ECLI:EU:C:2020:530

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

9 July 2020 (*)

(Appeal — Own resources of the European Union — Financial liability of the Member States — Request to be released from the obligation to make own resources available — Action for annulment — Admissibility — Letter from the European Commission – Concept of 'actionable measure' — Article 47 of the Charter of Fundamental Rights of the European Union — Effective judicial protection — Action alleging unjust enrichment on the part of the European Union)

In Case C-575/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 September 2018,

Czech Republic, represented by O. Serdula, J. Vláčil and M. Smolek, acting as Agents,

appellant,

supported by:

Kingdom of the Netherlands, represented by M.K. Bulterman, C.S. Schillemans, M.L. Noort, M.H.S. Gijzen and J. Langer, acting as Agents,

intervener in the appeal,

the other party to the proceedings being:

European Commission, represented initially by M. Owsiany-Hornung and Z. Malůšková, and subsequently by Z. Malůšková and J.-P. Keppenne, acting as Agents,

defendant at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, A. Prechal, M. Vilaras, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, L. Bay Larsen, K. Jürimäe (Rapporteur), N. Piçarra and A. Kumin, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 11 November 2019,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2020,

gives the following

Judgment

1 By its appeal, the Czech Republic seeks to have set aside the order of the General Court of the European Union of 28 June 2018, *Czech Republic* v *Commission* (T-147/15, not published, EU:T:2018:395, 'the order under appeal'), by which the General Court dismissed its action for annulment of the decision of the Director of the Own Resources and Financial Programming Directorate of the Directorate-General for Budget of the European Commission which, it is claimed, is contained in the letter of 20 January 2015 bearing the reference Ares (2015)217973 ('the letter at issue').

Legal context

Decisions 2000/597/EC, Euratom and 2007/436/EC, Euratom

2 In the period to which the facts giving rise to the dispute relate, two decisions relating to the system of the European Union's own resources were successively applicable: 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), and then, from 1 January 2007, 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).

3 Under Article 2(1)(b) of Decision 2000/597, the content of which was reproduced, in essence, in Article 2(1)(a) of Decision 2007/436, revenue from, inter alia, 'Common Customs Tariff duties and other duties established or to be established by the institutions of the [Union] in respect of trade with non-member countries' is to constitute own resources entered in the general budget of the European Union.

4 The first and third subparagraphs of Article 8(1) of Decisions 2000/597 and 2007/436 provide, in particular, that those own resources of the Union are to be collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action, which are, where appropriate, to be adapted to meet the requirements of EU rules, and that the Member States are to make those resources available to the Commission.

Regulation No 1150/2000

5 Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 2007/436 (OJ 2000 L 130, p. 1) is the product of two amendments introduced, in the period to which the facts giving rise to the dispute relate, respectively, with effect from 28 November 2004, by Council Regulation (EC, Euratom) No 2028/2004 of 16 November 2004 (OJ 2004 L 352, p. 1), and, with effect from 1 January 2007, by Council Regulation (EC, Euratom) No 105/2009 of 26 January 2009 (OJ 2009 L 36, p. 1) ('Regulation No 1150/2000').

6 Under Article 2(1) of Regulation No 1150/2000, the Union's entitlement to own resources is to be established as soon as the conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor.

7 Article 6(1) and (3)(a) and (b) of that regulation provides:

'1. Accounts for own resources shall be kept by the Treasury of each Member State or by the body appointed by each Member State and broken down by type of resources.

…

3.

(a) Entitlements established in accordance with Article 2 shall, subject to point (b) of this paragraph, be entered in the accounts at the latest on the first working day after the 19th day of the second month following the month during which the entitlement was established.

(b) Established entitlements not entered in the accounts referred to in point (a), because they have not yet been recovered and no security has been provided shall be shown in separate accounts within the period laid down in point (a). Member States may adopt this procedure where established entitlements for which security has been provided have been challenged and might, upon settlement of the disputes which have arisen, be subject to change.'

8 The first subparagraph of Article 9(1) of that regulation provides:

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

9 In accordance with Article 10(1) of the regulation:

'After deduction of collection costs in accordance with Article 2(3) and Article 10(3) of Decision [2007/436] entry of the own resources referred to in Article 2(1)(a) of that Decision shall be made at the latest on the first working day following the 19th day of the second month following the month during which the entitlement was established in accordance with Article 2 of this Regulation.

However, for entitlements shown in separate accounts under Article 6(3)(b) of this Regulation, the entry must be made at the latest on the first working day following the 19th day of the second month following the month in which the entitlements were recovered.'

10 Under Article 11(1) of Regulation No 1150/2000, any delay in making the entry in the account referred to in Article 9(1) of that regulation is to give rise to the payment of interest by the Member State concerned.

11 Article 17(1) to (4) of that regulation states:

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

2. Member States shall be 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.

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

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

If part payment or payments have been received, the period of five years at maximum shall start from the date of the last payment made, where this does not clear the debt.

Amounts declared or deemed irrecoverable shall be definitively removed from the separate account referred to in Article 6(3)(b). They shall be shown in an annex to the quarterly statement referred to in Article 6(4)(b) and where applicable, in the quarterly statement referred to in Article 6(5).

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

…

4. The Commission has six months from the receipt of the report provided for in paragraph 3 to forward its comments to the Member State concerned.

…’

Background to the dispute and the letter at issue

12 The background to the dispute is set out in paragraphs 1 to 9 of the order under appeal. For the purposes of the present proceedings, it may be summarised as follows.

13 On 30 May 2008, the European Anti-Fraud Office (OLAF) adopted a final report on an investigation to check imports of pocket flint lighters from Laos in the period from 2004 to 2007.

14 The report stated that ‘the evidence of Chinese origin established in the course of the mission [was] sufficient for Member States to take administrative duty recovery proceedings’. According to

the report, it was necessary ‘that Member States institute follow up audits and investigations if appropriate of the importers concerned and initiate recovery proceedings as a matter of urgency, if this [had] not already been done’.

15 The findings in that report identified 28 cases of imported goods in the Czech Republic. The competent Czech customs offices took steps to carry out tax adjustments and recovery in those cases.

16 However, in none of those cases was it possible to effect recovery within a period of three months from the date of notification of the Czech version of the OLAF report.

17 Between November 2013 and November 2014, in accordance with the applicable legislation, the Czech Republic added the cases in which recovery of the Union’s own resources was impossible to the WOMIS information system (Write-Off Management and Information System).

18 In July and December 2014, the Czech Republic submitted additional information to the Commission at the Commission’s request.

19 In the letter at issue, the Director of the Own Resources and Financial Programming Directorate of the Commission’s Directorate-General for Budget informed the Czech authorities that the requirements for their being released from the obligation to make the Union’s own resources available, laid down in Article 17(2) of Regulation No 1150/2000, had not been met in any of those cases. He requested the Czech authorities to take the measures necessary in order for the Commission’s account to be credited in the amount of 53 976 340 Czech koruny (CZK) (approximately EUR 2 112 708) (‘the amount at issue’), at the latest on the first working day following the 19th day of the second month following the month in which that letter was sent. He added that any delay would give rise to the payment of interest under Article 11 of Regulation No 1150/2000.

Procedure before the General Court and the order under appeal

20 By application lodged at the Registry of the General Court on 30 March 2015, the Czech Republic brought an action for annulment of the decision allegedly contained in the letter at issue.

21 By separate document lodged at the Registry of the General Court on 11 June 2015, the Commission raised a plea of inadmissibility in respect of that action, on the ground that the letter at issue did not constitute a decision against which an action for annulment could be brought. The Czech Republic submitted its observations on that plea.

22 By document lodged at the Registry of the General Court on 20 July 2015, the Slovak Republic sought leave to intervene in support of the form of order sought by the Czech Republic.

23 By decision of 22 December 2015, having received the observations of the Czech Republic and the Commission, the General Court stayed the proceedings before it, pending delivery of the decisions closing the proceedings in the cases that gave rise to the judgments of 25 October 2017, *Slovakia* v *Commission* (C-593/15 P and C-594/15 P, EU:C:2017:800), and *Romania* v *Commission* (C-599/15 P, EU:C:2017:801). The proceedings resumed following delivery of those judgments. The Czech Republic and the Commission were invited to express their views on the inferences to be drawn from them.

24 By the order under appeal, the General Court upheld the plea of inadmissibility put forward by the Commission and accordingly dismissed the action of the Czech Republic as being inadmissible, in so far as it was directed against a measure which could not be the subject of an action for annulment, without ruling on the Slovak Republic's application to intervene.

Procedure before the Court of Justice and forms of order sought by the parties to the appeal

25 The Czech Republic claims that the Court should:

– set aside the order under appeal;

– reject the plea of inadmissibility raised by the Commission;

– refer the case back to the General Court for a decision on whether the action is well founded;

– order the Commission to pay the costs.

26 The Commission contends that the Court should:

– dismiss the appeal, and

– order the Czech Republic to pay the costs.

27 By decision of the President of the Court of 8 January 2019, the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by the Czech Republic.

28 In its statement in intervention, the Kingdom of the Netherlands claims that the Court should:

– grant the appeal, and

– order the Commission to pay the costs.

The appeal

Arguments of the parties

29 In support of its appeal, the Czech Republic puts forward a single ground of appeal, alleging infringement of Article 263 TFEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

30 By that ground of appeal the Czech Republic claims, in essence, that, contrary to what is suggested by the General Court in paragraph 81 et seq. of the order under appeal, it does not have an effective legal remedy that would enable it to obtain a judicial review of the position taken by the Commission in its dispute with the Czech Republic as to whether the latter is under an obligation to make the amount at issue available to the Commission. In those circumstances, the General Court should have declared the action at first instance to be admissible, in order to ensure that the Czech Republic has effective judicial protection.

31 In that regard, the Czech Republic submits that when the Commission asks a Member State to make available to it an amount of the Union's own resources by means of a letter such as the letter at issue, that Member State is, de facto, obliged to pay the amount claimed within the prescribed

period, notwithstanding any reservations expressed with regard to the Commission's position. By refusing to make that amount available to that institution, the Member State runs the risk of having to pay interest in addition to the principal amount if, following the commencement of infringement proceedings by the Commission, the Court of Justice were to find that there had been a failure to fulfil the obligation to make own resources available. The amount of interest due depends in practice on the period within which the Commission brings such an action and the duration of the infringement procedure. The amount could thus be very high and would constitute an excessive legal expense for the Member State concerned.

32 According to the Czech Republic, first, a Member State cannot be certain that the merits of its dispute with the Commission will be examined by the Court, in view of the Commission's discretion in commencing infringement proceedings and the absence of any time limit for doing so. In so far as access to the Court thus depends on the Commission's 'goodwill', the right to effective judicial protection is not guaranteed.

33 In the view of the Czech Republic, the position would be different only if the Commission were required to initiate infringement proceedings against the Member State concerned in circumstances in which that Member State had made available to the Commission an amount of the Union's own resources, but that payment was subject to reservations as to the validity of the payment obligation.

34 However, as matters stand, no such obligation to initiate infringement proceedings in such circumstances is apparent from the case-law of the Courts of the European Union. That case-law is, moreover, imprecise with regard to the conditions and effects of making own resources available subject to reservations, which creates a state of legal uncertainty and undermines the right to effective judicial protection.

35 Furthermore, the current practice of the Commission shows that it does not consider itself bound to initiate infringement proceedings where the Union's own resources are made available subject to reservations.

36 On the contrary, the Commission would take the view that, in that situation, there is no longer any infringement for the purposes of Article 258 TFEU.

37 It follows, according to the Czech Republic, that a Member State has access to the Courts of the European Union, in the context of infringement proceedings, only by refusing to make the amount claimed available to the Commission, thereby running the risk of having to pay very high interest if the infringement is established.

38 Second, in the opinion of the Czech Republic, the shortcomings in the judicial protection it enjoys constitute an element of the 'factual and legal context' in which the letter at issue was sent, which is a relevant criterion for assessing whether that letter is actionable. In view of that context, the interpretation of the concepts of 'binding legal effects' and 'actionable measure' should differ from that adopted by the General Court in the order under appeal in order to guarantee the right to effective judicial protection.

39 That would apply *a fortiori* if, despite the steps taken by the Czech Republic, the Commission persisted in refusing to initiate infringement proceedings. The Czech Republic states in that regard that it made the amount at issue available to the Commission as early as 17 March 2015, while expressing reservations as to the validity of the Commission's arguments. In addition, by a letter of 30 August 2018, which has remained unanswered, the Czech Republic had reiterated to the

Commission its reservations regarding its obligation to make that amount available and asked the Commission to refund that amount or to initiate infringement proceedings.

40 At the oral hearing, first, the Czech Republic added that the letter at issue was capable of producing legal effects, since it set a time limit within which the amount at issue was to be made available, failing which interest would have to be paid. The starting point for that time limit differed, however, from that laid down in Article 10 of Regulation No 1150/2000.

41 Second, the Czech Republic added that an action for damages for unjust enrichment on the part of the European Union would also fail to guarantee effective judicial protection, given the strict conditions that circumscribe that legal remedy.

42 According to the Kingdom of the Netherlands, the General Court erred in finding that the letter at issue constituted 'merely a legal opinion' or a 'mere invitation to make available' the amount at issue. In fact that letter had been intended to produce legal effects in that it had imposed new obligations on the Czech Republic by determining independently a date from which interest is payable.

43 In its submission, furthermore, an action for annulment of such a measure and infringement proceedings could coexist. The lack of a remedy under Article 263 TFEU against measures such as the letter at issue therefore constitute a 'lacuna' in the judicial protection of the Member States.

44 At the hearing, the Kingdom of the Netherlands added that two solutions would enable that lacuna to be filled. The first would entail finding that, when a Member State makes available to the Commission an amount of the Union's own resources while expressing reservations as to its obligation to do so, that institution would be obliged to initiate infringement proceedings against that Member State. Such an obligation could be based on the principles of effective judicial protection and sincere cooperation. The second solution would entail allowing a Member State to bring an action before the General Court based on unjust enrichment of the European Union. The Kingdom of the Netherlands indicated its preference for the first solution, expressing doubts as to the expediency of the second.

45 The Commission disputes the merits of the single ground of appeal put forward by the Czech Republic.

Findings of the Court

46 As a preliminary point, it should be recalled that, in accordance with consistent case-law, any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as 'actionable measures' for the purposes of Article 263 TFEU (judgment of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 31 and the case-law cited).

47 In order to determine whether the contested act produces such effects, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act (judgment of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 32 and the case-law cited).

48 In the present case, the General Court recalled that case-law in paragraphs 31 and 35 of the order under appeal. In accordance with that case-law, it held, in paragraph 64 of that order, that the

letter at issue was not capable of producing legal effects. It drew that conclusion following, first, an analysis, set out in paragraphs 36 to 56 of that order, of the context in which the letter was sent and the powers vested in the Commission in relation to the Union's own resources, having regard in particular to the combined provisions of Article 8(1) of Decision 2007/436 and Article 2(1), Article 9(1) and Article 17(1) to (4) of Regulation No 1150/2000, and, second, an examination in paragraphs 57 to 63 of that order of the content of the letter.

49 In the context of the single ground of appeal put forward, the Czech Republic contests neither the General Court's interpretation of the combined provisions of Decision 2007/436 and Regulation No 1150/2000 nor the analysis of the content of the letter at issue and the context in which it was sent.

50 The Czech Republic takes the view, however, that the General Court erred in law by dismissing the action for annulment as being inadmissible even though, contrary to what was suggested by the General Court in paragraph 81 et seq. of the order under appeal, the Czech Republic has no other legal remedy that would enable it to obtain a judicial review of the position taken by the Commission in the dispute between them concerning the making available to the Commission of the amount at issue. According to the Czech Republic, the shortcomings in the judicial protection it enjoys constitute an element of the context that should have been taken into account in the assessment as to whether the letter at issue is actionable.

51 In those paragraphs of the order under appeal, the General Court rejected the arguments put to it by the Czech Republic in relation to the latter's right to effective judicial protection. First, in paragraph 81 of that order it recalled, in essence, that the interpretation, in the light of Article 47 of the Charter, of the requirement that the contested act should produce binding legal effects cannot lead to a situation where that requirement is disregarded. Second, in paragraphs 82 to 86 of that order, the General Court indicated that it was open to the Czech Republic either not to act on the letter at issue, pending the possible initiation by the Commission of infringement proceedings, or to make the amount at issue available while expressing reservations as to the validity of the Commission's position.

52 In that regard it must be noted, in the first place, that the General Court correctly recalled in paragraph 81 of the order under appeal that, according to the Explanations relating to the Charter (OJ 2007 C 303, p. 2) and the settled case-law of the Court of Justice, although the requirement as to binding legal effects must be interpreted in the light of the right to effective judicial protection as guaranteed in the first paragraph of Article 47 of the Charter, that right is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union. Thus, the interpretation of the concept of 'actionable measure' in the light of Article 47 of the Charter cannot lead to a situation where that requirement is disregarded on pain of exceeding the jurisdiction conferred by the FEU Treaty on the Courts of the European Union (see, to that effect, judgment of 25 October 2017, *Slovakia* v *Commission*, C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 66 and the case-law cited).

53 However, that would necessarily be the case if a Member State were permitted to bring an action for annulment in respect of a letter that does not constitute an actionable measure within the meaning of the case-law cited in paragraphs 46 and 47 of the present judgment, in that, having regard to its content, the context in which it is sent and the powers of the institution that sent it, it is not capable of producing binding legal effects, as the General Court ruled in paragraphs 36 to 64 of the order under appeal, without those elements of the analysis having been called into question by the Czech Republic in its appeal.

54 At most, the Czech Republic submitted at the hearing, as did the Kingdom of the Netherlands in its statement in intervention, that the letter at issue was capable of producing legal effects in so far as it fixed a time limit within which the amount at issue had to be made available, failing which interest would be payable. However, the Commission's indication of such a time limit is incapable, by its very nature, of producing legal effects. The Court of Justice has ruled that, under Article 11 of Regulation No 1150/2000, any delay in making the entries in the account referred to in Article 9(1) of that regulation gives rise to the payment of interest by the Member State concerned at the interest rate applicable to the entire period of delay, irrespective of the reason for the delay and any time limit fixed by the Commission for making available the Union's own resources (see, to that effect, judgments of 1 July 2010, *Commission* v *Germany*, C-442/08, EU:C:2010:390, paragraphs 93 and 95, and of 17 March 2011, *Commission* v *Portugal*, C-23/10, not published, EU:C:2011:160, paragraph 62).

55 Furthermore, the arguments of the Czech Republic according to which its action for annulment must be deemed admissible are at odds with the characteristics of the system of the Union's own resources.

56 It must be recalled in that regard that it is apparent from Article 8(1) of Decisions 2000/597 and 2007/436 that the Union's own resources referred to, respectively, in Article 2(1)(a) and (b) of Decision 2000/597 and Article 2(1)(a) of Decision 2007/436 are collected by the Member States who are obliged to make them available to the Commission (judgment of 8 July 2010, *Commission* v *Italy*, C-334/08, EU:C:2010:414, paragraph 34).

57 To that end, the Member States are required, under Article 2(1) of Regulation No 1150/2000, to establish the Union's entitlement to own resources 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'. The Member States are accordingly required to enter the duties established in accordance with Article 2 of that regulation in the accounts for the Union's own resources on the conditions laid down in Article 6 of that regulation (see, to that effect, judgment of 1 July 2010, *Commission* v *Germany*, C-442/08, EU:C:2010:390, paragraph 76 and the case-law cited). It must be made clear in that regard that, under Article 6(3)(b) of that regulation, an established entitlement which has not yet been recovered and in respect of which no security has been provided is to be shown in separate accounts (see, to that effect, judgment of 11 July 2019, *Commission* v *Italy (Own resources – Recovery of a customs debt)*, C-304/18, not published, EU:C:2019:601, paragraph 52).

58 The Member States must then make the Union's own resources available to the Commission on the conditions laid down in Articles 9 to 11 of Regulation No 1150/2000, by crediting those resources, within the prescribed period, to the account opened in the name of that institution. In accordance with Article 11(1) of that regulation, any delay in making the entry in that account is to give rise to the payment of interest by the Member State concerned.

59 There is, therefore, an inseparable link between the obligation to establish the Union's 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, to that effect, judgment of 20 March 1986, *Commission* v *Germany*, 303/84, EU:C:1986:140, paragraph 11), such interest being payable regardless of the reason for the delay in making the entry in the Commission's account (judgment of 1 July 2010, *Commission* v *Germany*, C-442/08, EU:C:2010:390, paragraph 93).

60 In addition, under Article 17(1) and (2) of Regulation No 1150/2000, Member States are to take all requisite measures to ensure that the amounts corresponding to the entitlements established under Article 2 of that regulation are made available to the Commission. Member States are to be released from that obligation only if the amounts cannot be recovered for reasons of force majeure or if recovery proves definitively to be impossible for reasons which cannot be attributed to them. Amounts declared or deemed irrecoverable are to be definitively removed from the separate account referred to in Article 6(3)(b) of that regulation.

61 In that context, it is apparent from Article 17(3) and (4) of Regulation No 1150/2000 that the Member States must provide the Commission with information on those cases where paragraph 2 of that article has been applied, provided the established entitlements involved exceed EUR 50 000. The Commission then has six months from the receipt of that report to forward its comments to the Member State concerned. As the General Court correctly held in paragraphs 46 to 50 of the order under appeal, without this being challenged in the appeal, such comments are not binding and must be regarded as merely an opinion expressed by the Commission.

62 It follows from the foregoing that, as EU law currently stands, the management of the system of the Union's own resources is entrusted to the Member States and is their responsibility alone. Thus, the obligations to collect, establish and place those resources on account are imposed directly on the Member States under the provisions of Decisions 2000/597 and 2007/436 and Regulation No 1150/2000, and no decision-making power has been conferred on the Commission enabling it to require the Member States to establish and to make available to it amounts that represent the Union's own resources (see, to that effect, judgment of 25 October 2017, *Slovakia* v *Commission*, C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 64).

63 It must be pointed out in that respect that the EU legislature chose not to act on a proposal made by the Commission in point 13.3 of its proposal for a Council regulation amending Regulation No 1150/2000, presented on 1 July 2003 (COM(2003) 366 final), which envisaged the Commission being given the power to adopt a reasoned decision, should it consider that the conditions set out in the first subparagraph of Article 17(2) of Regulation No 1150/2000 are not met.

64 In those circumstances, making available an action for annulment, as the Czech Republic proposes, against a letter, such as the letter at issue, for the purpose of reviewing the validity of that Member State's obligation to make available to the Commission the amount at issue would be effectively to disregard the system of the Union's own resources, as laid down in the rules of EU law. It is not for the Court to change the choice made in that respect by the EU legislature.

65 As regards, in the second place, the considerations set out by the General Court in paragraphs 82 to 86 of the order under appeal, it should be noted that, in accordance with the Commission's role as guardian of the Treaties, conferred on it under Article 17(1) TEU, it is for that institution to ensure the proper performance by the Member States of their obligations in relation to the Union's own resources.

66 In accomplishing that task, the Commission has a discretion in determining the expediency of initiating the procedure laid down in Article 258 TFEU, where it considers that a Member State has failed to fulfil one of its obligations under EU law (see, to that effect, judgments of 19 October 1995, *Richardson*, C-137/94, EU:C:1995:342, paragraph 35, and of 6 December 2007, *Commission* v *Germany*, C-456/05, EU:C:2007:755, paragraph 25).

67 In that regard, the Court has ruled, in particular, that a Member State which fails to establish the Union's own resources and to make the corresponding amount available to the Commission,

without one of the conditions laid down in Article 17(2) of Regulation No 1150/2000 being met, falls short of its obligations under EU law, notably Articles 2 and 8 of Decisions 2000/597 and 2007/436 (see, to that effect, judgments of 15 November 2005, *Commission* v *Denmark*, C-392/02, EU:C:2005:683, paragraph 68; of 18 October 2007, *Commission* v *Denmark*, C-19/05, EU:C:2007:606, paragraph 32; and of 3 April 2014, *Commission* v *United Kingdom*, C-60/13, not published, EU:C:2014:219, paragraph 50).

68 It follows that the Commission's ability to submit to review by the Court, in infringement proceedings, a dispute between the Commission and a Member State regarding the latter's obligation to make available to the Commission a certain amount of the Union's own resources is inherent in the system of own resources, as currently configured in EU law.

69 It is true that, as the Czech Republic has argued, Member States that do not share the Commission's view regarding their obligation to make available to it an amount of the Union's own resources and fail to make those resources available run the risk of having to pay interest, should the Court find that they have failed to fulfil their obligations under the legislation governing the Union's own resources.

70 However, it should be noted in that respect, first, that, as is apparent in essence from paragraphs 58 and 59 of the present judgment, the obligation to pay interest pursuant to Article 11(1) of Regulation No 1150/2000 is ancillary to the obligation to make the Union's own resources available to the Commission in accordance with the conditions laid down in Articles 9 to 11 of that regulation, in particular, the time limits fixed by the regulation.

71 The Czech Republic was therefore wrong, at the hearing, to treat the interest that may be payable by a Member State in the context of the system of the Union's own resources as being akin to a legal expense which, in its view, could be an impediment to access to justice.

72 Second, as the General Court correctly noted in paragraph 84 of the order under appeal, it is apparent from the case-law of the Court that a Member State can avoid the adverse financial consequences of interest, the amount of which may be high, by making the amount claimed available to the Commission, while expressing reservations as to the validity of the Commission's arguments (see, to that effect, judgments of 16 May 1991, *Commission* v *Netherlands*, C-96/89, EU:C:1991:213, paragraph 17, and of 12 September 2000, *Commission* v *United Kingdom*, C-359/97, EU:C:2000:426, paragraph 31).

73 Where own resources are made available to the Commission subject to such reservations, it is for the Commission, in accordance with the principle of sincere cooperation within the meaning of Article 4(3) TEU, to engage in constructive dialogue with the Member State concerned in order to clarify their respective positions and to determine the obligations of that Member State.

74 Should that dialogue between the Member State and the Commission fail, it is open to that institution, contrary to its contention in the present case, to initiate infringement proceedings against that Member State with regard to its obligations to collect, establish and make available the Union's own resources.

75 As the Advocate General indicated in point 98 of her Opinion, the making available of the Union's own resources subject to reservations would justify a finding of a failure to fulfil obligations should it transpire that the Member State concerned was indeed required to make those resources available.

76 The Court has, moreover, already examined an action for failure to fulfil obligations brought by the Commission in a case in which the defendant Member State made the Union's own resources available subject to reservations (see, to that effect, judgment of 1 July 2010, *Commission* v *Germany*, C-442/08, EU:C:2010:390, paragraph 51).

77 That being the case, contrary to the arguments put forward by the Czech Republic, supported by the Kingdom of the Netherlands, when a Member State makes own resources available subject to reservations, the fact remains that the Commission cannot be obliged to initiate infringement proceedings against that Member State.

78 Such an obligation would be contrary to the scheme of Article 258 TFEU, from which it is clear that the Commission is not bound to commence infringement proceedings, but has a discretion in that respect (see, to that effect, judgment of 14 February 1989, *Star Fruit* v *Commission*, 247/87, EU:C:1989:58, paragraph 11).

79 Thus, a Member State cannot require that the making available of the Union's own resources, subject to reservations, be conditional upon the Commission undertaking to bring an action for failure to fulfil obligations before the Court (see, to that effect, order of 21 June 2007, *Finland* v *Commission*, C-163/06 P, EU:C:2007:371, paragraph 44).

80 It follows that, because of the discretion conferred on the Commission, the legal remedy of infringement proceedings does not offer the Member State concerned any guarantee of having its dispute with that institution concerning the making available of the Union's own resources resolved by the Court.

81 In those circumstances, it must be added that when a Member State has made available to the Commission an amount of the Union's own resources while expressing reservations as to the validity of the Commission's arguments, and the dialogue referred to in paragraph 73 of the present judgment has not brought the dispute between that Member State and that institution to an end, it is open to that Member State to seek damages on account of the Union's unjust enrichment and, if necessary, to bring an action before the General Court to that end.

82 In that regard it must be recalled that the Court has held that, according to the principles common to the laws of the Member States, a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss. While the FEU Treaty does not make express provision for a means of pursuing that type of action, if Article 268 TFEU and the second paragraph of Article 340 TFEU were to be construed as excluding that possibility, the result would be contrary to the principle of effective judicial protection. Actions for unjust enrichment of the European Union, brought under those articles, require proof of enrichment on the part of the defendant for which there is no valid legal basis and proof of impoverishment on the part of the applicant which is linked to that enrichment (see, to that effect, judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraphs 44 and 46 to 50).

83 When examining such an action, the General Court would have to assess, in particular, whether the impoverishment of the applicant Member State, corresponding to the amount of the Union's own resources which have been made available to the Commission and which that Member State has disputed, and the corresponding enrichment of the Commission, are justified by the Member State's obligations under EU law governing the Union's own resources or, on the contrary, whether no such justification exists.

84 The Czech Republic, supported by the Kingdom of the Netherlands, is therefore wrong to claim that a Member State is deprived of any effective judicial protection in the event of disagreement with the Commission as to the Member State's obligations in relation to the Union's own resources.

85 In the light of all of the above considerations, the single ground of appeal put forward by the Czech Republic must be rejected and, consequently, the appeal must be dismissed in its entirety.

Costs

86 Under Article 138(1) of the Rules of Procedure of the Court of Justice, 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.

87 Since the Commission has applied for costs to be awarded against the Czech Republic and the Czech Republic has been unsuccessful in its single ground of appeal, the Czech Republic must be ordered to bear its own costs and to pay those incurred by the Commission.

88 Article 140(1) of the Rules of Procedure, which also applies to appeal proceedings by virtue of Article 184(1) thereof, provides that the Member States and institutions of the European Union which have intervened in the proceedings are to bear their own costs.

89 Accordingly, the Kingdom of the Netherlands shall bear its own costs.

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

1. **Dismisses the appeal;**

2. **Orders the Czech Republic to bear its own costs and to pay the costs incurred by the European Commission;**

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

[Signatures]

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* Language of the case: Czech.