State from being held liable, under Article 4(3) TEU, for the wrongful issue of EXP certificates by the authorities of its OCTs. According to the actual wording of Article 234 of the OCT Decision, EU action was to be based only ‘as far as possible’ on that consultation between the Commission, the Member State responsible for the OCT and the relevant local authorities of that OCT. Moreover, according to Article 235(2) of that decision, working parties in association with the OCT ‘may be set up’, notably at the request of the OCT concerned, to deal with any problem arising between the OCT and the European Union. Thus, while it is true that that partnership framework was not implemented in this instance, the fact remains that the wording of those provisions indicates that such implementation was optional.
- 91 The third argument, relating to Anguilla’s constitutional self-governance, cannot be accepted either, in so far as the United Kingdom does not state how the liability of a Member State for the actions of its OCTs, which is without prejudice to the tasks entrusted to them by the OCT Decision, could undermine their self-governance.
- 92 It is also necessary to assess the types of errors made by an OCT in the context of the issue of EXP certificates for which the Member State having responsibility for that OCT must be held liable.
- 93 In that regard, 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 (see, to that effect, judgments of 7 October 2010, *Stils Met*, C-382/09, EU:C:2010:596, paragraph 44, and of 5 December 2017, *Germany v Council*, C-600/14, EU:C:2017:935, paragraph 94).
- 94 In view of the preferential and derogating nature of the customs arrangements that applied to products not originating in the OCTs, under the conditions provided for in Article 101(2) of the OCT Decision read in conjunction with the second indent of Article 108(1) and with Annex III thereto, the obligation referred to in the preceding paragraph must be fulfilled all the more strictly in the present case. Therefore, the liability vis-à-vis the European Union of the Member State responsible for an OCT extends, by virtue of Article 4(3) TEU, to any error made by the authorities of that OCT, in the context of the issue of EXP certificates. Accordingly, the Court must reject the argument of the United Kingdom that, in essence, it cannot be held liable for any wrongful issue of EXP certificates by

the authorities of Anguilla, on the ground that the certificates were issued prior to clarification, by Decision REC 03/2004, of the scope of the requirements imposed in Article 101(2) of the OCT Decision.

- 95 Having regard to all of these considerations, it must be concluded that the United Kingdom is, by virtue of its obligations as Member State under the first paragraph of Article 131 of the EC Treaty (subsequently the first paragraph of Article 182 EC, now the first paragraph of Article 198 TFEU) and Article 4(3) TEU, liable, vis-à-vis the European Union, for any issue by the Anguillan authorities of EXP certificates in breach of the OCT Decision (see, by analogy, judgment of today's date, *Commission v Netherlands (Liability for the action of an OCT)*, C-395/17, paragraph 97).

The obligation to compensate any loss of own resources, under Article 4(3) TEU

- 96 It has consistently been held that, pursuant to the principle of sincere cooperation, the Member States are required to nullify the unlawful consequences of an infringement of EU law. Consequently, the authorities of Member States are required to take, within the sphere of their competence, all measures necessary to remedy an infringement of EU law (see, to that effect, judgments of 21 June 2007, *Jonkman and Others*, C-231/06 to C-233/06, EU:C:2007:373, paragraphs 37 and 38; of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35 and the case-law cited; and of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others*, C-597/17, EU:C:2019:544, paragraph 54).
- 97 In so far as the issue of an EXP certificate in breach of Article 101(2) of the OCT Decision prevents, in the circumstances provided for in Article 220(2)(b) and in Article 239 of the Customs Code, the authorities of the importing Member State concerned from collecting the customs duties which they would have had to collect in the absence of such an EXP certificate, the resulting loss of traditional own resources of the European Union constitutes the unlawful consequence of an infringement of EU law. According to the case-law of the Court, such a loss must be offset either by another own resource or by an adjustment of expenditure (see, by analogy, judgments of 15 November 2005, *Commission v Denmark*, C-392/02, EU:C:2005:683, paragraph 54, and of 5 October 2006, *Commission v Germany*, C-105/02, EU:C:2006:637, paragraph 88).
- 98 Consequently, the Member State which is liable, vis-à-vis the European Union, for the wrongful issue of such a certificate is bound, in accordance with the principle of sincere cooperation, to take all measures necessary to remedy that infringement of EU law and, in particular, to compensate the resulting loss of own resources (see, by analogy, judgment of today's date, *Commission v Netherlands (Liability for the action of an OCT)*, C-395/17, paragraph 100).
- 99 With regard, more specifically, to the question whether default interest is, in certain circumstances, to be added to the amount of that loss of own resources, suffice it to note that compensation only for the amount of customs duties which could not be collected is not sufficient to nullify the unlawful consequences of the wrongful issue of an EXP certificate.
- 100 That interpretation cannot be called into question by the argument as to the principle of legal certainty invoked by the United Kingdom, according to which such a compensation obligation cannot exist if there is no express provision for it in EU law. The obligation to compensate the loss of own resources resulting from the wrongful issue of EXP certificates is merely a particular expression of the obligation, arising from the principle of sincere cooperation, under which the Member States are required to take all necessary measures to remedy an infringement of EU law and to nullify the unlawful consequences of it. As is apparent from the settled case-law recalled in paragraph 96 of the present judgment, the latter obligation extends to all unlawful consequences of an infringement of EU law, in particular those which are of a financial nature, such as those at issue in this case.

101 However, default interest does not start to run until the date of the request addressed to the Member State concerned for compensation for the loss of own resources.

102 Having regard to all of these considerations, it must be concluded that the Member State which is liable vis-à-vis the European Union for the wrongful issue of EXP certificates by an OCT that is under the responsibility of that Member State is obliged, in accordance with the principle of sincere cooperation, to compensate any loss of own resources, together with any default interest.

The alleged breach of obligations

103 The Commission maintains that, in 1999, the authorities of Anguilla issued 12 EXP certificates in breach of Article 101(2) of the OCT Decision, that that wrongful issue caused the European Union a loss of own resources and that the United Kingdom has failed to fulfil its obligation to compensate that loss.

104 As regards, in the first place, the alleged irregularity of the EXP certificates at issue, the Commission submits that Decisions REC 03/2004 and REM 03/2004 and the 2003 OLAF report are sufficient to demonstrate that irregularity. According to the United Kingdom, however, the Commission must establish, for the purposes of the present action for failure to fulfil obligations, the irregular nature of each of those certificates.

105 In that regard, so far as concerns Decisions REC 03/2004 and REM 03/2004, it must be borne in mind that, in accordance with Article 875 and Article 908(3) of Implementing Regulation No 2454/93, where the Commission adopts, under Articles 873 and 907 of that regulation, a decision establishing that the circumstances under consideration are such that the duty in question need not be entered in the accounts, it may specify the conditions under which the Member States may take a similar decision in cases involving comparable issues of fact and of law (see, to that effect, judgment of 26 October 2017, *Aqua Pro*, C-407/16, EU:C:2017:817, paragraph 68).

106 Decisions REC 03/2004 and REM 03/2004 are decisions that contain such findings. In those decisions, the Commission found that the authorities of Anguilla and of Saint Pierre and Miquelon had granted payment, during the relevant periods, of ‘transport aid’ of USD 25 per tonne of aluminium to the economic operators who had first released aluminium for free circulation in those OCTs and then re-exported that aluminium to the European Union. The Commission found that, in those circumstances, the payment of that aid represented a link with the earlier payment of customs duties and constituted a partial refund of those duties, which meant that the EXP certificates issued by those authorities were contrary to the second indent of Article 101(2) of the OCT Decision. According to the findings in those decisions, the existence of ‘transport aid’ with those characteristics was identified as the decisive factor in concluding that there had been an infringement of that provision.

107 According to the case-law, the assessments of fact and law in a decision, such as Decisions REC 03/2004 and REM 03/2004, bind all the authorities of the Member State to which it was addressed and, under the conditions specified by the Commission, the authorities of the other Member States, in cases involving comparable issues of fact and of law (see, to that effect, judgments of 20 November 2008, *Heuschen & Schrouff Oriental Foods Trading*, C-375/07, EU:C:2008:645, paragraph 64 and the case-law cited, and of 26 October 2017, *Aqua Pro*, C-407/16, EU:C:2017:817, paragraph 69).

108 Furthermore, it must be recalled that, in so far as an OLAF report contains relevant information with regard, in particular, to the conduct of the customs authorities of the exporting OCT, that report can be taken into consideration in order to establish whether a particular case involves issues of fact and of

law comparable to a case on which a Commission decision was taken under Articles 873 and 907 of Implementing Regulation No 2454/93 (see, to that effect, judgment of 26 October 2017, *Aqua Pro*, C-407/16, EU:C:2017:817, paragraphs 55 and 70).

- 109 In the present case, it should be noted that Decision REC 03/2004 and the 2003 OLAF report concern the customs practices of a single OCT, namely Anguilla. In addition, that report found, in point 4.2, that the customs procedures in force in Anguilla and, notwithstanding a change in what was stated on the invoices presented by Corbis to the Anguillan authorities, the provision of an economic incentive that was paid to EU importers in the form of ‘transport aid’ had remained unchanged throughout 1998 and 1999. Furthermore, the EXP certificates at issue were all issued in 1999 by the Anguillan authorities to undertakings identified in point 4.3 of that report as being recipients of that aid.
- 110 Thus, it can be established from the findings in the 2003 OLAF report that the Anguillan authorities had issued the relevant EXP certificates whilst granting that ‘transport aid’. Relying on that report, the Commission thus explained in detail, in the context of the present action, that those certificates had been issued in a situation involving issues of fact and of law comparable to that in respect of which Decision REC 03/2004 was taken.
- 111 Although, in proceedings brought under Article 258 TFEU for failure to fulfil obligations, it is for the Commission to prove the allegation that an obligation has not been fulfilled, by placing before the Court all the information required to enable the Court to establish that the obligation has not been fulfilled, without the Commission being entitled to rely on any presumption, where the Commission has adduced sufficient evidence to establish that the provisions of EU law are not applied correctly in practice in the territory of the defendant Member State, it is for the latter to challenge in substance and in detail the information produced and the inferences drawn (see, to that effect, judgment of 28 January 2016, *Commission v Portugal*, C-398/14, EU:C:2016:61, paragraphs 47 and 48 and the case-law cited).
- 112 That case-law may be applied to a situation such as that which characterises the present case, as is apparent from the conclusion drawn in paragraph 95 of the present judgment. Accordingly, in so far as the Commission did, as is evident from paragraph 110 of the present judgment, explain in detail, relying on the 2003 OLAF report, that the relevant EXP certificates had been issued in a situation involving issues of fact and of law comparable to that in respect of which Decision REC 03/2004 was taken, it was not obliged to adduce, to that end, particular proof in respect of each certificate. On the contrary, in those circumstances, it was for the United Kingdom to challenge in substance and in detail the findings in that report.
- 113 It must, however, be held that, in this instance, the United Kingdom has not satisfied that requirement. By confining itself to making general assertions, such as those set out in paragraph 66 of the present judgment, it did not put forward any specific information that might challenge the finding, notably in Decision REC 03/2004, that the transport aid which, according to the findings in the 2003 OLAF report, had been granted in connection with the issue of the relevant EXP certificates, had to be considered a partial refund of customs duties.
- 114 In those circumstances, it has been established to the requisite legal standard that the relevant EXP certificates were issued by the Anguillan authorities in breach of Article 101(2) of the OCT Decision.
- 115 For the purposes of demonstrating, in the second place, that the wrongful issue of the EXP certificates concerned entailed a loss of own resources, the Commission put before the Court, in addition to those certificates, in particular, the import declarations which had been sent to it by the Italian authorities. The United Kingdom disputes the notion that those documents can establish the actual loss of own resources invoked by the Commission.

- 116 In that regard, it is not disputed that the importation of aluminium to which Decision REC 03/2004 relates was made upon submission of the EXP certificates at issue to the Italian authorities. In addition, the information given in those certificates and those import declarations demonstrate that, except in two cases, the certificates were all submitted to the Italian authorities for the purpose of importing aluminium into the European Union free of customs duties. The identical description of the goods concerned and of their origin, the identity of the vessel used and of the undertaking acting as EU importer and, in particular, the fact that those import declarations mention the reference number of those EXP certificates demonstrate that the certificates were indeed submitted to those authorities.
- 117 Thus, except in two instances, the Commission established, on the basis of the EXP certificates at issue and the import declarations, that all those EXP certificates had been submitted to the Italian authorities.
- 118 While the Commission conceded, in reply to a question put by the Court, that the documents annexed to its application do not cover all the aluminium imports on which it relies for the purposes of its action for failure to fulfil obligations, it must be noted that the Commission's application does not incorporate a claim containing actual figures. Moreover, at the hearing, the Commission emphasised that, by its action, it seeks a declaration that the United Kingdom has failed to fulfil its obligation of sincere cooperation by rejecting the very principle of paying any compensation for the loss of own resources resulting from the wrongful issue of the EXP certificates concerned, irrespective of the amount of that loss.
- 119 Since it is common ground that the United Kingdom has not paid any compensation of that nature, it is not necessary to identify, for the purposes of the present proceedings, all the aluminium imports into the European Union that were made upon presentation of the EXP certificates at issue, or the amount of the loss of own resources that resulted from them.
- 120 As to whether the issue of the EXP certificates concerned entailed, as a matter of certainty, a loss of own resources, it must be observed that those EXP certificates, which were issued wrongfully, led the Italian authorities to accept aluminium from Anguilla for importation into the European Union free of customs duties and to issue decisions on the remission and refund of customs duties.
- 121 The United Kingdom disputes the existence of a causal link between the wrongful issue of the EXP certificates concerned and that loss of own resources. It maintains, in essence, that the Italian authorities could have avoided that loss if they had, on the one hand, followed the recommendations in the Communication on Mutual Assistance and, on the other, determined that the requirements relating to the conduct of the operators concerned, as specified in paragraph 31 of Decision REC 03/2004, were not met.
- 122 However, the existence of that causal link cannot be called in question merely because, as the United Kingdom argues, the relevant operators might have declined to import the goods concerned into the European Union if the Italian authorities had followed the recommendations in the Communication on Mutual Assistance. Similarly, the United Kingdom's claim that the Italian authorities should have recovered the customs duties if they had determined that the relevant operators did not meet the requirements specified in paragraph 31 of Decision REC 03/2004 concerns a situation outwith that of the present case, in which those authorities — as has been stated, in essence, in paragraph 47 of the present judgment — remitted or refunded customs duties on the basis of that decision.
- 123 Furthermore, the United Kingdom submits that the principles of legal certainty and of good administration preclude in this instance the possibility of finding that there has been a failure to fulfil the obligation of compensating that loss, since the Commission failed to request such compensation within a reasonable time in accordance with the case-law arising from the judgment of 13 November 2014, *Nencini v Parliament* (C-447/13 P, EU:C:2014:2372, paragraph 48).

- 124 In that regard, it must be pointed out that the case-law resulting from the judgment cited in the preceding paragraph concerns Article 85b of Implementing Regulation No 2342/2002 setting the starting point for the five-year limitation period under Article 73a of the Financial Regulation as the expiry of the deadline communicated to the debtor in the debit note.
- 125 It is true that, in that judgment, the Court ruled that, where the applicable texts are silent, the principle of legal certainty requires the institution concerned to make that communication within a reasonable time, whilst making clear that the period in which a debit note is communicated must be presumed to be unreasonable where that communication takes place outside a period of 5 years from the point at which the institution was, in normal circumstances, in a position to claim its debt (see, to that effect, judgment of 13 November 2014, *Nencini v Parliament*, C-447/13 P, EU:C:2014:2372, paragraphs 48 and 49).
- 126 However, without it being necessary to consider whether Article 73a of the Financial Regulation and Article 85b of Implementing Regulation No 2342/2002 are applicable to the obligation to compensate a loss of own resources under Article 4(3) TEU, such as that at issue in the present case, it must be held that the Commission did not in any event exceed the period of 5 years beyond which the period in which a debit note is communicated must be presumed to be unreasonable according to the case-law arising from the judgment cited in the preceding paragraph. Since, as is apparent from Article 875 and from Article 908(3) of Implementing Regulation No 2454/93, the Italian authorities were required to apply Decisions REC 03/2004 and REM 03/2004 and to decide on the refund or remission of customs duties relating to the imports of aluminium from Anguilla, the Commission was not in a position to seek compensation from the United Kingdom for the resulting loss of own resources before being informed by the Italian authorities of the decisions which they had taken. It is common ground that the Italian authorities did not provide that information to the Commission, as has been stated in paragraph 47 of the present judgment, until 2006 and 2007. Therefore, it must be held that the Commission observed that time limit when it requested that compensation from the United Kingdom in 2010.
- 127 Consequently, it must be held that, by failing to compensate the loss of own resources resulting from the wrongful issue, in the light of the OCT Decision, by the authorities of Anguilla, of EXP certificates in respect of the imports of aluminium from Anguilla during the period 1999/2000, the United Kingdom has failed to fulfil its obligations under Article 4(3) TEU.

Costs

- 128 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been unsuccessful, the United Kingdom must be ordered to pay the costs.
- 129 In accordance with Article 140(1) of the Rules of Procedure, according to which the Member States which have intervened in the proceedings are to bear their own costs, the Kingdom of the Netherlands is to bear its own costs.

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

- 1. Declares that, by failing to compensate the loss of own resources resulting from the wrongful issue, in the light of Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community, by the authorities of Anguilla, of export certificates EXP in respect of the imports of aluminium from Anguilla during the period 1999/2000, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 4(3) TEU;**

2. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;

3. Orders the Kingdom of the Netherlands to bear its own costs.

Lenaerts	Silva de Lapuerta	Bonichot
Arabadjiev	Safjan	Rodin
Malenovský	Bay Larsen	von Danwitz
Toader	Vajda	Biltgen
Jürimäe		

Delivered in open court in Luxembourg on 31 October 2019.

A. Calot Escobar
Registrar

K. Lenaerts
President