

CJEU Rules on Member States' Liability in the Event of Losses of Own Resources

News

Thomas Wahl

On 8 March 2022, the CJEU, sitting in for the Grand Chamber, [delivered an important ruling](#) on the obligations of EU Member States to protect the EU's financial interests (Art. 325 TFEU) and to apply the EU's customs legislation.

Facts of the case

In the case at issue ([C-213/19](#)), the Commission brought an action against the United Kingdom for failure of its obligations under EU legislation on control and supervision in relation to the recovery of own resources and under EU legislation on customs duty and VAT. The cases date back to 2007, 2009, and 2015 when OLAF detected risks of extreme undervaluation of imports of textiles and footwear from China by shell companies circumventing the EU customs duties. OLAF and the Commission developed risk assessment tools and anti-fraud strategies and recommended the UK authorities using this EU-wide risk approach. However, according to OLAF, the UK did not follow its recommendations, instead releasing the products concerned for free circulation in the internal market without conducting appropriate customs controls. As a result, a substantial proportion of the customs duties due were not collected or made available to the Commission. Against this background, the Commission initiated an infringement procedure against the UK for not having taken effective control measures on undervalued importation within the period between November 2011 and October 2017. In addition, the Commission requested the correct determination of the customs value.

Admissibility of the action

The CJEU first clarified that it has jurisdiction in the case despite Brexit. According to the agreements between the EU and the UK, the CJEU continues to have jurisdiction in any proceedings brought against the United Kingdom before the end of the transition period, i.e. 1 January 2021; the CJEU can also rule on the interpretation and application of EU legislation on own resources relating to the financial years until 2020.

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Breaches regarding the protection of the EU's financial interests

On the merits, the Court largely upholds the Commission's pleas. As far as the UK's failure to fulfil obligations to protect the EU's financial interests and to counter fraud was concerned, the judges in Luxembourg reiterate the obligations under Art. 325(1) TFEU:

- Member States must not only provide for the application of appropriate penalties, but also of effective and dissuasive customs control measures, in order to effectively and comprehensively collect traditional own resources in the form of customs duties;
- The Member States' latitude and freedom of choice as to the measures to be taken have its limits in the principles of proportionality, equivalence and effectiveness, and general principles of EU law;
- Member States have precise obligations as to the result to be achieved;
- The nature of the necessary customs control measures cannot be determined in an abstract and fixed manner, since they depend on the characteristics of EU fraud or other illegal activity, which may change over time.

Considering the particular features of undervaluation fraud, the CJEU concluded that the UK "manifestly failed" to respect the principle of effectiveness under Art. 325(1) TFEU by limiting customs controls to post-clearance action to recover duties. Regarding the breach of obligations under EU customs legislation, the CJEU acknowledged that the risk profiles and types of customs control which OLAF and the Commission were recommending have a non-binding nature. However, the UK was required, at the very least, to take due account of them when establishing its system of risk analysis and risk management during the infringement period. This follows from the duty of cooperation and must apply in particular if Member States have not developed national criteria that are at least as effective as those recommended by the EU. As a consequence, the UK mainly neglected three issues:

- Applying pre-clearance risk profiles to goods before release for free circulation;
- Systematically demanding guarantees in respect of the imports in question;
- Entering in the accounts in due time the amounts corresponding to the difference between the duties calculated on the basis of incorrectly declared values and the duties which would have been established if they had been calculated on the basis of the true value of the goods concerned.

Breaches regarding obligations to make available own resources

The CJEU clarified that the UK also infringed EU legislation on own resources since, during the infringement period, the country did not make available to the Commission the traditional own resources in respect of the relevant imports that were due. In this regard, the Court points out that the Member States must establish a Union entitlement to own resources as soon as their authorities are in a position to calculate the amount of duty resulting from a customs debt and to determine the person liable for payment of the duty; they must then take all necessary measures to ensure that the Union's own resources are made available to the Commission. The management of the Union's own resources system is thus entrusted to the Member States and is their sole responsibility. Because of the direct link between the collection of revenue from customs duties and the making available of the corresponding resources to the Commission, the Member States are obliged to protect the Union's financial interests and to take the necessary measures to ensure the effective and complete collection of customs duties.

In the present case, the CJEU particularly blamed the UK for not determining an accurate value of the imported undervalued goods before their release for free circulation. Thus, the UK created an irreversible situation leading to considerable losses of own resources for the EU, for which the UK must be held liable.

The CJEU then established the liability of the UK for the losses of the EU in the context of OLAF's joint customs cooperation "Snake" and identified several administrative failures by the UK customs authorities to correctly determine the customs value due. Ultimately, however, the Court criticised the Commission's calculation of the amount of losses of own resources.

Reaction by OLAF

In a [statement of 10 March 2022](#), OLAF welcomed the CJEU's judgment in the UK undervaluation case. OLAF Director-General *Ville Itälä* said that the judgment validates OLAF's investigative work. He above all expressed pride that the judgment endorsed the methodology which OLAF developed to fight undervaluation and which now could become the main reference tool for all national customs authorities.

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