Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 21 March 2024[1]

Case C-494/22 P

European Commission
v

Czech Republic

(Appeal – Own resources of the European Union – Customs duties – Obligations of the Member States – Payment to the European Commission of amounts corresponding to non-recovered own resources – Investigation into the circumvention of anti-dumping duties of pocket lighters from Laos – European Union Anti-Fraud Office (OLAF) mission report – Action based on unjust enrichment – Articles 268 and 340 TFEU)

I. Introduction

1. The third time is the charm, as they say.

2. This case represents the third time the Czech Republic has sought to put before the EU Courts a dispute with the European Commission concerning the obligation to credit EU own resources. It follows attempts by that Member State to lodge, first, an action for annulment under Article 263 TFEU (to challenge the Commission's letter requesting payment)[2] and, second, an action for failure to act under Article 265 TFEU (on account of the Commission's failure to bring an infringement action against it).[3]

3. Indeed, in its landmark judgment in *Czech Republic* v *Commission*,[4] the Court considered that, where a Member State disagrees with the Commission regarding its obligations relating to own resources, an action for annulment is not possible, nor can the Commission be obliged to initiate infringement proceedings. However, it is open to the Member State to seek damages on account of the European Union's unjust enrichment and to bring an action before the General Court to that end.

1 Original language: English.

2 See order of 28 June 2018, *Czech Republic* v *Commission* (T-147/15, not published, EU:T:2018:395), in which the General Court found that action inadmissible; it was upheld on appeal in the judgment of 9 July 2020, *Czech Republic* v *Commission* (C-575/18 P, EU:C:2020:530).

3 See order of 30 September 2020, *Czech Republic* v *Commission* (T-13/19, not published, EU:T:2020:455), whereby the Czech Republic withdrew that action.

4 See judgment of 9 July 2020 (C-575/18 P, EU:C:2020:530, paragraphs 52 to 84).

4. In practice, therefore, a Member State must credit the disputed amount of EU own resources to the Commission's account to avoid having to pay default interest in case it loses the dispute. After that, when seeking repayment of that amount by the action based on the unjust enrichment of the European Union, the Member State can prove that the Commission was wrong.

5. The Czech Republic did just that. Now that the procedural hurdle has been overcome, the substantive question before this Court on appeal is whether that Member State or the Commission was correct in its understanding of the EU budgetary rules.

6. By the judgment of the General Court of 11 May 2022, *Czech Republic* v *Commission* (T-151/20, EU:T:2022:281; 'the judgment under appeal'), the General Court upheld, in part, the Czech Republic's action for unjust enrichment. The General Court essentially found that the Czech Republic could be released from its obligation to pay certain amounts of own resources that had proved impossible to recover, and that it was entitled to wait for a mission report sent by the European Union Anti-Fraud Office ('OLAF')[5] before taking the necessary measures to enter those amounts in the relevant accounts.

7. On appeal, the Commission claims that the Czech Republic was required by EU law to pay all of the disputed amounts and that there has been no unjust enrichment of the European Union.

8. This case therefore raises important questions of principle and practice regarding the obligations of Member States under EU own resources law. The main issues are essentially two. The first requires an interpretation of the relevant EU law in order to determine whether a Member State's late entry in the accounts precludes that Member State from being released from its obligations to make available own resources. The second relates to whether the Czech Republic was late in establishing and entering the EU entitlements in the particular circumstances of this case because it waited for OLAF's mission report.

II. Background

A. The system of EU own resources and the relevant EU law

9. The European Union relies on a balanced budget that is financed mainly by its own resources. EU own resources are essentially revenue which accrue to the EU budget automatically, without the need for any subsequent decision by the Member State authorities.[6]

[5] OLAF is a service or department within the Commission. It was established in 1999 as a means to strengthen the fight against fraud and other illegal activities detrimental to the European Union's financial interests. See, in particular, Articles 1 and 2 and recitals 1 to 4 of Commission Decision 1999/352/EC, ECSC, Euratom of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (OJ 1999 L 136, p. 20).

[6] European Commission, *European Union Public Finance*, 4th ed., Office for Official Publications of the European Communities, Luxembourg, 2008, p. 135.

10. There are several types of EU own resources, including traditional own resources ('TOR'), which are mainly customs duties on products imported from third countries.[7] TOR constitutes a direct source of revenue for the European Union, which is not dependent on Member State contributions.[8] It is completely defined by the EU legislature,[9] and the role of the Member States in connection with its collection and transfer is purely instrumental.[10]

11. However, since the European Union does not have its own tax collectors, the Member States must collect the customs duties and pay them ('make them available' in the terminology of the EU legislation) to the EU budget by depositing them in an account in the Commission's name (while being permitted to keep a certain percentage for collection costs).

12. Thus, in a nutshell, TOR is EU money, but the European Union has to rely on the Member States to obtain it.

13. Consequently, the system of EU own resources is governed by a specific EU legal framework,[11] which is at the heart of this case. In that system, the Member States have no discretion and must make available own resources according to the rules (including time limits) laid down in the EU legislation on own resources.[12]

14. Relevant for this case are Decisions 2000/597[13] and 2007/436,[14] along with Regulation 1150/2000.[15]

15. Regulation 1150/2000 lays down provisions on the making available of own resources to the Commission. This happens in three steps. First, a Member State must *establish EU entitlements*, which is governed by Article 2 thereof. Second, that Member State must *enter those entitlements*

7 The other categories of EU own resources are those based on value added tax ('VAT'), on gross national income ('GNI') and on non-recycled plastic packaging waste (introduced in 2021).

8 TOR accounted for about 16% of own resources revenue in 2022, worth EUR 23.5 billion. See Communication from the Commission to the European Parliament, the Council and the Court of Auditors, Consolidated Annual Accounts of the European Union for the Financial Year 2022, COM(2023) 391 final, 28 June 2023, point 5.1, p. 25 and point 3.6.1, p. 149.

9 Since Council Decision 70/243 ECSC, EEC, Euratom of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (OJ, English Special Edition 1970 (I), p. 224).

10 See Opinion of Advocate General Geelhoed in *Commission* v *Denmark* (C-392/02, EU:C:2005:142, point 11). See also Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Finland* (C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06, EU:C:2009:67, point 72 footnote 39), noting that customs duties are 'grouped under the illustrative name "traditional" or "natural" own resources, since they are levied exclusively as a result of EU policies and not the wishes of Member States.'

11 Over the years, the Council has adopted decisions establishing the system of own resources, which, on the basis of what is now Article 311, third paragraph, TFEU, are to be approved by the Member States in accordance with their respective constitutional requirements. Those decisions are implemented by regulations, which the Council adopts with the consent of the European Parliament on the basis of Article 311, fourth paragraph, TFEU or after consulting the Parliament and the European Court of Auditors on the basis of Article 322(2) TFEU.

12 In the judgments of 9 July 2020, *Czech Republic* v *Commission* (C-575/18 P, EU:C:2020:530, paragraph 62), and of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 345), the Court underlined that the management of the system of EU own resources is entrusted to the Member States and that the obligations to collect, establish and make available own resources are imposed directly on them under EU legislation on own resources.

13 Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42).

14 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).

15 Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing [Decision 2007/436] on the system of the Communities' own resources (OJ 2000 L 130, p. 1), as amended at the relevant time by Council Regulation (EC, Euratom) No 2028/2004 of 16 November 2004 (OJ 2004 L 352, p. 1), and by Council Regulation (EC, Euratom) No 105/2009 of 26 January 2009 (OJ 2009 L 36, p. 1). Regulation 1150/2000 was later repealed by 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 last amended by Council Regulation (EU, Euratom) 2022/615 of 5 April 2022 in order to enhance predictability for Member States and to clarify procedures for dispute resolution when making available the traditional, VAT and GNI-based own resources (OJ 2022 L 115, p. 51).

in the accounts in accordance with Article 6 thereof. Third, under Articles 9 and 10 thereof, the Member State must *make the established amount available to the Commission* by crediting the Commission's account with the amount corresponding to those entitlements.

16. With regard to establishment of entitlements, Article 2(1) of Regulation 1150/2000 makes a link with the EU customs legislation. It provides that the European Union's entitlement to TOR must 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.' [16] According to Article 2(2) of that regulation, the date of establishment is 'the date of entry in the accounting ledgers provided for by the customs regulations.'

17. With regard to entry of entitlements in the accounts, Article 6(1) of Regulation 1150/2000 obliges the Member States to keep specific accounts for own resources. [17] According to Article 6(3) thereof, within the specified time limit, [18] Member States must enter TOR in one of two accounts. In a regular situation, namely when they have collected amounts due or have received a guarantee from the debtor, they enter the entitlement in the normal account, referred to as the 'A account'. However, if the amounts have not been recovered from the debtor or guaranteed, or if the guaranteed amounts have been challenged and might be subject to change, Member States enter EU entitlements in a separate account, referred to as the 'B account'.

18. With regard to putting own resources at the disposal of the Commission, Article 9(1) of Regulation 1150/2000 provides that Member States must credit own resources to the account opened in the Commission's name in accordance with the procedure set out in Article 10. Under Article 10(1) of that regulation, after deduction of collection costs, entry of own resources from the A account to the Commission's account must be made within a time limit based on when the entitlements were established, whereas for own resources from the B account, the entry must be made within a time limit based on when the entitlements were recovered. According to Article 11 thereof, any delay in making available own resources to the Commission gives rise to the payment of interest.

19. Article 17(1) of Regulation 1150/2000 requires Member States to 'take all requisite measures to ensure that the amount corresponding to the entitlements established under Article 2 are made available to the Commission as specified in this Regulation.'

20. However, for entitlements entered in the B account, Article 17(2) of Regulation 1150/2000, in the version applicable at the relevant time, provides that Member States are 'released from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements which prove irrecoverable either: (a) for reasons of force majeure; or (b) for other reasons which cannot be attributed to them.'

[16] Article 217(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code'), in the version applicable at the relevant time, provided: 'Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", 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).' That regulation was later repealed by 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), which contains similar provisions in that respect (see Articles 101(1) and 104(1) thereof).

[17] Recital 11 of Regulation 1150/2000 provides: 'Separate accounts should be kept for entitlements which have not been recovered. These accounts and the submission of a quarterly statement of such accounts should enable the Commission to monitor more closely the action taken by the Member States to collect own resources and particularly those compromised by fraud or irregularities.'

[18] 'at the latest on the first working day after the 19th day of the second month following the month during which the entitlement was established.'

21. According to Article 17(2) of Regulation 1150/2000, amounts of established entitlements are 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 a final decision has been given, notified or published in the case of an appeal. Such irrecoverable amounts are definitively removed from the B account. [19]

22. In accordance with the procedure set out in Article 17(3) and (4) of Regulation 1150/2000, Member States are required to report to the Commission in cases where the irrecoverable amounts exceed EUR 50 000 (often referred to as write-off reports). The Commission is then to provide its comments, with a view to assessing the Member State's justification for its release under Article 17(2), as occurred in this case.

B. Events leading to the proceedings before the General Court

23. This case arose out of a dispute between the Czech Republic and the Commission as to whether that Member State belatedly established certain amounts corresponding to EU own resources because it waited on information from OLAF. Below is the sequence of events that led to the present case.

24. In 2001, the European Union imposed anti-dumping duties on pocket lighters from China. [20] As a result, efforts to circumvent those duties ensued, and attempts were made to import the lighters into the European Union with falsely declared origins from a number of countries in Southeast Asia, including Laos, in breach of EU law.

25. Baide Lighter Industry (LAO) Co., Ltd. is a company in Laos which imported pocket lighters into the European Union through its European company, Baide International (Europe) s.r.o., in Prague (Czech Republic). I will collectively refer to those companies as 'Baide'.

26. On 22 March 2006, the Czech authorities established a risk profile ('the risk profile'), which indicated that there was a reasonable suspicion of circumvention of customs legislation with regard to imports of lighters and imposed internal controls.

27. On 13 April 2006, the Czech authorities sent a letter to OLAF, providing information about cases of imports of lighters and indicating suspicions of fraud committed by companies including Baide.

28. On 28 August 2006, the Czech authorities opened an investigation concerning Baide.

29. On 2 November 2006, the Czech authorities updated the risk profile.

30. On 20 December 2006, OLAF opened an investigation into imports of lighters from Laos for the period 2004 to 2006.

31. On 30 April 2007, OLAF adopted a mutual assistance communication, which was sent to the Member States to alert them of the suspected fraud and request further information.

[19] See Article 17(2), fifth subparagraph, of Regulation 1150/2000.

[20] These were gas-fuelled, non-refillable and refillable pocket flint lighters. See Council Regulation (EC) No 1824/2001 of 12 September 2001 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in the People's Republic of China and consigned from or originating in Taiwan (OJ 2001 L 248, p. 1).

32. From 2 to 26 November 2007, an EU mission went to Laos and Thailand to investigate the alleged circumvention of anti-dumping duties on lighters imported from Laos into the European Union for the period 2004 to 2007 ('the mission'). The EU mission team consisted of officials from OLAF and the customs authorities of the Czech Republic, Germany and the United Kingdom, the three Member States considered to be mainly concerned by this traffic.

33. During the mission, on 15 November 2007, the members of the EU mission team and the Lao authorities drew up and signed the Agreed Joint Minutes ('the joint minutes').[21] Those minutes described the background and findings of the mission, and included a set of annexed documents.

34. In particular, the joint minutes referred to the preliminary investigation carried out by the Lao authorities prior to the mission, which concluded that 96 out of the 110 consignments included on the list of EU imports were re-exports of imported Chinese lighters, while the remaining 14 consignments consisted of lighters originating in Laos. Those minutes also mentioned further information and documentation obtained from the Lao authorities and from the visit to Baide's premises in Laos. They further indicated that it had been agreed that the Lao authorities would carry out a further investigation concerning some additional consignments identified during the course of the mission, and that the EU mission team would submit a new request to certain authorities in Laos to search for customs declarations relating to all the consignments concerned.

35. Following the return of the mission, OLAF had agreed to communicate the evidence collected during the mission to the Czech Republic at the beginning of 2008. However, OLAF was delayed in communicating its report to which the evidence was attached.

36. On 6 May 2008, Baide ceased its activity in the Czech Republic.

37. On 30 May 2008, OLAF adopted a report on the mission ('the OLAF mission report'). That report contained a summary of the mission, the results and OLAF's recommendations, and was accompanied by evidence collected during the mission.

38. In particular, the OLAF mission report summarised the information received during the mission, and indicated that the information available in Laos together with that provided by the Member States allowed OLAF to prepare a complete audit trail for 67 consignments imported into the European Union. That report concluded that Baide imported lighters from China into Laos and re-exported them via Thailand into the European Union, thereby evading anti-dumping duties.

39. OLAF's recommendations in that report stated in relevant part: 'It is considered that the evidence of Chinese origin established in the course of the mission is sufficient for Member States to take administrative duty recovery proceedings.'

40. On 9 July 2008, the OLAF mission report was notified to the Czech Republic.

41. On 4 August 2008, the Czech Republic received a Czech language version of the OLAF mission report in response to its request.

[21] Agreed Joint Minutes, Vientiane, 15 November 2007, 'Community Mission of administrative co-operation for the Verification of origin of flint operated lighters exported from Lao P.D.R. to the European Community', Lao P.D.R., 6 to 16 November 2007.

42. On 11 August 2008, there was a meeting of the Czech authorities on the action to be taken. On the same day, the Czech authorities carried out an inspection of Baide's premises in Prague, and discovered that that company had deregistered and moved out as of 6 May 2008.

43. Starting in September 2008, the Czech authorities took measures to adjust and recover, with little success, the duties in 28 cases of lighters imported by Baide into the Czech Republic and released for free circulation between 26 September 2005 and 1 March 2007.

44. Between 22 September 2008 and 18 February 2009, the Czech Republic established the duties due by Baide and entered the amounts corresponding to the entitlements established but not yet recovered with respect to those cases in the B account pursuant to Article 6(3)(b) of Regulation 1150/2000.

45. On 10 December 2008, OLAF adopted a final case report on the investigation into imports of lighters from Laos for the period 2004 to 2006 ('the OLAF final report'). It summarised the background and results of the mission, and set forth OLAF's legal evaluation and conclusions.

46. Between November 2013 and November 2014, the Czech Republic submitted reports to the Commission for the 28 cases in which that Member State considered that it should be released from the obligation to make those amounts available to the Commission pursuant to Article 17(2) of Regulation 1150/2000 because recovery was impossible.

47. After a few exchanges of information, on 20 January 2015, the Commission sent a letter to the Czech Republic, setting out its position that the conditions laid down in Article 17(2) of Regulation 1150/2000 were not satisfied for the 28 cases. The Commission requested that Member State to credit its account in the amount of 53 976 340 Czech koruny (CZK) (approximately EUR 2 112 708).

48. On 17 March 2015, the Czech Republic, after having expressed reservations, paid 75% of that amount (CZK 40 482 255, or approximately EUR 1 584 531) to the Commission's account, following deduction of 25% collection costs. [22]

C. Proceedings before the General Court and the judgment under appeal

49. On 16 March 2020, the Czech Republic brought an action based on the unjust enrichment of the European Union before the General Court, seeking repayment of that amount.

50. The Kingdom of Belgium and the Republic of Poland intervened in support of the form of order sought by the Czech Republic.

51. By the judgment under appeal, the General Court upheld the Czech Republic's action as regards part of that amount.

52. First, the General Court held that the Czech Republic could invoke Article 17(2) of Regulation 1150/2000 in order to be released from its obligation to make available the amounts in question to the Commission, irrespective of whether that Member State had failed to make a timely entry in

[22] Thereafter, on 22 December 2016, the Czech Republic paid an additional 5% of that amount to the Commission, which corresponded to the reduction of the rate of collection costs from 25% to 20%, following retroactive amendment of the relevant EU legislation. The Czech Republic later withdrew its claim for repayment of that additional amount, and thus it is not at issue in these proceedings. See paragraphs 15 and 29 of the judgment under appeal.

the B account in accordance with the periods laid down in Article 6(3)(b) thereof. The General Court also considered that the Czech Republic had made such a timely entry, since those periods were to be calculated from the date on which the entitlements were actually established, and not from the date on which they should have been established (paragraphs 85 to 93 of the judgment under appeal).

53. Second, the General Court found that the Czech Republic could establish the customs duties due by Baide only following receipt of the OLAF mission report, and that that Member State was not required to do so upon return of the mission. The General Court reasoned that the Czech Republic was entitled to wait for that report, and not to ask for the evidence collected during the mission prior to that, since OLAF had agreed to communicate that evidence at the beginning of 2008, but was delayed in doing so, and OLAF was best placed to analyse and verify such evidence (paragraphs 94 to 126 of the judgment under appeal).

54. Third, the General Court ruled that Baide's cessation of activity in the Czech Republic constituted a reason not attributable to that Member State under Article 17(2) of Regulation 1150/2000, which released it from the obligation to make available the disputed amounts, since it was no longer possible for any assets to be seized in its territory (paragraphs 127 to 137 of the judgment under appeal).

55. Fourth, the General Court considered, however, that the Czech Republic was required by EU law to lodge a security for the anti-dumping duties due by Baide as of the adoption of the risk profile on 22 March 2006. On that basis, the General Court concluded that there had been unjustified enrichment of the European Union as regards 12 out of the 28 cases of imports made before that date, but not for the 16 cases made thereafter (paragraphs 145 to 196 of the judgment under appeal).

D. Procedure before the Court of Justice

56. By its appeal lodged on 22 July 2022, the Commission requests that the Court set aside the first point of the operative part of the judgment under appeal, dismiss the case and order the Czech Republic to pay the costs, or, in the alternative, refer the case back to the General Court for a ruling on the pleas that have not yet been examined, the costs being reserved.

57. In its response lodged on 8 November 2022, the Czech Republic requests that the Court reject the appeal as inadmissible, or, in the alternative, as unfounded, and order the Commission to pay the costs.

58. The Commission and the Czech Republic also lodged a reply and rejoinder on 13 March 2023 and 21 April 2023, respectively.

59. The Kingdom of Belgium and the Republic of Poland request the Court to reject the appeal and order the Commission to pay the costs.

60. By decision of 13 February 2023, the President of the Court of Justice granted the Kingdom of the Netherlands leave to intervene in support of the Czech Republic.

61. A hearing was held on 10 January 2024 at which the Commission, the Czech Republic and the Belgian, Netherlands and Polish Governments presented oral argument.

III. Analysis

62. The action for unjust enrichment of the European Union was developed by the Court under the rubric of EU non-contractual liability. [23]

63. To succeed with such an action, the Czech Republic, as the applicant, must adduce proof of enrichment on the part of the European Union for which there is no valid legal basis and proof of impoverishment on its part which is linked to that enrichment. [24]

64. There is no dispute in these proceedings about the European Union being enriched by the correlative impoverishment of the Czech Republic, as that Member State paid the disputed amount of EU own resources, even if it disagreed with the Commission about its obligation to do so. Rather, the crux of the dispute in the present case is whether there existed a valid legal basis for such payment.

65. If the Czech Republic can successfully invoke Article 17(2) of Regulation 1150/2000, there would not be a valid legal basis requiring the payment. The European Union would then be unjustly enriched and would have to return the amount in question.

66. The General Court found that the Czech Republic could rely on Article 17(2) of Regulation 1150/2000 to claim repayment of part of the amount credited to the EU budget.

67. On appeal, the Commission claims that the Czech Republic established and entered the amounts belatedly, so it could not invoke Article 17(2) of Regulation 1150/2000. Therefore, that Member State was not released from its obligation to make available all of the disputed amounts to the Commission, and no amounts should be paid back.

68. The Commission raises two grounds of appeal. The first ground is based on the General Court's misinterpretation of Article 6(3) and Article 17(2) of Regulation 1150/2000. The second ground is based on that Court's misinterpretation of Article 2(1) and Article 17(1) of Regulation 1150/2000, in conjunction with Article 217(1) of the Customs Code and Article 325 TFEU.

69. In essence, the first ground challenges the General Court's finding that a Member State can rely on Article 17(2) of Regulation 1150/2000 even if the entry it made in the B account under Article 6(3)(b) thereof was late. The second ground challenges that Court's finding that the Czech Republic had made a timely entry because it was justified in waiting for the OLAF mission report.

70. The Czech Republic, supported by the Belgian, Netherlands and Polish Governments, argues that the appeal brought by the Commission should be rejected as inadmissible and, in any event, unfounded.

[23] For the first time, in the judgment of 16 December 2008, *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726, paragraphs 44 to 50), the Court recognised that an action for unjust enrichment of the European Union is available in order to ensure effective judicial protection. In the judgment of 9 July 2020, *Czech Republic* v *Commission* (C-575/18 P, EU:C:2020:530, in particular paragraphs 81 to 84), the Court considered that such an action could be used in a situation such as the one in the present case. See Bačić Selanec, N., 'A (more) complete system of remedies: Effective judicial protection of EU Member States in *Czech Republic* v. *Commission*', *Common Market Law Review*, Vol. 49, No 1, 2022, p. 171. See also, more generally, Nowak, J., 'On the incompleteness of the system of remedies established by the EU Treaties and how to proceed', *EU Law Live Weekend Edition*, No 21, 2020.

[24] Judgment of 9 July 2020, *Czech Republic* v *Commission* (C-575/18 P, EU:C:2020:530, paragraphs 82 and 83).

71. I will first explain why I consider that the arguments put forward by the Czech Republic concerning the admissibility of the appeal must be dismissed (A). I will then demonstrate why I consider that the first (B) and the second (C) grounds of appeal are well founded.

A. Admissibility

72. The Czech Republic claims that both grounds of appeal are inadmissible, since they do not comply with the procedural requirements as interpreted in the Court's case-law relating to the clarity and precision of the appeal and the paragraphs of the judgment under appeal which are challenged.[25] That Member State also argues that some of the Commission's arguments are new and have not been examined in the context of the proceedings before the General Court.[26] In particular, as the Czech Republic emphasised at the hearing, the Commission changed its position and advanced new arguments based on the joint minutes, which it did not put forward before the General Court.

73. In my view, the Czech Republic's arguments should be rejected.

74. First, contrary to that Member State's submissions, both grounds of the appeal indicate precisely the contested paragraphs of the judgment under appeal and set out the reasons why those paragraphs are, according to the Commission, vitiated by an error of law, enabling the Court to exercise its power of review of their lawfulness.

75. Second, contrary to the Czech Republic's arguments, the Commission has not raised new pleas in law in the appeal. In that respect, it is apparent from paragraphs 94, 95 and 104 of the judgment under appeal, as well as from the written submissions of the Commission and the Czech Republic in the proceedings before the General Court,[27] that the Commission relied on the joint minutes to claim before the General Court that the Czech Republic had sufficient information to establish the customs debt upon return from the mission at the latest. In so far as by its arguments on appeal the Commission seeks to demonstrate that the General Court was wrong to find that the Czech Republic could wait to establish the amounts until the delivery of the OLAF mission report, they are an amplification of a plea in law raised before the General Court, and not a new plea raised for the first time in the appeal.

76. Therefore, I consider that the appeal is admissible.

B. The first ground of appeal

77. By the first ground of appeal, the Commission complains that, in paragraphs 85 to 93 of the judgment under appeal, the General Court misinterpreted Article 6(3) and Article 17(2) of Regulation 1150/2000.

[25] See, in that respect, for example, judgments of 20 September 2016, *Ledra Advertising and Others* v *Commission and ECB* (C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 35), and of 8 November 2022, *Fiat Chrysler Finance Europe* v *Commission* (C-885/19 P and C-898/19 P, EU:C:2022:859, paragraph 52).

[26] For case-law confirming that the Court cannot examine new pleas at the appeal stage, see, for example, judgments of 30 January 2019, *Belgium* v *Commission* (C-587/17 P, EU:C:2019:75, paragraphs 39 and 40), and of 9 December 2020, *Groupe Canal +* v *Commission* (C-132/19 P, EU:C:2020:1007, paragraph 28).

[27] I refer, in that regard, to the Commission's defence (points 70 to 72), the Czech Republic's reply (points 50 and 52), the Commission's rejoinder (points 36, 37, 40 and 44), the Commission's observations on Belgium's statement of intervention, (point 19), the Commission's observations on Poland's statement of intervention (points 7, 10 and 16) and the Czech Republic's observations on Belgium's statement of intervention (point 18).

78. The core of the Commission's argument is that the General Court wrongly considered that a Member State could invoke Article 17(2) of Regulation 1150/2000 even if it entered the entitlements in the B account under Article 6(3) thereof belatedly.

79. The Czech Republic, supported by the Belgian, Netherlands and Polish Governments, submits that the Commission's interpretation of the relationship between Article 6(3)(b) and Article 17(2) of Regulation 1150/2000 is not supported by the wording and objectives of those provisions. In the view of those Member States, a late entry in the B account cannot automatically have the effect of excluding a Member State from relying on Article 17(2). That would run counter to the intention of the EU legislature underlying that provision.

80. To my mind, the interpretation of the relationship between Article 6(3)(b) and Article 17(2) of Regulation 1150/2000 depends on the determination of when the entry of an entitlement is considered to be late. If the entry is late where a Member State did not make it sooner due to its own failure, there is no reason to allow that Member State to invoke Article 17(2) of Regulation 1150/2000. Under that latter provision, a Member State can be released from the obligation to credit the EU budget only if the collection of the debt proves irrecoverable for reasons not attributable to that Member State. [28]

81. I will first analyse the question as to when a Member State should be considered to be late in entering an entitlement and therefore to be in breach of Article 6(3) of Regulation 1150/2000. I will then turn to the relationship between Article 6(3) and Article 17(2) of that regulation, and examine whether a late entry precludes a Member State from relying on Article 17(2) to be released from its obligations.

1. When is a Member State late with the entry of entitlements?

82. According to the Commission, the entry is late if it was made after the deadline calculated from the moment when the Member State *should have established* the entitlement. In contrast, according to the Czech Republic and the intervening Member States, the deadline for entering the entitlement can only start running from the moment when the Member State *actually established* the entitlement.

83. To begin with, it is evident from the text of Regulation 1150/2000 and the Court's case-law that the establishment and the entry of entitlements are closely connected. [29]

84. It follows from the wording of Article 6(3)(a) of Regulation 1150/2000 that the entitlements should be entered in the appropriate account at the latest on the first working day after the 19th day of the second month following the *month in which the entitlement was established*. The deadline for entering the entitlement thus starts running from the moment when the entitlement is established.

[28] Such a position is supported by the case-law according to which a Member State which fails to establish the European Union's own resources and to make the corresponding amounts available to the Commission, without any of the conditions laid down in Article 17(2) of Regulation 1150/2000 being met, falls short of its obligations under EU law. See, for example, judgments of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraph 68), and of 9 July 2020, *Czech Republic* v *Commission* (C-575/18 P, EU:C:2020:530, paragraph 67).

[29] According to the case-law, there is an 'inseparable link' between the obligation to establish EU own resources, the obligation to credit them to the Commission's account within the prescribed time limit and the obligation to pay interest in the event of delay. See, for example, judgments of 21 September 1989, *Commission* v *Greece* (68/88, EU:C:1989:339, paragraph 17), and of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 399).

85. If, during that period, the Member State collects the duties or gets a guarantee for them, such entitlements are entered in the A account. If, on the contrary, the Member State does not succeed in collecting the debt or if the debt is disputed, such entitlements are entered in the B account. From the moment of entering the entitlement in the B account, the Member State is, pursuant to Article 17(1) of Regulation 1150/2000, under the obligation to take all requisite measures to try to collect the debt and make the respective amount available to the Commission.

86. *The deadline for entering* the entitlements in either the A or the B account is the same and it starts running *from* the month *when the entitlement was established*. That deadline therefore depends on Article 2 of Regulation 1150/2000, which lays down when the entitlements should be established.

87. To recall, Article 2(1) of Regulation 1150/2000 provides that entitlements to own resources must be established 'as soon as the conditions provided for by the customs regulations have been met concerning the entry of the entitlements in the accounts and the notification of the debtor.' In turn, Article 217(1) of the Customs Code, in the version applicable at the relevant time, provides that customs duties must be 'calculated by the customs authorities *as soon as they have the necessary particulars*'.[30]

88. According to the case-law, the entitlement is therefore established as soon as the Member State's customs authorities *are in the position*, first, *to calculate the amount* of duties arising from a customs debt and, second, *to determine the debtor*.[31]

89. It follows from the foregoing that a Member State is late with the entry into the relevant account (A or B), and thus is in breach of Article 6(3) of Regulation 1150/2000, if it was late in establishing the entitlement. The Member State is, in turn, late in establishing the entitlement if it had sufficient information (to calculate the amount and to identify the debtor), but did not establish the entitlement.

90. Consequently, the wording and the structure of Regulation 1150/2000 suggest that the correct interpretation is the one proposed by the Commission, namely that a Member State is late with the entry of entitlements if it missed the deadline calculated from the moment when it should have established those entitlements, and not from the moment when it actually established them.

91. The Polish Government argues that such an approach allows for arbitrary decisions. According to that Member State, a hypothetical date on which the national authorities should have established the customs debt would be impossible to meet in practice.

92. I do not agree with the Polish Government that the decision when the Member State should have established the entitlement is arbitrary. It is based on the finding whether sufficient information (on the amount and the debtor) was available to the Member State authorities at the moment at which it is claimed that the Member State should have established the entitlement. If the Member State did not have, nor could it have had, sufficient information, then there is no obligation for it to establish the entitlement, since the obligation only arises once the Member State has sufficient information.

[30] Emphasis added. See point 16 of this Opinion and accompanying footnote.

[31] See, for example, judgments of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraphs 58 to 61 and 68), and of 1 July 2010, *Commission* v *Germany* (C-442/08, EU:C:2010:390, paragraph 76).

93. However, if it can be demonstrated that a Member State had, or could have had if it acted proactively, all of the necessary information, but did not act, there is a delay in the establishment, and therefore also in the entry, of the entitlement. If the Member State remained passive in acquiring the necessary information, it cannot claim that it could not establish the entitlement earlier.

94. Such an interpretation is in conformity with the necessity to interpret strictly the obligations of Member States relating to the establishment and entry of EU entitlements to own resources due to the vulnerability of the EU system of own resources, which depends entirely on Member States' proactive cooperation. [32]

95. The interpretation that the deadline for a Member State to enter entitlements to own resources is to be calculated from the moment when the entitlements should have been established, and not from the moment when they were actually established, is also supported by case-law starting early on. [33] In that respect, the Court has held that, even if an error committed by the customs authorities of a Member State results in the debtor not having to pay the customs duties in question, that does not affect that Member State's obligation to pay duties that *should have been established* in the context of making available own resources. [34] Additionally, the Court recently found in *Commission* v *United Kingdom* [35] that the United Kingdom did not enter in the accounts the full customs duties due, nor, consequently, did it establish or make available to the Commission all of the own resources relating to those imports at the time when they *ought to have been established* and made available. [36]

96. Therefore, as to the question of when a Member State is late with the entry of entitlements, I propose that the Court accept the interpretation put forward by the Commission that the deadline to enter the entitlement starts running from the moment when the Member State should have established the entitlement, and not from the moment when it actually established it.

2. Can a Member State rely on Article 17(2) of Regulation 1150/2000 if it entered the entitlement belatedly?

97. To substantiate its argument that a Member State cannot rely on Article 17(2) of Regulation 1150/2000 if it was late in establishing and entering the entitlement, the Commission relies on the judgment in *Commission* v *Italy*. [37] The Commission considers that it follows from that judgment

[32] See, in that respect, Opinion of Advocate General Geelhoed in *Commission* v *Denmark* (C-392/02, EU:C:2005:142, point 58). See also Opinion of Advocate General Darmon in *Commission* v *Italy* (54/87, not published, EU:C:1988:537, point 4), and Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Finland* (C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06, EU:C:2009:67, point 94).

[33] See, for example, judgment of 10 January 1980, *Commission* v *Italy* (267/78, EU:C:1980:6, paragraph 15). For an overview of the case-law on that issue, see Opinion of Advocate General Geelhoed in *Commission* v *Denmark* (C-392/02, EU:C:2005:142, in particular points 53 to 59).

[34] See, for example, judgments of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraph 63); of 19 March 2009, *Commission* v *Italy* (C-275/07, EU:C:2009:169, paragraph 100); of 17 March 2011, *Commission* v *Portugal* (C-23/10, not published, EU:C:2011:160, paragraph 60); and of 3 April 2014, *Commission* v *United Kingdom* (C-60/13, not published, EU:C:2014:219, paragraph 45).

[35] See judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 347).

[36] Advocate General Geelhoed also noted in his Opinion in *Commission* v *Denmark* (C-392/02, EU:C:2005:142, point 56) that determining the date from when the entitlements were actually established instead of when they should have been established would be inconsistent with the system of EU own resources.

[37] Judgment of 8 July 2010 (C-334/08, EU:C:2010:414; '*Commission* v *Italy*').

that Article 17(2) is applicable only if the entire customs procedure has been carried out in compliance with EU law, and thus the deadlines for establishing customs duties and entering them in the B account are respected.

98. The Czech Republic, supported by the Belgian, Netherlands and Polish Governments, argues that *Commission* v *Italy* is not applicable to the present case, as it arose from different circumstances.

99. I am inclined to agree with those Member States that the conclusion advocated by the Commission does not follow directly from *Commission* v *Italy*.

100. That judgment arose from a situation in which the Italian customs authorities had granted authorisations in breach of EU customs rules, resulting in misappropriated own resources of over EUR 22 million. Italy entered that amount in the B account under Article 6(3)(b) of Regulation 1150/2000 and then sought to rely on Article 17(2) thereof, on the grounds that the breach was not attributable to it. [38]

101. The Court ruled that Italy had failed to fulfil its obligations by not making available the disputed amounts to the Commission. In particular, in paragraph 65 of *Commission* v *Italy*, the Court held that for a Member State to be released from its obligation to make available established entitlements, not only must the conditions laid down in Article 17(2) of Regulation 1150/2000 be met, but also those entitlements must have been properly entered in the B account. As the Court explained in paragraph 68 of that judgment, entry in the B account reflects an exceptional situation. Consequently, the Court considered, in paragraph 69 of that judgment, that 'in order to be eligible for such exceptional treatment, the entry of entitlements in the B account must have been carried out by the Member States *in compliance with European Union law*.' [39]

102. On that basis, the Court found that, had the conduct of the national authorities complied with EU law, the entitlements would have been established and entered in the A account. Thus, Italy could not claim that the conditions governing entry in the B account were satisfied because by not establishing the entitlements, Italy had itself brought about the conditions for application of Article 6(3)(b) of Regulation 1150/2000. Since the Italian authorities unlawfully entered the own resources in the B account, the provisions of Article 17(2) of Regulation 1150/2000 did not apply to it. [40]

103. Therefore, to my mind, *Commission* v *Italy* dealt with a situation where Article 17(2) of Regulation 1150/2000 was held not to apply because the entitlements were incorrectly entered in the B account when they should have been included in the A account, and not because the entitlements were entered late in the B account. [41]

[38] See *Commission* v *Italy*, paragraphs 13 to 19.

[39] Emphasis added.

[40] See *Commission* v *Italy*, paragraphs 70 to 73. See also Opinion of Advocate General Kokott in *Commission* v *Italy* (C-334/08, EU:C:2010:187, points 68 to 78, in particular point 76) ('Entry in the B account is out of the question where it is the Member State itself that has created the conditions for entry in the B account. This reflects the legal concept that a person may not benefit from his own wrongdoing.').

[41] See also, in that regard, judgment of 3 April 2014, *Commission* v *United Kingdom* (C-60/13, not published, EU:C:2014:219, in particular paragraphs 51 to 54), in which the Court referred to paragraphs 61 and 65 of the *Commission* v *Italy* judgment in finding that the United Kingdom could not rely on the exemption under Article 17(2) of Regulation 1150/2000 in a situation where it had not entered the entitlements in the B account at all.

104. In the present case, it is not certain that, had the Czech Republic established the entitlements earlier, it would have been able to enter them in the A account. It is quite likely that it would still have had to enter the entitlements in the B account. However, what makes its entry in the B account belated is that that Member State remained passive at the time when it was possible to acquire the necessary information for establishing the entitlements.

105. In *Commission* v *Italy*, the Court did not specifically consider whether 'in compliance with EU law' in paragraph 69 of that judgment addressed the situation in which the entitlement is correctly entered in the B account, but the entry itself could have happened sooner. That judgment does not, therefore, lead on its own to the conclusion that a belated entry automatically precludes a Member State from relying on Article 17(2) of Regulation 1150/2000.

106. Nevertheless, the sense of *Commission* v *Italy* suggests that a correct interpretation of the relationship between Article 6(3) and Article 17(2) of Regulation 1150/2000 is that a Member State cannot rely on Article 17(2) if it was late in establishing and entering the entitlement.

107. The Czech Republic claims that such an interpretation of Article 17(2) of Regulation 1150/2000 would run counter to the intention of the EU legislature to release a Member State where it was not the cause of the impossibility of recovering the duties and was not able to prevent it.

108. In my understanding, the intention behind Article 17(2) of Regulation 1150/2000 is grounded in the fact that customs duties are a direct source of the EU budget, payable by importers, and not by Member States. The latter are only the intermediary in collecting that revenue. Therefore, if the impossibility to collect the debt is imputable to the importer, and not to the Member State of import, the EU budget would have to accept the loss.

109. On the contrary, Article 17(2) does not relate to a situation where impossibility to collect the debt *is* imputable to the Member State, including because of its lack of proactive engagement to establish and collect the debt on time.

110. As already explained, late establishment and entry in the accounts is imputable to the Member State. Late establishment precisely means that a Member State did not establish the entitlement even if it could have. The Member State cannot claim that it could not establish the entitlement earlier if it remained passive in acquiring the necessary information.

111. Therefore, an interpretation according to which a Member State cannot rely on Article 17(2) of Regulation 1150/2000 if it established and entered the entitlement belatedly does not run counter to the intention of the EU legislature, as understood by the Czech Republic.

112. As the Court has held, the release of obligations as provided for in Article 17(2) of Regulation 1150/2000 is by its very nature exceptional, and a Member State can only rely on it for a reason which could not be attributed to it.[42] Such a strict interpretation of Article 17(2) of Regulation 1150/2000 is justified by the necessity to incentivise Member States to proactively establish and collect EU own resources, given that that revenue is entirely dependent on the cooperative conduct of Member States (see also point 94 of this Opinion).

[42] See judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 381).

113. The Commission additionally contends that if a Member State is entitled to rely on Article 17(2) of Regulation 1150/2000 even if the failure to establish the entitlement is attributable to it, that would have damaging consequences for the European Union's financial interests.

114. The Czech Republic and the intervening Member States submit that no such damaging consequences are liable to occur; if non-recovery of the customs debt resulted from a late establishment of the customs duties attributable to the national authorities, then the conditions of Article 17(2) of Regulation 1150/2000 would not be fulfilled. Thus, the EU budget would not suffer a loss.

115. That argument advanced by those Member States leads to the conclusion that whether a Member State may, or may not, invoke Article 17(2) of Regulation 1150/2000 if it was late with the establishment and entry of entitlements makes no difference, since in such a situation the Member State could not be released from its obligation to put the relevant amount at the disposal of the Commission. It, therefore, begs the question as to why would a Member State, which established the entitlement later than it should have, be allowed to invoke Article 17(2) at all, if it is already known in advance that the conditions imposed by that provision are not fulfilled.

116. To my mind, if an interpretation according to which a Member State could invoke Article 17(2) even if it was late would be accepted, that could damage the efficiency of the system of EU own resources, as it would allow exceptions to the obligation of Member States to establish and enter the entitlements on time.

117. As an additional argument against the interpretation proposed by the Commission, the Belgian and Netherlands Governments emphasise that subsequent changes to the EU legislation by virtue of Article 13(2) of Regulation 609/2014, which is the successor to Article 17(2) of Regulation 1150/2000,[43] lend support to the position that a late entry cannot automatically preclude a Member State from relying on this release.

118. That argument does not convince me either.

119. Article 13(2) of Regulation 609/2014 introduced an additional situation in which a Member State may be released from its obligations towards own resources. It provides in relevant part:

'Member States shall be likewise released from the obligation to place at the disposal of the Commission the amounts corresponding to *entitlements established under Article 2* where they prove that an error committed by the Member State *after establishing these entitlements*, such as those leading to a belated entry in the separate accounts, had no influence on the irrecoverability of the amount corresponding to entitlements under Article 2.'[44]

120. As is apparent from its wording, that provision is concerned with administrative errors that were committed *after* the correct establishment of entitlements. Therefore, that provision seems to be concerned with a different situation than that presented in this case, in which timely establishment is at issue.

[43] See footnote 15 to this Opinion.

[44] Emphasis added.

121. Consequently, that argument does not invalidate the conclusion that a Member State that was late in establishing and entering entitlements cannot rely on Article 17(2) of Regulation 1150/2000.

122. Therefore, on the basis of the foregoing considerations, I consider that the first ground of appeal is well founded.

C. The second ground of appeal

123. By the second ground of appeal, the Commission complains that, in paragraphs 94 to 126 of the judgment under appeal, the General Court misinterpreted Article 2(1) and Article 17(1) of Regulation 1150/2000, in conjunction with Article 217(1) of the Customs Code and Article 325 TFEU, in finding that the Czech Republic was entitled to wait for the OLAF mission report before taking action to establish and enter the entitlements in question.

124. According to the Commission, the evidence annexed to the joint minutes was sufficient to enable the Czech Republic to establish the customs debt upon return from the mission at the latest. Not having requested the evidence from OLAF upon return of the mission, the customs debt was established late and the amounts corresponding to that debt were entered belatedly in the B account.

125. The Czech Republic, supported by the Belgian, Netherlands and Polish Governments, argues that it could legitimately expect OLAF to respect its commitments, in line with the principle of sincere cooperation under Article 4(3) TEU, and cannot be blamed for OLAF's delay. According to that Member State, OLAF was aware that the Czech Republic was waiting for OLAF's assessment and transmission of the evidence collected during the mission. Thus, the Czech Republic cannot be criticised for not having requested that evidence sooner.

126. In my view, the General Court erred in its interpretation of applicable law when it found that the Czech Republic could wait for the OLAF mission report in order to establish the European Union's entitlements to own resources in the circumstances of the present case.

127. As indicated by the Commission, Article 2(1) and Article 17(1) of Regulation 1150/2000, in conjunction with Article 217(1) of the Customs Code, *require Member States* to take all the necessary measures as soon as possible to establish the European Union's entitlements to own resources.

128. Under Article 325(1) TFEU, on which the Commission also relies, *it is for the Member States* to adopt the measures necessary to guarantee the effective and comprehensive collection of the duties and therefore of the corresponding amounts of own resources. [45]

129. It follows from those provisions that the obligation to establish entitlements falls on the Member States.

[45] See, for example, judgments of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraphs 51 and 52), and of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraphs 346 and 359).

130. The Court's case-law confirms such a position. Thus, 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*.' [46]

131. It is true that the principle of sincere cooperation commits the Member States and OLAF to cooperate with each other. [47]

132. However, the fact that, according to the relevant EU legislation, [48] OLAF has to inform Member States (and the European Parliament) and draw up reports, and that such reports constitute admissible evidence in the Member States, does not alter the responsibilities incumbent on the Member States in the system of EU own resources.

133. Thus, OLAF's failure to transmit to the Czech Republic the necessary information as promised cannot excuse that Member State's failure to take a proactive stance and request that information from OLAF.

134. The EU legislation relating to OLAF lends support for this position.

135. Regulation 1073/1999 provides that 'the current distribution and balance of responsibilities as between the national and [EU] levels should be maintained' and that that regulation 'in no way diminishes the powers and responsibilities of the Member States to take measures to combat fraud affecting the [European Union's] financial interests'. [49]

136. Moreover, Article 10(1) of Regulation 1073/1999 states that OLAF 'may *at any time* forward to the competent authorities of the Member States concerned information obtained in the course of external investigations.' [50]

137. Likewise, Article 21(3) of Regulation 515/97 indicates that information obtained in the course of missions are to be forwarded by OLAF to the national authorities 'if they so request'.

138. All of the foregoing militates in favour of an interpretation according to which a Member State cannot be excused for being late because it waited passively for information to be transmitted by OLAF.

[46] Judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 345). Emphasis added.

[47] According to the case-law, Article 17(1) of Regulation 1150/2000 is a specific expression of the principle of sincere cooperation enshrined in Article 4(3) TEU. See judgments of 5 October 2006, *Commission* v *Germany* (C-105/02, EU:C:2006:637, paragraph 87), and of 5 October 2006, *Commission* v *Belgium* (C-377/03, EU:C:2006:638, paragraph 93). The same is true for Article 325(3) TFEU, which calls on Member States to 'coordinate their action aimed at protecting the financial interests of the Union against fraud' and 'organise, together with the Commission, close and regular cooperation between the competent authorities.' See judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 261).

[48] See, in that regard, Articles 20 and 21 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); Article 9 and recitals 13 and 16 of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p.1). That latter regulation was subsequently repealed by Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 2013 L 248, p. 1).

[49] Recitals 3 and 21 of Regulation 1073/1999. Similar language appears in recitals 2 and 49 of Regulation 883/2013, respectively. See also recital 2 of Decision 1999/352, which reiterates that 'the current allocation and balance of responsibilities as between the national and [EU] levels should be maintained'.

[50] Emphasis added. See also recital 15 of Regulation 1073/1999. Similar language appears in Article 12(1) and recital 35 of Regulation 883/2013, respectively.

139. That position is corroborated by case-law. In *Commission* v *United Kingdom*,[51] involving customs fraud on textiles and footwear from China, the Court ruled that the United Kingdom was in breach, inter alia, of its obligations under EU own resources law to make available TOR to the Commission. According to the Court, 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 in order to establish those values correctly, and could not therefore profit from its own inaction to justify its failure to make the own resources available. The information provided by OLAF could at most constitute an additional tool, but did not take the place of the information incumbent on the Member States to obtain.[52]

140. This leads me to the conclusion that, in the particular circumstances of this case, the Czech Republic cannot be excused for being late in establishing and entering entitlements to own resources by waiting for the OLAF mission report before taking the necessary measures to establish the duties owed by Baide.

141. It should be recalled that according to the sequence of events as set out in points 26 to 44 of this Opinion:

– The Czech Republic adopted the risk profile in 2006, so it was aware of the suspected evasion of EU anti-dumping duties.

– The mission in November 2007 confirmed the existence of customs fraud and, as apparent from the joint minutes, during that mission the Czech authorities were made aware of documentation that substantiated that Baide had evaded EU anti-dumping duties for numerous imports of pocket lighters.

– The Czech Republic waited for receipt of the OLAF mission report in July 2008 and the Czech language version in August 2008. As the Czech Republic confirmed at the hearing, it did not communicate with OLAF to try to get the documents sooner. The Czech Republic did nothing, as OLAF promised that the information would be sent.

– The Czech Republic began to take action only in August 2008, that is, about nine months following the mission in November 2007.

– The Czech Republic established and entered the European Union's entitlements to own resources only starting in September 2008, that is, nearly ten months following the mission in November 2007.

142. In those circumstances, I do not find it objectively reasonable for a Member State to wait for at least nine months after having confirmation that fraud was committed.

143. Thus, the Czech Republic was indeed late in establishing and entering the entitlements to EU own resources by the mere fact that it passively waited for the information to be provided by OLAF.

[51] See judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, in particular paragraphs 404 and 533).

[52] See judgment of 8 March 2022, *Commission* v *United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, in particular paragraphs 374, 377, 378 and 392 to 394). See also paragraph 322 of that judgment, in which the Court held that '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.'

144. That does not excuse OLAF for not transmitting the promised information. I can agree with the Belgian Government's arguments that the Commission's services, such as OLAF, should not be allowed to be lax in the exercise of their functions.

145. Nevertheless, the breach by OLAF of its obligations does not relieve a Member State from its own obligation to do everything necessary to establish and enter entitlements to EU own resources on time.

146. Contrary to the submissions of the Czech Republic, the commitments given by OLAF are irrelevant, as they do not take the place of the responsibilities of the Member States to do everything possible.

147. Therefore, on the basis of the foregoing considerations, I consider that the second ground of appeal is well founded.

IV. Consequences

148. The first and second grounds of appeal are, in my view, well founded. As a consequence, point 1 of the operative part of the judgment under appeal should be set aside.

149. In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give the final judgment in the matter, where the state of the proceedings so permits. I consider that that is the case here.

150. It follows from my analysis of the first ground of the appeal that a Member State cannot invoke Article 17(2) of Regulation 1150/2000 if it establishes and enters entitlements belatedly. It also follows from my analysis of the second ground of appeal that, in the particular circumstances of this case, the Czech Republic established and entered the entitlements at issue belatedly. Consequently, the Czech Republic cannot rely on Article 17(2) of Regulation 1150/2000 to be released from its obligation to make available the disputed amounts to the Commission, and was required to credit the Commission's account. Accordingly, there existed a valid legal basis for payment, and there is no unjust enrichment of the European Union in the present case. I, therefore, propose that the Court dismiss the action for unjust enrichment of the European Union lodged by the Czech Republic before the General Court.

V. Costs

151. Under Article 184(2) of the Court's Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

152. Under Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, 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 applied for costs in its pleadings, and the Czech Republic has been unsuccessful, the Czech Republic should be ordered to bear its own costs and to pay those incurred by the Commission at first instance and in the appeal proceedings.

153. Additionally, under Article 140(1) of the Court's Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the Kingdom of Belgium and the Republic of Poland should be ordered to bear their own costs at first instance and in the appeal proceedings, and the Kingdom of the Netherlands to bear its own costs in the appeal proceedings.

VI. Conclusion

154. In the light of the foregoing, I propose that the Court of Justice should:

– find that the first and second grounds of appeal are well founded;

– set aside point 1 of the operative part of the judgment of the General Court of 11 May 2022, *Czech Republic* v *Commission* (T-151/20, EU:T:2022:281);

– dismiss the action for unjust enrichment of the European Union lodged by the Czech Republic before the General Court;

– order the Czech Republic to pay the costs incurred by the European Commission at first instance and in the appeal proceedings;

– order the Kingdom of Belgium and the Republic of Poland to pay their own costs at first instance and in the appeal proceedings, and the Kingdom of the Netherlands to pay its own costs in the appeal proceedings.