

Université  
de Liège



**ADVANCED EU LAW – DROI2055-2**

**Cases & Materials**

Faculté de Droit, de Science Politique et de Criminologie

Université de Liège

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## WELCOME

Dear students,

The European Union (EU) is one of the most fascinating international organisations currently in operation. No other organisation over the past century succeeded in shaping, refining and structuring a truly autonomous *supranational* legal order that constantly keeps evolving towards a closer union between the States and peoples of Europe. At the same time, the EU remains a project under construction, which has become the object of ever more intense criticism.

This course will offer you a panoramic perspective of the state of European Union law today by introducing a series of themes showcasing EU law's potential and limits in the current EU institutional setup. The law having played a major role in building a supranational legal order, its limits have nevertheless also become clear more than ever before, in the wake of successive Euro-crises and the results of the UK referendum on 23 June 2016. The course therefore explicitly invites you to think critically about the state of EU law – and more generally the European Union – today. The basics of the EU legal order being outlined in introductory courses to the field (at the ULg, those courses include 'droit institutionnel européen' in the second year and 'droit matériel européen' in the third), this course will presuppose some knowledge on EU law and the EU institutions in order for you to be able to follow it. If you do not have such knowledge, you will be required – in the early weeks of the course – to catch up with this independently.

The course will be structured around three themes and one supplementary topic, all related to the quest for an ever more perfect European Union grounded in law and legal norms. The first theme focuses on the EU internal market, the limits to its current setup and the steps taken to overcome some of the legal loopholes not envisaged by the Founding Fathers of the European Union. The second theme focuses on the institutional functioning of the EU in itself. A more perfect Union presupposes better streamlined institutions and decision-making procedures as well. The third theme relates to the Economic and Monetary Union, which occupies a special status within the EU Treaty framework; considered technical and esoteric by many, the crisis sparked renewed interest in this field. Finally, we end the course on the legal implications and potential future directions in the wake of the 23 June 2016 U.K. referendum results. Studying the legal implications of a pending Brexit, we will discuss how this change may affect the outlook and structure of the EU in the decades to come.

This reader contains case law and legislation, as well as basic outlines for each lecture meant to help you maintain some structure in the materials covered in class sessions. Additional materials, e.g. doctrinal articles and additional information, will be made available on eCampus. At the same time, the materials chosen are only a starting point for reflection and discussion; they are above all meant to trigger your input during class sessions.

In case of questions, do not hesitate to contact me at [pieter.vancleynenbreugel@ulg.ac.be](mailto:pieter.vancleynenbreugel@ulg.ac.be) or during class breaks. I look forward to meeting you in class every Friday of the first term!

Pieter Van Cleynenbreugel



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## COURSE SCHEDULE AND SETUP

Fourteen two hour lecture sessions will be organised, ten of which will take place during our regular time-slot on Fridays from 10.30 to 12.30. The four other lectures will be scheduled on Fridays from 8.30 to 10.30, in addition to the lectures during our regular time-slot. This is to compensate for public holidays or scheduling conflicts. Although I am aware this will mean you have four hours of class on 4 Friday mornings, I do ask for your understanding and sincerely apologise for this; it has proven rather difficult to schedule class times on other moments during the week, due to scheduling conflicts and to avoid overlap with other elective or compulsory courses. I thank you for your understanding in this regard.

In addition to the lectures, a visit to the Court of Justice in Luxemburg will be organised on Thursday 17 November. The visit forms part of the course – for organisational purposes, you will be asked to register explicitly for this visit during the first class. More practical information on the visit and the programme will be communicated to you in due course.

The following lectures will be organised in the *Weber* classroom (B31 – Sart Tilman campus):

1. Towards an ever more perfect European Union? The role of law in European integration (23/09)
2. Perfecting the internal market: horizontalising free movement rights (30/09, 8.30-10.30)
3. Perfecting the internal market: primary law v. secondary law (30/09)
4. Perfecting the internal market: economic freedoms v. social rights? (7/10, 8.30-10.30)
5. Perfecting the internal market: citizenship without limits? (7/10)
6. Improving EU institutional functioning: making sense of legal acts and instruments in EU law (14/10)
7. Improving EU institutional functioning: transparency and access to documents: buzzwords or reality? (21/10)
8. Improving EU institutional functioning: fundamental rights protection in post-Lisbon EU law (28/10)
9. Improving EU institutional functioning: effective judicial protection and direct access to EU Courts (4/11, 8.30-10.30)
10. Improving EU institutional functioning: enhanced cooperation as new institutional reality? (4/11)

Visit to the Court of Justice in Luxemburg (17/11)

11. Beyond market integration: legal foundations of the Economic and Monetary Union (25/11, 8.30-10.30)
12. Beyond market integration: Economic and Monetary Union in crisis (25/11)
13. Beyond market integration: saving the EMU outside and inside the EU legal order (2/12)
14. The EU law implications of a “Brexit” (9/12)

Course materials consist in a reader containing course outlines, cases and materials, available at the Presses Universitaires. Additional materials will be posted on eCampus.



## PRACTICAL INFORMATION

### a. Course format

This course is an advanced EU law course. “Advanced” should be understood to have two dimensions. On the one hand, the course will offer a more in-depth discussion of familiar materials from your introductory EU law courses. On the other hand, it will also cover more advanced materials not generally treated in those introductory courses. Its aim is to highlight themes that are important for anyone engaged in EU law practice or having a keen interest in the functioning and future of the European Union. As such, it envisages to provoke discussion, to incite lawyerly reflection and to introduce important institutional and substantive law themes to you.

As the EU is a complex organisation and as it is impossible to cover everything in this course, the selected themes – *capita selecta* approach has been opted for. Although themes may strike you as different and varied in scope, they all related to the same fundamental question: how does EU law shape a supranational legal order, in which Member States’ legal orders are embedded and what legal problems are created by this supranational reality, both on the institutional and substantive law fronts?

### b. Course materials – class preparation

This reader contains the materials that are essential and that will be used in detail during the lecture sessions. You can bring those materials to the exam preparation and you may add notes to them. Additional materials will be posted on e-Campus; you are free to print them, but you cannot take them with you during the course.

The TEU, TFEU and the Charter of Fundamental Rights have been posted on eCampus; you may print them as well and take them to the exam. In any case, printed versions will be made available to you when preparing your oral exam.

The course will be taught in an interactive way; that means that ex cathedra lecture moments will be complemented by discussion sessions on the materials. You are therefore expected to read the cases for each session in advance! That will not only facilitate our discussion, but will help you to come to class with questions that may be relevant to others as well. The aim is really to stimulate discussion, so you do not have to be afraid to interrupt the lecture and ask me a question if things happen to be unclear.

In principle, everyone will be “on call” in class; I will make sure that, over the course of the semester, everyone has at least once – and preferably, twice – participated actively to one of the class discussions. Being “on call” means that I will ask you questions you are expected to answer. Not being prepared in class may result in points being detracted from your final grade. Please do not be scared to speak up in class – I know I was when I was a student – as I really want you to feel comfortable in expressing yourself in a non-native language and to learn new things about the European Union along the way. It is not bad to make mistakes in class, I just want everyone to join me in the conversation about the European Union.

In order to do so, you will also be required to actively engage with the eCampus forum. On that forum, I will ask one or two questions for each session; those questions will be phrased as discussion questions, to which you will be invited to prepare a short written answer (200-300 words in total). Every student will be expected to write and publish on eCampus at least two written contributions over the course of the semester. Not doing so will result in you losing two points on your final grade.

No particular textbook is assigned for this course. For your information, I propose some suggestions regarding textbooks, which may help you in structuring and framing the materials covered in class:

- K. Davies, *Understanding EU law*, Oxford, Routledge, 6<sup>th</sup> Edition, 2015, 184 pp. (a clear English-language introduction to European Union law).
- P. Craig and G. De Búrca, *EU law. Text, cases and materials*, Oxford, Oxford University Press, 6<sup>th</sup> Edition, 2015, 1380 p. (the standard textbook in the field, covers a lot of ground not necessarily covered in this class, yet it may also offer a background framework to help you in your studies).
- R. Schütze, *An introduction to European Law*, Cambridge, Cambridge University Press, 2015, 2<sup>nd</sup> Edition, 380 p. (another clear introduction to EU law, both from institutional and substantive law perspectives)
- K. Lenaerts and P. Van Nuffel, *European Union Law*, London, Sweet & Maxwell, 3<sup>rd</sup> Edition, 2011, 1334 p. (a very complete textbook, covering every area in an in-depth fashion; as such, it offers a true encyclopaedia for anyone wanting to understand a field of EU law in a detailed way).

Please bear in mind that this is a 6 ECTS course, which means that you will be expected to work above and beyond the 30 hours of class time. You are in principle expected to work three hours for each hour of class; take your preparations seriously and make sure to read materials in advance. This will help you more meaningfully to contribute to class discussions and prepare for the questions asked during the exam or when writing your discussion summaries on the eCampus forum.

c. Time slots

As mentioned above, the regular course time slot is Friday morning from 10.30 to 12.30 in the *Weber* classroom (B31 – Sart Tilman campus). In addition, a visit to the Court (17/11) and four complementary lectures – from 8.30 to 10.30 in the same *Weber* room – will be organised.

The four complementary lecture sessions are currently planned from 8.30 to 10.30 on Friday morning. Although I am aware that this time slot is not ideal, we want to avoid as little overlap with other courses as possible, hence the timing. I thank you for your understanding in this.

Please do keep an eye on eCampus and your ulg-mailbox, as schedule changes are always possible; I will do my utmost best to avoid them, and promise to inform you as soon as possible should any unexpected change occur.

d. Compulsory eLearning!

eCampus will be used as a tool to enhance your learning experience. Links to audiovisual materials will be posted there and a forum will be in operation. On that forum, I will post a

discussion question after each session. As student enrolled in the course, you are expected to contribute at least **twice** over the course of the semester to the discussion started there. That means that I expect you to answer briefly – in 200 to 300 words to the question asked and/or to the answer given by your fellow students. Not doing this will be taken into account for the final grade awarded for this course. During the first session, I will explain you how the forum works. The main aim is to invite you firmly to contribute to debates and to think about the subject matter of the course already during the course term. Your participation in discussing a subject-matter in a brief and clear way will also improve your English writing skills and will force you to be precise!

e. Exam

The exam will be an oral exam, for which you will have 30 minutes of preparation time. You will receive two questions relating to the course themes, which you can discuss during the oral exam session (which will last about 20 minutes). I will also ask you small questions relating to other subject-matters covered in class. The purpose will be to have an informed discussion on the subject-matter of the course. Preparation will be open-book; you can bring your annotated course materials and legislation to the exam.

In addition, your active contribution to the eCampus forum will be taken into account. Not having contributed twice to the forum will result in two points being detracted from your total. Having responded twice may result in an increase of your grade by a maximum of two points, if and to the extent that the quality of your contributions is deemed of very good to excellent quality and if you really show you can contribute to EU law debates.



## HOW TO READ A JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION?

The cases and materials covered here include mainly judgments by the Court of Justice and the General Court. In order to smoothen the reading and preparation process, I would like to offer you five guidelines meant to help you in structuring your readings.

- Start by reading the operative part: the judgment always contains an operative part; in case of a reference for a preliminary ruling, the answer to the question asked by the national jurisdiction – or thought to be asked by it when the Court of Justice rephrases it – will be given. In actions for annulment, the Court will only dismiss or grant the application, leaving you with less information on what the legal issue in the case was. In that case, you will have to delve immediately into the whole of the Court's *obiter dicta* – i.e. the reasoning preceding the conclusion reached by the judges – to understand what was really at stake. In a preliminary reference procedure, you can already partially infer the question from the answer given by the Court; it therefore pays to start reading the operative part.
- Clearly distinguish and summarise the facts of a case: although many people tend to read high-level and general insights in Court judgments, always be aware that, in the mindset of the Court, it is resolving a particular case at hand. Judges are above all problem-solvers; when confronted with a specific question, they are tasked to answer it. As such, it is necessary for you to infer what the problem actually is that confronts the Court in a particular case. For that purpose, it is essential to consult the facts of the case and the legislation in issue. Even when the Court will eventually invoke an unwritten general principle of EU law, it is crucial to understand why the Court did so, why no other provision of EU law was/could have been invoked. I would therefore advise you to summarise the facts of the case and to distinguish the relevant legal question as apparent from them. It is often on the basis of peculiar facts that peculiar answers to legal questions are given, so link facts and law after having read the operative part!
- Distinguish between the arguments of the parties and the findings of the Court: in the obiter part of the judgment itself, you will find a lot of paragraphs restating the arguments made by the parties to the proceedings in writing and orally. That information is interesting, as it guides the Court to develop its own legal reasoning. However, as you are mainly interested in the Court's legal reasoning, I would encourage you to continue your reading – following a summary of the facts – with the findings of the Court. Only if those findings leave you with questions or if you want to understand what led the Court to this conclusion, the arguments of the parties are to be consulted. In more recent case law, the Court has begun to distinguish – using subtitles – between arguments of the parties and findings of the Court. That is not the case in earlier case law; it will then be up to you to make the distinction!
- Link the judgment to other cases: when reading the judgment – especially in later stages of the course – make explicit links to judgments studied earlier; how does the judgment fit earlier precedents? Does it deviate from them – and if so – to what extent? Although the Court does indeed solve individual cases, it has to be predictable to some extent. Assess for each case whether you could have predicted the answer on the basis of

precedent case law; asking yourself that question will enhance your understanding of legal reasoning and of how the Court actually works.

- Reflect critically on the legal reasoning developed by the Court: once you have found the Court's reasoning, the next step will be to reflect critically on what the Court said; did it make a general or generalizable statement or did it just address a specific situation? Why did the Court invoke a specific provision or principle? What are the effects of that decision, potentially, for Member States and individuals? Is the judgment workable in practice or does it pose difficulties for Member States, national jurisdictions or litigants? Could the Court have reasoned otherwise in your opinion? If available, try to read the Advocate General's Opinion in this context as well. The aim of your reading should be to question profoundly, on the basis of your previous knowledge of EU law or precedents established by the Court itself, the judicial reasoning or interpretation of EU legal instruments. In adopting a critical perspective on what the Court does, your understanding of EU law will improve.

## LEARNING GOALS

The course aims to increase your knowledge, practical and critical reflection skills with regard to themes of EU law.

In terms of knowledge,

- the course will expand your knowledge on selected themes that go beyond the traditional topics covered in basic EU law courses, introducing you to legal regimes aimed at making the EU work better;
- you will learn terminology you are familiar with in your native language in an English context;
- you will better understand the links between primary and secondary EU law and the role of the Court in outlining that relationship;
- you will identify bridges between substantive and institutional law problems that have been distinguished commonly, for pedagogical reasons, in EU law analysis;
- you will understand better how the European Union functions and how this functioning is grounded firmly in supranational law;
- you will be introduced to economic and monetary integration and its relationship to the more classical field of EU internal market law;
- you will analyse the legal implications of a “Brexit” in the wake of the United Kingdom’s referendum.

In terms of practical skills,

- you will actively learn how to read, interpret and understand judgments by the Court of Justice;
- you will take part, in writing, in discussions on the subject matter in English;
- you will learn how to phrase, in plain English, a clear answer to a discussion question;
- you will develop be able to follow, in a more informed way, debates on the future of the European Union.

In terms of critical reflection skills,

- you will learn to think critically about the role of the Court of Justice in EU legal integration;
- you will be able to read and critically assess points of view developed by legal scholars;
- you will develop your own point of view on the legal desirability of proposed solutions at the EU level;
- you will be able to put EU law debates in the perspective of more general political debates on the role and future of the European Union;
- you will be able to balance the advantages and disadvantages of the current EU integration through law setup.



## **1. TOWARDS A MORE PERFECT UNION? LAW AND POLITICS IN EUROPEAN INTEGRATION**

The European Union is a remarkable international organisation. Part of its uniqueness lies in the power of legal rules originating in and underlying the organisation. Early on, the Court of Justice of the European Union – then European Economic Community – recognised the direct effect and primacy of Treaty rules and secondary legislation derived from them over Member States' law. As a result, law became a tool directly to integrate Member States' legal orders in an unprecedented fashion, entrusting individuals with rights to be invoked against EU institutions, Member States and other individuals

The firm belief in law led to a gradual extension of legal bases included in the Treaties and to the adoption of a now-binding Charter of Fundamental Rights. The first part of this course – comprising its introductory lecture – will demonstrate precisely how the law has structured and at the same time restrained future EU integration developments. As such, the intricate link between law and politics in European integration will be demonstrated, which constitutes the background against which the course will further develop.



## LECTURE 1: THE EUROPEAN UNION AS A LEGAL AND POLITICAL ACTOR

What makes EU law special? How does it distinguish itself from public international law and from Member States' national or regional legal norms? The answer to that question lies in the "hybrid" nature of EU law, having features of both public international and national law. Those features have been conferred on EU law by means of two crucial judgments: *Van Gend & Loos* and *Costa/ENEL*. In this first session, we will *read* and *interpret* both judgments as starting points for a peculiar 'integration through law' framework underlying the European Union. That framework, it will be argued, is grounded in an understanding of EU law as comprising subjective rights to be invoked against EU institutions, Member States and even other individuals. The recognition of rights thus gave rise to what can be called 'the politics of law' underlying EU integration. In that understanding, EU law has become a 'political' tool to reshape or reformulate existing national legal provisions or to escape from private law obligations. The emergence of EU fundamental rights only contributed further to this. This first session will explain and develop that framework, against the background of which the other course themes will be assessed.

### Materials to read:

- Court of Justice, 5 February 1963, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.
- Court of Justice, 15 July 1964, Case 6/64, *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.
- Charter of Fundamental Rights of the European Union, 26 October 2012, [2012] *O.J.* C 326/391 (browse through the Charter – what kind of rights can you distinguish? Do you find any rights you would not normally have expected in a fundamental rights instrument?).
  
- *Optional background article:* J.H.H. Weiler, "The transformation of Europe", 100 *Yale Law Journal* (1991), 2403-2484 (via eCampus).

### Lecture 1 outline:

- a. Introduction to the course
  1. Course theme
  2. Course setup
  3. Practical information
- b. The importance of law in European integration
  1. Public international law basis – Treaty setup
  2. Going beyond public international law: defining EU law
  3. Fundamental rights law
  4. Primary v. secondary law
- c. The key features of EU law: primacy and direct effect
  1. *Van Gend & Loos*: direct effect of EU law
  2. *Costa/Enel*: primacy of EU law

3. Consequences of direct effect and primacy
4. Limits of direct effect and primacy: the curious case of directives
- d. Building on primacy and direct effect: ‘integration through law’
  1. Harmonisation of Member States’ laws
  2. A complex hierarchy of norms: fundamental rights at the apex?
  3. The scope of EU law vis-à-vis Member State law
- e. Limits of EU integration through law?
  1. The need for a legal basis
  2. Crisis and fast-track solutions
- f. The politics of law – towards a more perfect Union?
  1. Classical EU law tools
  2. Alternative law strategies
- g. Law and politics in today’s EU – an overview of issues
  1. Law and politics in the internal market
  2. Law and politics in the institutional functioning of the EU
  3. Law and politics in the Economic and Monetary Union
  4. The law and politics of a “Brexit”

Questions for discussion:

- Distinguish the direct and indirect impact of the principle of direct effect on the development of EU law? What is its importance today?
- What are the implications of the EU’s integration through law strategy for the development of an ever more perfect European Union?

**Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v  
Netherlands Inland Revenue Administration**

Parties

*IN CASE 26/62*

*REFERENCE TO THE COURT UNDER SUBPARAGRAPH ( A ) OF THE FIRST PARAGRAPH AND UNDER THE THIRD PARAGRAPH OF ARTICLE 177 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY BY THE TARIEFKOMMISSIE, A NETHERLANDS ADMINISTRATIVE TRIBUNAL HAVING FINAL JURISDICTION IN REVENUE CASES, FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN*

*N.V . ALGEMENE TRANSPORT - EN EXPEDITIE ONDERNEMING VAN GEND & LOOS, HAVING ITS REGISTERED OFFICE AT UTRECHT, REPRESENTED BY H.G . STIBBE AND L.F.D . TER KUILE, BOTH ADVOCATES OF AMSTERDAM, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE CONSULATE-GENERAL OF THE KINGDOM OF THE NETHERLANDS*

*AND*

*NEDERLANDSE ADMINISTRATIE DER BELASTINGEN ( NETHERLANDS INLAND REVENUE ADMINISTRATION ), REPRESENTED BY THE INSPECTOR OF CUSTOMS AND EXCISE AT ZAANDAM, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE NETHERLANDS EMBASSY,*

Subject of the case

*ON THE FOLLOWING QUESTIONS :*

*1 . WHETHER ARTICLE 12 OF THE EEC TREATY HAS DIRECT APPLICATION WITHIN THE TERRITORY OF A MEMBER STATE, IN OTHER WORDS, WHETHER NATIONALS OF SUCH A STATE CAN, ON THE BASIS OF THE ARTICLE IN QUESTION, LAY CLAIM TO INDIVIDUAL RIGHTS WHICH THE COURTS MUST PROTECT;*

*2 . IN THE EVENT OF AN AFFIRMATIVE REPLY, WHETHER THE APPLICATION OF AN IMPORT DUTY OF 8% TO THE IMPORT INTO THE NETHERLANDS BY THE APPLICANT IN THE MAIN ACTION OF UREA-FORMALDEHYDE ORIGINATING IN THE FEDERAL REPUBLIC OF GERMANY REPRESENTED AN UNLAWFUL INCREASE WITHIN THE MEANING OF ARTICLE 12 OF THE EEC TREATY OR WHETHER IT WAS IN THIS CASE A REASONABLE ALTERATION OF THE DUTY APPLICABLE BEFORE 1 MARCH 1960, AN ALTERATION WHICH, ALTHOUGH AMOUNTING TO AN INCREASE FROM THE ARITHMETICAL POINT OF VIEW, IS NEVERTHELESS NOT TO BE REGARDED AS PROHIBITED UNDER THE TERMS OF ARTICLE 12;*

Grounds

*I - PROCEDURE*

*NO OBJECTION HAS BEEN RAISED CONCERNING THE PROCEDURAL VALIDITY OF THE REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE TARIEFKOMMISSIE, A COURT OR TRIBUNAL WITHIN THE MEANING OF THAT ARTICLE . FURTHER, NO GROUNDS EXIST FOR THE COURT TO RAISE THE MATTER OF ITS OWN MOTION .*

*II - THE FIRST QUESTION*

*A - JURISDICTION OF THE COURT*

*THE GOVERNMENT OF THE NETHERLANDS AND THE BELGIAN GOVERNMENT CHALLENGE THE JURISDICTION OF THE COURT ON THE GROUND THAT THE REFERENCE RELATES NOT TO THE INTERPRETATION BUT TO THE APPLICATION OF THE TREATY IN THE CONTEXT OF THE CONSTITUTIONAL LAW OF THE NETHERLANDS, AND THAT IN PARTICULAR THE COURT HAS NO JURISDICTION TO DECIDE, SHOULD THE OCCASION ARISE, WHETHER THE PROVISIONS OF THE EEC TREATY PREVAIL OVER NETHERLANDS LEGISLATION OR OVER OTHER AGREEMENTS ENTERED INTO BY THE NETHERLANDS AND INCORPORATED INTO DUTCH NATIONAL LAW . THE SOLUTION OF SUCH A PROBLEM, IT IS CLAIMED, FALLS WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL COURTS, SUBJECT TO AN APPLICATION IN ACCORDANCE WITH THE PROVISIONS LAID DOWN BY ARTICLES 169 AND 170 OF THE TREATY .*

*HOWEVER IN THIS CASE THE COURT IS NOT ASKED TO ADJUDICATE UPON THE APPLICATION OF THE TREATY ACCORDING TO THE PRINCIPLES OF THE NATIONAL LAW OF THE NETHERLANDS, WHICH REMAINS THE CONCERN OF THE NATIONAL COURTS, BUT IS ASKED, IN CONFORMITY WITH SUBPARAGRAPH ( A ) OF THE FIRST PARAGRAPH OF ARTICLE 177 OF THE TREATY, ONLY TO INTERPRET THE SCOPE OF ARTICLE 12 OF THE SAID TREATY WITHIN THE CONTEXT OF COMMUNITY LAW AND WITH REFERENCE TO ITS EFFECT ON INDIVIDUALS . THIS ARGUMENT HAS THEREFORE NO LEGAL FOUNDATION .*

*THE BELGIAN GOVERNMENT FURTHER ARGUES THAT THE COURT HAS NO JURISDICTION ON THE GROUND THAT NO ANSWER WHICH THE COURT COULD GIVE TO THE FIRST QUESTION OF THE TARIEFKOMMISSIE WOULD HAVE ANY BEARING ON THE RESULT OF THE PROCEEDINGS BROUGHT IN THAT COURT .*

*HOWEVER, IN ORDER TO CONFER JURISDICTION ON THE COURT IN THE PRESENT CASE IT IS NECESSARY ONLY THAT THE QUESTION RAISED SHOULD CLEARLY BE CONCERNED WITH THE INTERPRETATION OF THE TREATY . THE CONSIDERATIONS WHICH MAY HAVE LED A NATIONAL COURT OR TRIBUNAL TO ITS CHOICE OF QUESTIONS AS WELL AS THE RELEVANCE WHICH IT ATTRIBUTES TO SUCH QUESTIONS IN THE CONTEXT OF A CASE BEFORE IT ARE EXCLUDED FROM REVIEW BY THE COURT OF JUSTICE . IT APPEARS FROM THE WORDING OF THE QUESTIONS REFERRED THAT THEY RELATE TO THE INTERPRETATION OF THE TREATY . THE COURT THEREFORE HAS THE JURISDICTION TO ANSWER THEM .*

*THIS ARGUMENT, TOO, IS THEREFORE UNFOUNDED .*

*B - ON THE SUBSTANCE OF THE CASE*

*THE FIRST QUESTION OF THE TARIEFKOMMISSIE IS WHETHER ARTICLE 12 OF THE TREATY HAS DIRECT APPLICATION IN NATIONAL LAW IN THE SENSE THAT NATIONALS OF MEMBER STATES MAY ON THE BASIS OF THIS ARTICLE LAY CLAIM TO RIGHTS WHICH THE NATIONAL COURT MUST PROTECT .*

*TO ASCERTAIN WHETHER THE PROVISIONS OF AN INTERNATIONAL TREATY EXTEND SO FAR IN THEIR EFFECTS IT IS NECESSARY TO CONSIDER THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THOSE PROVISIONS .*

*THE OBJECTIVE OF THE EEC TREATY, WHICH IS TO ESTABLISH A COMMON MARKET, THE FUNCTIONING OF WHICH IS OF DIRECT CONCERN TO INTERESTED PARTIES IN THE COMMUNITY, IMPLIES THAT THIS TREATY IS MORE THAN AN AGREEMENT WHICH MERELY CREATES MUTUAL OBLIGATIONS BETWEEN THE CONTRACTING STATES . THIS VIEW IS CONFIRMED BY THE PREAMBLE TO THE TREATY WHICH REFERS NOT ONLY TO GOVERNMENTS BUT TO PEOPLES . IT IS ALSO CONFIRMED MORE SPECIFICALLY BY THE ESTABLISHMENT OF INSTITUTIONS ENDOWED WITH SOVEREIGN RIGHTS, THE EXERCISE OF WHICH AFFECTS MEMBER STATES AND ALSO THEIR CITIZENS . FURTHERMORE, IT MUST BE NOTED THAT THE NATIONALS OF THE STATES BROUGHT TOGETHER IN THE COMMUNITY ARE CALLED UPON TO COOPERATE IN THE FUNCTIONING OF THIS*

COMMUNITY THROUGH THE INTERMEDIARY OF THE EUROPEAN PARLIAMENT AND THE ECONOMIC AND SOCIAL COMMITTEE .

IN ADDITION THE TASK ASSIGNED TO THE COURT OF JUSTICE UNDER ARTICLE 177, THE OBJECT OF WHICH IS TO SECURE UNIFORM INTERPRETATION OF THE TREATY BY NATIONAL COURTS AND TRIBUNALS, CONFIRMS THAT THE STATES HAVE ACKNOWLEDGED THAT COMMUNITY LAW HAS AN AUTHORITY WHICH CAN BE INVOKED BY THEIR NATIONALS BEFORE THOSE COURTS AND TRIBUNALS . THE CONCLUSION TO BE DRAWN FROM THIS IS THAT THE COMMUNITY CONSTITUTES A NEW LEGAL ORDER OF INTERNATIONAL LAW FOR THE BENEFIT OF WHICH THE STATES HAVE LIMITED THEIR SOVEREIGN RIGHTS, ALBEIT WITHIN LIMITED FIELDS, AND THE SUBJECTS OF WHICH COMPRISE NOT ONLY MEMBER STATES BUT ALSO THEIR NATIONALS . INDEPENDENTLY OF THE LEGISLATION OF MEMBER STATES, COMMUNITY LAW THEREFORE NOT ONLY IMPOSES OBLIGATIONS ON INDIVIDUALS BUT IS ALSO INTENDED TO CONFER UPON THEM RIGHTS WHICH BECOME PART OF THEIR LEGAL HERITAGE . THESE RIGHTS ARISE NOT ONLY WHERE THEY ARE EXPRESSLY GRANTED BY THE TREATY, BUT ALSO BY REASON OF OBLIGATIONS WHICH THE TREATY IMPOSES IN A CLEARLY DEFINED WAY UPON INDIVIDUALS AS WELL AS UPON THE MEMBER STATES AND UPON THE INSTITUTIONS OF THE COMMUNITY .

WITH REGARD TO THE GENERAL SCHEME OF THE TREATY AS IT RELATES TO CUSTOMS DUTIES AND CHARGES HAVING EQUIVALENT EFFECT IT MUST BE EMPHASIZED THAT ARTICLE 9, WHICH BASES THE COMMUNITY UPON A CUSTOMS UNION, INCLUDES AS AN ESSENTIAL PROVISION THE PROHIBITION OF THESE CUSTOMS DUTIES AND CHARGES . THIS PROVISION IS FOUND AT THE BEGINNING OF THE PART OF THE TREATY WHICH DEFINES THE 'FOUNDATIONS OF THE COMMUNITY' . IT IS APPLIED AND EXPLAINED BY ARTICLE 12 .

THE WORDING OF ARTICLE 12 CONTAINS A CLEAR AND UNCONDITIONAL PROHIBITION WHICH IS NOT A POSITIVE BUT A NEGATIVE OBLIGATION . THIS OBLIGATION, MOREOVER, IS NOT QUALIFIED BY ANY RESERVATION ON THE PART OF STATES WHICH WOULD MAKE ITS IMPLEMENTATION CONDITIONAL UPON A POSITIVE LEGISLATIVE MEASURE ENACTED UNDER NATIONAL LAW . THE VERY NATURE OF THIS PROHIBITION MAKES IT IDEALLY ADAPTED TO PRODUCE DIRECT EFFECTS IN THE LEGAL RELATIONSHIP BETWEEN MEMBER STATES AND THEIR SUBJECTS .

THE IMPLEMENTATION OF ARTICLE 12 DOES NOT REQUIRE ANY LEGISLATIVE INTERVENTION ON THE PART OF THE STATES . THE FACT THAT UNDER THIS ARTICLE IT IS THE MEMBER STATES WHO ARE MADE THE SUBJECT OF THE NEGATIVE OBLIGATION DOES NOT IMPLY THAT THEIR NATIONALS CANNOT BENEFIT FROM THIS OBLIGATION .

IN ADDITION THE ARGUMENT BASED ON ARTICLES 169 AND 170 OF THE TREATY PUT FORWARD BY THE THREE GOVERNMENTS WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT IN THEIR STATEMENTS OF CASE IS MISCONCEIVED . THE FACT THAT THESE ARTICLES OF THE TREATY ENABLE THE COMMISSION AND THE MEMBER STATES TO BRING BEFORE THE COURT A STATE WHICH HAS NOT FULFILLED ITS OBLIGATIONS DOES NOT MEAN THAT INDIVIDUALS CANNOT PLEAD THESE OBLIGATIONS, SHOULD THE OCCASION ARISE, BEFORE A NATIONAL COURT, ANY MORE THAN THE FACT THAT THE TREATY PLACES AT THE DISPOSAL OF THE COMMISSION WAYS OF ENSURING THAT OBLIGATIONS IMPOSED UPON THOSE SUBJECT TO THE TREATY ARE OBSERVED, PRECLUDES THE POSSIBILITY, IN ACTIONS BETWEEN INDIVIDUALS BEFORE A NATIONAL COURT, OF PLEADING INFRINGEMENTS OF THESE OBLIGATIONS .

A RESTRICTION OF THE GUARANTEES AGAINST AN INFRINGEMENT OF ARTICLE 12 BY MEMBER STATES TO THE PROCEDURES UNDER ARTICLE 169 AND 170 WOULD REMOVE ALL DIRECT LEGAL PROTECTION OF THE INDIVIDUAL RIGHTS OF THEIR NATIONALS . THERE IS THE RISK THAT RECOURSE TO THE PROCEDURE UNDER THESE ARTICLES WOULD BE INEFFECTIVE IF IT WERE TO OCCUR AFTER THE IMPLEMENTATION OF A NATIONAL DECISION TAKEN CONTRARY TO THE PROVISIONS OF THE TREATY .

THE VIGILANCE OF INDIVIDUALS CONCERNED TO PROTECT THEIR RIGHTS AMOUNTS TO AN EFFECTIVE SUPERVISION IN ADDITION TO THE SUPERVISION ENTRUSTED BY ARTICLES 169 AND 170 TO THE DILIGENCE OF THE COMMISSION AND OF THE MEMBER STATES .

*IT FOLLOWS FROM THE FOREGOING CONSIDERATIONS THAT, ACCORDING TO THE SPIRIT, THE GENERAL SCHEME AND THE WORDING OF THE TREATY, ARTICLE 12 MUST BE INTERPRETED AS PRODUCING DIRECT EFFECTS AND CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT.*

### *III - THE SECOND QUESTION*

#### *A - THE JURISDICTION OF THE COURT*

*ACCORDING TO THE OBSERVATIONS OF THE BELGIAN AND NETHERLANDS GOVERNMENTS, THE WORDING OF THIS QUESTION APPEARS TO REQUIRE, BEFORE IT CAN BE ANSWERED, AN EXAMINATION BY THE COURT OF THE TARIFF CLASSIFICATION OF UREA-FORMALDEHYDE IMPORTED INTO THE NETHERLANDS, A CLASSIFICATION ON WHICH VAN GEND & LOOS AND THE INSPECTOR OF CUSTOMS AND EXCISE AT ZAANDAM HOLD DIFFERENT OPINIONS WITH REGARD TO THE 'TARIEFBESLUIT' OF 1947. THE QUESTION CLEARLY DOES NOT CALL FOR AN INTERPRETATION OF THE TREATY BUT CONCERNS THE APPLICATION OF NETHERLANDS CUSTOMS LEGISLATION TO THE CLASSIFICATION OF AMINOPLASTS, WHICH IS OUTSIDE THE JURISDICTION CONFERRED UPON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES BY SUBPARAGRAPH (A) OF THE FIRST PARAGRAPH OF ARTICLE 177.*

*THE COURT HAS THEREFORE NO JURISDICTION TO CONSIDER THE REFERENCE MADE BY THE TARIEFCOMMISSIE.*

*HOWEVER, THE REAL MEANING OF THE QUESTION PUT BY THE TARIEFCOMMISSIE IS WHETHER, IN LAW, AN EFFECTIVE INCREASE IN CUSTOMS DUTIES CHARGED ON A GIVEN PRODUCT AS A RESULT NOT OF AN INCREASE IN THE RATE BUT OF A NEW CLASSIFICATION OF THE PRODUCT ARISING FROM A CHANGE OF ITS TARIFF DESCRIPTION CONTRAVENES THE PROHIBITION IN ARTICLE 12 OF THE TREATY.*

*VIEWED IN THIS WAY THE QUESTION PUT IS CONCERNED WITH AN INTERPRETATION OF THIS PROVISION OF THE TREATY AND MORE PARTICULARLY OF THE MEANING WHICH SHOULD BE GIVEN TO THE CONCEPT OF DUTIES APPLIED BEFORE THE TREATY ENTERED INTO FORCE.*

*THEREFORE THE COURT HAS JURISDICTION TO GIVE A RULING ON THIS QUESTION.*

#### *B - ON THE SUBSTANCE*

*IT FOLLOWS FROM THE WORDING AND THE GENERAL SCHEME OF ARTICLE 12 OF THE TREATY THAT, IN ORDER TO ASCERTAIN WHETHER CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT HAVE BEEN INCREASED CONTRARY TO THE PROHIBITION CONTAINED IN THE SAID ARTICLE, REGARD MUST BE HAD TO THE CUSTOMS DUTIES AND CHARGES ACTUALLY APPLIED AT THE DATE OF THE ENTRY INTO FORCE OF THE TREATY.*

*FURTHER, WITH REGARD TO THE PROHIBITION IN ARTICLE 12 OF THE TREATY, SUCH AN ILLEGAL INCREASE MAY ARISE FROM A RE-ARRANGEMENT OF THE TARIFF RESULTING IN THE CLASSIFICATION OF THE PRODUCT UNDER A MORE HIGHLY TAXED HEADING AND FROM AN ACTUAL INCREASE IN THE RATE OF CUSTOMS DUTY.*

*IT IS OF LITTLE IMPORTANCE HOW THE INCREASE IN CUSTOMS DUTIES OCCURRED WHEN, AFTER THE TREATY ENTERED INTO FORCE, THE SAME PRODUCT IN THE SAME MEMBER STATE WAS SUBJECTED TO A HIGHER RATE OF DUTY.*

*THE APPLICATION OF ARTICLE 12, IN ACCORDANCE WITH THE INTERPRETATION GIVEN ABOVE, COMES WITHIN THE JURISDICTION OF THE NATIONAL COURT WHICH MUST ENQUIRE WHETHER THE DUTIABLE PRODUCT, IN THIS CASE UREA-FORMALDEHYDE ORIGINATING IN THE FEDERAL REPUBLIC OF GERMANY, IS CHARGED UNDER THE CUSTOMS MEASURES BROUGHT INTO FORCE IN THE NETHERLANDS WITH AN IMPORT DUTY HIGHER THAN THAT WITH WHICH IT WAS CHARGED ON 1 JANUARY 1958.*

*THE COURT HAS NO JURISDICTION TO CHECK THE VALIDITY OF THE CONFLICTING VIEWS ON THIS SUBJECT WHICH HAVE BEEN SUBMITTED TO IT DURING THE PROCEEDINGS BUT MUST LEAVE THEM TO BE DETERMINED BY THE NATIONAL COURTS .*

Decision on costs

*THE COSTS INCURRED BY THE COMMISSION OF THE EEC AND THE MEMBER STATES WHICH HAVE SUBMITTED THEIR OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE, AND AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, A STEP IN THE ACTION PENDING BEFORE THE TARIEFKOMMISSIE, THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .*

Operative part

*THE COURT*

*IN ANSWER TO THE QUESTIONS REFERRED TO IT FOR A PRELIMINARY RULING BY THE TARIEFKOMMISSIE BY DECISION OF 16 AUGUST 1962, HEREBY RULES :*

*1 . ARTICLE 12 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY PRODUCES DIRECT EFFECTS AND CREATES INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .*

*2 . IN ORDER TO ASCERTAIN WHETHER CUSTOMS DUTIES OR CHARGES HAVING EQUIVALENT EFFECT HAVE BEEN INCREASED CONTRARY TO THE PROHIBITION CONTAINED IN ARTICLE 12 OF THE TREATY, REGARD MUST BE HAD TO THE DUTIES AND CHARGES ACTUALLY APPLIED BY THE MEMBER STATE IN QUESTION AT THE DATE OF THE ENTRY INTO FORCE OF THE TREATY .*

*SUCH AN INCREASE CAN ARISE BOTH FROM A RE-ARRANGEMENT OF THE TARIFF RESULTING IN THE CLASSIFICATION OF THE PRODUCT UNDER A MORE HIGHLY TAXED HEADING AND FROM AN INCREASE IN THE RATE OF CUSTOMS DUTY APPLIED . 3 . THE DECISION AS TO COSTS IN THESE PROCEEDINGS IS A MATTER FOR THE TARIEFKOMMISSIE.*



**Case 6/64, *Flaminio Costa v E.N.E.L.***

Parties

*IN CASE 6/64*

*REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE GIUDICE CONCILIATORE, MILAN, FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN*

*FLAMINIO COSTA AND*

*ENEL ( ENTE NAZIONALE ENERGIA ELETTRICA ( NATIONAL ELECTRICITY BOARD ), FORMERLY THE EDISON VOLTA UNDERTAKING )*

Subject of the case

*ON THE INTERPRETATION OF ARTICLES 102, 93, 53 AND 37 OF THE SAID TREATY*

Grounds

*BY ORDER DATED 16 JANUARY 1964, DULY SENT TO THE COURT, THE GIUDICE CONCILIATORE OF MILAN, ' HAVING REGARD TO ARTICLE 177 OF THE TREATY OF 25 MARCH 1957 ESTABLISHING THE EEC, INCORPORATED INTO ITALIAN LAW BY LAW N . 1203 OF 14 OCTOBER 1957, AND HAVING REGARD TO THE ALLEGATION THAT LAW N . 1643 OF 6 DECEMBER 1962 AND THE PRESIDENTIAL DECREES ISSUED IN EXECUTION OF THAT LAW...INFRINGE ARTICLES 102, 93, 53 AND 37 OF THE AFOREMENTIONED TREATY ', STAYED THE PROCEEDINGS AND ORDERED THAT THE FILE BE TRANSMITTED TO THE COURT OF JUSTICE .*

*ON THE APPLICATION OF ARTICLE 177*

*ON THE SUBMISSION REGARDING THE WORKING OF THE QUESTION*

*THE COMPLAINT IS MADE THAT THE INTENTION BEHIND THE QUESTION POSED WAS TO OBTAIN, BY MEANS OF ARTICLE 177, A RULING ON THE COMPATIBILITY OF A NATIONAL LAW WITH THE TREATY .*

*BY THE TERMS OF THIS ARTICLE, HOWEVER, NATIONAL COURTS AGAINST WHOSE DECISIONS, AS IN THE PRESENT CASE, THERE IS NO JUDICIAL REMEDY, MUST REFER THE MATTER TO THE COURT OF JUSTICE SO THAT A PRELIMINARY RULING MAY BE GIVEN UPON THE ' INTERPRETATION OF THE TREATY ' WHENEVER A QUESTION OF INTERPRETATION IS RAISED BEFORE THEM . THIS PROVISION GIVES THE COURT NO JURISDICTION EITHER TO APPLY THE TREATY TO A SPECIFIC CASE OR TO DECIDE UPON THE VALIDITY OF A PROVISION OF DOMESTIC LAW IN RELATION TO THE TREATY, AS IT WOULD BE POSSIBLE FOR IT TO DO UNDER ARTICLE 169 .*

*NEVERTHELESS, THE COURT HAS POWER TO EXTRACT FROM A QUESTION IMPERFECTLY FORMULATED BY THE NATIONAL COURT THOSE QUESTIONS WHICH ALONE PERTAIN TO THE INTERPRETATION OF THE TREATY . CONSEQUENTLY A DECISION SHOULD BE GIVEN BY THE COURT NOT UPON THE VALIDITY OF AN ITALIAN LAW IN RELATION TO THE TREATY, BUT ONLY UPON THE INTERPRETATION OF THE ABOVEMENTIONED ARTICLES IN THE CONTEXT OF THE POINTS OF LAW STATED BY THE GIUDICE CONCILIATORE .*

*ON THE SUBMISSION THAT AN INTERPRETATION IS NOT NECESSARY*

*THE COMPLAINT IS MADE THAT THE MILAN COURT HAS REQUESTED AN INTERPRETATION OF THE TREATY WHICH WAS NOT NECESSARY FOR THE SOLUTION OF THE DISPUTE BEFORE IT .*

*SINCE, HOWEVER, ARTICLE 177 IS BASED UPON A CLEAR SEPARATION OF FUNCTIONS BETWEEN NATIONAL COURTS AND THE COURT OF JUSTICE, IT CANNOT EMPOWER THE LATTER EITHER TO INVESTIGATE THE FACTS OF THE CASE OR TO CRITICIZE THE GROUNDS AND PURPOSE OF THE REQUEST FOR INTERPRETATION .*

*ON THE SUBMISSION THAT THE COURT WAS OBLIGED TO APPLY THE NATIONAL LAW*

*THE ITALIAN GOVERNMENT SUBMITS THAT THE REQUEST OF THE GIUDICE CONCILIATORE IS ' ABSOLUTELY INADMISSIBLE ', INASMUCH AS A NATIONAL COURT WHICH IS OBLIGED TO APPLY A NATIONAL LAW CANNOT AVAIL ITSELF OF ARTICLE 177 .*

*BY CONTRAST WITH ORDINARY INTERNATIONAL TREATIES, THE EEC TREATY HAS CREATED ITS OWN LEGAL SYSTEM WHICH, ON THE ENTRY INTO FORCE OF THE TREATY, BECAME AN INTEGRAL PART OF THE LEGAL SYSTEMS OF THE MEMBER STATES AND WHICH THEIR COURTS ARE BOUND TO APPLY .*

*BY CREATING A COMMUNITY OF UNLIMITED DURATION, HAVING ITS OWN INSTITUTIONS, ITS OWN PERSONALITY, ITS OWN LEGAL CAPACITY AND CAPACITY OF REPRESENTATION ON THE INTERNATIONAL PLANE AND, MORE PARTICULARLY, REAL POWERS STEMMING FROM A LIMITATION OF SOVEREIGNTY OR A TRANSFER OF POWERS FROM THE STATES TO THE COMMUNITY, THE MEMBER STATES HAVE LIMITED THEIR SOVEREIGN RIGHTS, ALBEIT WITHIN LIMITED FIELDS, AND HAVE THUS CREATED A BODY OF LAW WHICH BINDS BOTH THEIR NATIONALS AND THEMSELVES .*

*THE INTEGRATION INTO THE LAWS OF EACH MEMBER STATE OF PROVISIONS WHICH DERIVE FROM THE COMMUNITY, AND MORE GENERALLY THE TERMS AND THE SPIRIT OF THE TREATY, MAKE IT IMPOSSIBLE FOR THE STATES, AS A COROLLARY, TO ACCORD PRECEDENCE TO A UNILATERAL AND SUBSEQUENT MEASURE OVER A LEGAL SYSTEM ACCEPTED BY THEM ON A BASIS OF RECIPROCITY . SUCH A MEASURE CANNOT THEREFORE BE INCONSISTENT WITH THAT LEGAL SYSTEM . THE EXECUTIVE FORCE OF COMMUNITY LAW CANNOT VARY FROM ONE STATE TO ANOTHER IN DEFERENCE TO SUBSEQUENT DOMESTIC LAWS, WITHOUT JEOPARDIZING THE ATTAINMENT OF THE OBJECTIVES OF THE TREATY SET OUT IN ARTICLE 5 ( 2 ) AND GIVING RISE TO THE DISCRIMINATION PROHIBITED BY ARTICLE 7 .*

*THE OBLIGATIONS UNDERTAKEN UNDER THE TREATY ESTABLISHING THE COMMUNITY WOULD NOT BE UNCONDITIONAL, BUT MERELY CONTINGENT, IF THEY COULD BE CALLED IN QUESTION BY SUBSEQUENT LEGISLATIVE ACTS OF THE SIGNATORIES . WHEREVER THE TREATY GRANTS THE STATES THE RIGHT TO ACT UNILATERALLY, IT DOES THIS BY CLEAR AND PRECISE PROVISIONS ( FOR EXAMPLE ARTICLES 15, 93 ( 3 ), 223, 224 AND 225 ). APPLICATIONS, BY MEMBER STATES FOR AUTHORITY TO DEROGATE FROM THE TREATY ARE SUBJECT TO A SPECIAL AUTHORIZATION PROCEDURE ( FOR EXAMPLE ARTICLES 8 ( 4 ), 17 ( 4 ), 25, 26, 73, THE THIRD SUBPARAGRAPH OF ARTICLE 93 ( 2 ), AND 226 ) WHICH WOULD LOSE THEIR PURPOSE IF THE MEMBER STATES COULD RENOUNCE THEIR OBLIGATIONS BY MEANS OF AN ORDINARY LAW .*

*THE PRECEDENCE OF COMMUNITY LAW IS CONFIRMED BY ARTICLE 189, WHEREBY A REGULATION ' SHALL BE BINDING ' AND ' DIRECTLY APPLICABLE IN ALL MEMBER STATES ' . THIS PROVISION, WHICH IS SUBJECT TO NO RESERVATION, WOULD BE QUITE MEANINGLESS IF A STATE COULD UNILATERALLY NULLIFY ITS EFFECTS BY MEANS OF A LEGISLATIVE MEASURE WHICH COULD PREVAIL OVER COMMUNITY LAW .*

*IT FOLLOWS FROM ALL THESE OBSERVATIONS THAT THE LAW STEMMING FROM THE TREATY, AN INDEPENDENT SOURCE OF LAW, COULD NOT, BECAUSE OF ITS SPECIAL AND ORIGINAL NATURE, BE OVERRIDDEN BY DOMESTIC LEGAL PROVISIONS, HOWEVER FRAMED, WITHOUT BEING*

*DEPRIVED OF ITS CHARACTER AS COMMUNITY LAW AND WITHOUT THE LEGAL BASIS OF THE COMMUNITY ITSELF BEING CALLED INTO QUESTION .*

*THE TRANSFER BY THE STATES FROM THEIR DOMESTIC LEGAL SYSTEM TO THE COMMUNITY LEGAL SYSTEM OF THE RIGHTS AND OBLIGATIONS ARISING UNDER THE TREATY CARRIES WITH IT A PERMANENT LIMITATION OF THEIR SOVEREIGN RIGHTS, AGAINST WHICH A SUBSEQUENT UNILATERAL ACT INCOMPATIBLE WITH THE CONCEPT OF THE COMMUNITY CANNOT PREVAIL . CONSEQUENTLY ARTICLE 177 IS TO BE APPLIED REGARDLESS OF ANY DOMESTIC LAW, WHENEVER QUESTIONS RELATING TO THE INTERPRETATION OF THE TREATY ARISE .*

*THE QUESTIONS PUT BY THE GIUDICE CONCILIATORE REGARDING ARTICLES 102, 93, 53, AND 37 ARE DIRECTED FIRST TO ENQUIRING WHETHER THESE PROVISIONS PRODUCE DIRECT EFFECTS AND CREATE INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT, AND, IF SO, WHAT THEIR MEANING IS .*

#### *ON THE INTERPRETATION OF ARTICLE 102*

*ARTICLE 102 PROVIDES THAT, WHERE ' THERE IS REASON TO FEAR ' THAT A PROVISION LAID DOWN BY LAW MAY CAUSE ' DISTORTION ', THE MEMBER STATE DESIRING TO PROCEED THEREWITH SHALL ' CONSULT THE COMMISSION ' ; THE COMMISSION HAS POWER TO RECOMMEND TO THE MEMBER STATES THE ADOPTION OF SUITABLE MEASURES TO AVOID THE DISTORTION FEARED .*

*THIS ARTICLE, PLACED IN THE CHAPTER DEVOTED TO THE ' APPROXIMATION OF LAWS ', IS DESIGNED TO PREVENT THE DIFFERENCES BETWEEN THE LEGISLATION OF THE DIFFERENT NATIONS WITH REGARD TO THE OBJECTIVES OF THE TREATY FROM BECOMING MORE PRONOUNCED .*

*BY VIRTUE OF THIS PROVISION, MEMBER STATES HAVE LIMITED THEIR FREEDOM OF INITIATIVE BY AGREEING TO SUBMIT TO AN APPROPRIATE PROCEDURE OF CONSULTATION . BY BINDING THEMSELVES UNAMBIGUOUSLY TO PRIOR CONSULTATION WITH THE COMMISSION IN ALL THOSE CASES WHERE THEIR PROJECTED LEGISLATION MIGHT CREATE A RISK, HOWEVER SLIGHT, OF A POSSIBLE DISTORTION, THE STATES HAVE UNDERTAKEN AN OBLIGATION TO THE COMMUNITY WHICH BINDS THEM AS STATES, BUT WHICH DOES NOT CREATE INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT . FOR ITS PART, THE COMMISSION IS BOUND TO ENSURE RESPECT FOR THE PROVISIONS OF THIS ARTICLE, BUT THIS OBLIGATION DOES NOT GIVE INDIVIDUALS THE RIGHT TO ALLEGE, WITHIN THE FRAMEWORK OF COMMUNITY LAW AND BY MEANS OF ARTICLE 177 EITHER FAILURE BY THE STATE CONCERNED TO FULFIL ANY OF ITS OBLIGATIONS OR BREACH OF DUTY ON THE PART OF THE COMMISSION .*

#### *ON THE INTERPRETATION OF ARTICLE 93*

*UNDER ARTICLE 93 ( 1 ) AND ( 2 ), THE COMMISSION, IN COOPERATION WITH MEMBER STATES, IS TO ' KEEP UNDER CONSTANT REVIEW ALL SYSTEMS OF AID EXISTING IN THOSE STATES ' WITH A VIEW TO THE ADOPTION OF APPROPRIATE MEASURES REQUIRED BY THE FUNCTIONING OF THE COMMON MARKET .*

*BY VIRTUE OF ARTICLE 93 ( 3 ), THE COMMISSION IS TO BE INFORMED, IN SUFFICIENT TIME, OF ANY PLANS TO GRANT OR ALTER AID, THE MEMBER STATE CONCERNED NOT BEING ENTITLED TO PUT ITS PROPOSED MEASURES INTO EFFECT UNTIL THE COMMUNITY PROCEDURE, AND, IF NECESSARY, ANY PROCEEDINGS BEFORE THE COURT OF JUSTICE, HAVE BEEN COMPLETED .*

*THESE PROVISIONS, CONTAINED IN THE SECTION OF THE TREATY HEADED ' AIDS GRANTED BY STATES ', ARE DESIGNED, ON THE ONE HAND, TO ELIMINATE PROGRESSIVELY EXISTING AIDS AND, ON THE OTHER HAND, TO PREVENT THE INDIVIDUAL STATES IN THE CONDUCT OF THEIR INTERNAL AFFAIRS FROM INTRODUCING NEW AIDS ' IN ANY FORM WHATSOEVER ' WHICH ARE LIKELY DIRECTLY OR INDIRECTLY TO FAVOUR CERTAIN UNDERTAKINGS OR PRODUCTS IN AN APPRECIABLE WAY, AND WHICH THREATEN, EVEN POTENTIALLY, TO DISTORT COMPETITION . BY VIRTUE OF ARTICLE 92, THE MEMBER STATES HAVE ACKNOWLEDGED THAT SUCH AIDS ARE*

*INCOMPATIBLE WITH THE COMMON MARKET AND HAVE THUS IMPLICITLY UNDERTAKEN NOT TO CREATE ANY MORE, SAVE AS OTHERWISE PROVIDED IN THE TREATY; IN ARTICLE 93, ON THE OTHER HAND, THEY HAVE MERELY AGREED TO SUBMIT THEMSELVES TO APPROPRIATE PROCEDURES FOR THE ABOLITION OF EXISTING AIDS AND THE INTRODUCTION OF NEW ONES .*

*BY SO EXPRESSLY UNDERTAKING TO INFORM THE COMMISSION ' IN SUFFICIENT TIME ' OF ANY PLANS FOR AID, AND BY ACCEPTING THE PROCEDURES LAID DOWN IN ARTICLE 93, THE STATES HAVE ENTERED INTO AN OBLIGATION WITH THE COMMUNITY, WHICH BINDS THEM AS STATES BUT CREATES NO INDIVIDUAL RIGHTS EXCEPT IN THE CASE OF THE FINAL PROVISION OF ARTICLE 93 ( 3 ), WHICH IS NOT IN QUESTION IN THE PRESENT CASE .*

*FOR ITS PART, THE COMMISSION IS BOUND TO ENSURE RESPECT FOR THE PROVISIONS OF THIS ARTICLE, AND IS REQUIRED, IN COOPERATION WITH MEMBER STATES, TO KEEP UNDER CONSTANT REVIEW EXISTING SYSTEMS OF AIDS . THIS OBLIGATION DOES NOT, HOWEVER, GIVE INDIVIDUALS THE RIGHT TO PLEAD, WITHIN THE FRAMEWORK OF COMMUNITY LAW AND BY MEANS OF ARTICLE 177, EITHER FAILURE BY THE STATE CONCERNED TO FULFIL ANY OF ITS OBLIGATIONS OR BREACH OF DUTY ON THE PART OF THE COMMISSION .*

#### *ON THE INTERPRETATION OF ARTICLE 53*

*BY ARTICLE 53 THE MEMBER STATES UNDERTAKE NOT TO INTRODUCE ANY NEW RESTRICTIONS ON THE RIGHT OF ESTABLISHMENT IN THEIR TERRITORIES OF NATIONALS OF OTHER MEMBER STATES, SAVE AS OTHERWISE PROVIDED IN THE TREATY . THE OBLIGATION THUS ENTERED INTO BY THE STATES SIMPLY AMOUNTS LEGALLY TO A DUTY NOT TO ACT, WHICH IS NEITHER SUBJECT TO ANY CONDITIONS, NOR, AS REGARDS ITS EXECUTION OR EFFECT, TO THE ADOPTION OF ANY MEASURE EITHER BY THE STATES OR BY THE COMMISSION . IT IS THEREFORE LEGALLY COMPLETE IN ITSELF AND IS CONSEQUENTLY CAPABLE OF PRODUCING DIRECT EFFECTS ON THE RELATIONS BETWEEN MEMBER STATES AND INDIVIDUALS . SUCH AN EXPRESS PROHIBITION WHICH CAME INTO FORCE WITH THE TREATY THROUGHOUT THE COMMUNITY, AND THUS BECAME AN INTEGRAL PART OF THE LEGAL SYSTEM OF THE MEMBER STATES, FORMS PART OF THE LAW OF THOSE STATES AND DIRECTLY CONCERNS THEIR NATIONALS, IN WHOSE FAVOUR IT HAS CREATED INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .*

*THE INTERPRETATION OF ARTICLE 53 WHICH IS SOUGHT REQUIRES THAT IT BE CONSIDERED IN THE CONTEXT OF THE CHAPTER RELATING TO THE RIGHT OF ESTABLISHMENT IN WHICH IT OCCURS . AFTER ENACTING IN ARTICLE 52 THAT ' RESTRICTIONS ON THE FREEDOM OF ESTABLISHMENT OF NATIONALS OF A MEMBER STATE IN THE TERRITORY OF ANOTHER MEMBER STATE SHALL BE ABOLISHED BY PROGRESSIVE STAGES ', THIS CHAPTER GOES ON IN ARTICLE 53 TO PROVIDE THAT ' MEMBER STATES SHALL NOT INTRODUCE ANY NEW RESTRICTIONS ON THE RIGHT OF ESTABLISHMENT IN THEIR TERRITORIES OF NATIONALS OF OTHER MEMBER STATES '. THE QUESTION IS, THEREFORE, ON WHAT CONDITIONS THE NATIONALS OF OTHER MEMBER STATES HAVE A RIGHT OF ESTABLISHMENT . THIS IS DEALT WITH BY THE SECOND PARAGRAPH OF ARTICLE 52, WHERE IT IS STATED THAT FREEDOM OF ESTABLISHMENT SHALL INCLUDE THE RIGHT TO TAKE UP AND PURSUE ACTIVITIES AS SELF-EMPLOYED PERSONS AND TO SET UP AND MANAGE UNDERTAKINGS ' UNDER THE CONDITIONS LAID DOWN FOR ITS OWN NATIONALS BY THE LAW OF THE COUNTRY WHERE SUCH ESTABLISHMENT IS EFFECTED ' .*

*ARTICLE 53 IS THEREFORE SATISFIED SO LONG AS NO NEW MEASURE SUBJECTS THE ESTABLISHMENT OF NATIONALS OF OTHER MEMBER STATES TO MORE SEVERE RULES THAN THOSE PRESCRIBED FOR NATIONALS OF THE COUNTRY OF ESTABLISHMENT, WHATEVER THE LEGAL SYSTEM GOVERNING THE UNDERTAKING .*

#### *ON THE INTERPRETATION OF ARTICLE 37*

*ARTICLE 37 ( 1 ) PROVIDES THAT MEMBER STATES SHALL PROGRESSIVELY ADJUST ANY ' STATE MONOPOLIES OF A COMMERCIAL CHARACTER ' SO AS TO ENSURE THAT NO DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED EXISTS BETWEEN NATIONALS OF MEMBER STATES . BY ARTICLE 37 ( 2 ), THE MEMBER STATES ARE UNDER*

*AN OBLIGATION TO REFRAIN FROM INTRODUCING ANY NEW MEASURE WHICH IS CONTRARY TO THE PRINCIPLES LAID DOWN IN ARTICLE 37 ( 1 ).*

*THUS, MEMBER STATES HAVE UNDERTAKEN A DUAL OBLIGATION : IN THE FIRST PLACE, AN ACTIVE ONE TO ADJUST STATE MONOPOLIES, IN THE SECOND PLACE, A PASSIVE ONE TO AVOID ANY NEW MEASURES. THE INTERPRETATION REQUESTED IS OF THE SECOND OBLIGATION TOGETHER WITH ANY ASPECTS OF THE FIRST NECESSARY FOR THIS INTERPRETATION .*

*ARTICLE 37 ( 2 ) CONTAINS AN ABSOLUTE PROHIBITION : NOT AN OBLIGATION TO DO SOMETHING BUT AN OBLIGATION TO REFRAIN FROM DOING SOMETHING . THIS OBLIGATION IS NOT ACCOMPANIED BY ANY RESERVATION WHICH MIGHT MAKE ITS IMPLEMENTATION SUBJECT TO ANY POSITIVE ACT OF NATIONAL LAW . THIS PROHIBITION IS ESSENTIALLY ONE WHICH IS CAPABLE OF PRODUCING DIRECT EFFECTS ON THE LEGAL RELATIONS BETWEEN MEMBER STATES AND THEIR NATIONALS .*

*SUCH A CLEARLY EXPRESSED PROHIBITION WHICH CAME INTO FORCE WITH THE TREATY THROUGHOUT THE COMMUNITY, AND SO BECAME AN INTEGRAL PART OF THE LEGAL SYSTEM OF THE MEMBER STATES, FORMS PART OF THE LAW OF THOSE STATES AND DIRECTLY CONCERNS THEIR NATIONALS, IN WHOSE FAVOUR IT CREATES INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT . BY REASON OF THE COMPLEXITY OF THE WORDING AND THE FACT THAT ARTICLES 37 ( 1 ) AND 37 ( 2 ) OVERLAP, THE INTERPRETATION REQUESTED MAKES IT NECESSARY TO EXAMINE THEM AS PART OF THE CHAPTER IN WHICH THEY OCCUR . THIS CHAPTER DEALS WITH THE ' ELIMINATION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES ' . THE OBJECT OF THE REFERENCE IN ARTICLE 37 ( 2 ) TO ' THE PRINCIPLES LAID DOWN IN PARAGRAPH ( 1 ) ' IS THUS TO PREVENT THE ESTABLISHMENT OF ANY NEW ' DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED...BETWEEN NATIONALS OF MEMBER STATES ' . HAVING SPECIFIED THE OBJECTIVE IN THIS WAY, ARTICLE 37 ( 1 ) SETS OUT THE WAYS IN WHICH THIS OBJECTIVE MIGHT BE THWARTED IN ORDER TO PROHIBIT THEM .*

*THUS, BY THE REFERENCE IN ARTICLE 37 ( 2 ), ANY NEW MONOPOLIES OR BODIES SPECIFIED IN ARTICLE 37 ( 1 ) ARE PROHIBITED IN SO FAR AS THEY TEND TO INTRODUCE NEW CASES OF DISCRIMINATION REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED . IT IS THEREFORE A MATTER FOR THE COURT DEALING WITH THE MAIN ACTION FIRST TO EXAMINE WHETHER THIS OBJECTIVE IS BEING HAMPERED, THAT IS WHETHER ANY NEW DISCRIMINATION BETWEEN NATIONALS OF MEMBER STATES REGARDING THE CONDITIONS UNDER WHICH GOODS ARE PROCURED AND MARKETED RESULTS FROM THE DISPUTED MEASURE ITSELF OR WILL BE THE CONSEQUENCE THEREOF .*

*THERE REMAIN TO BE CONSIDERED THE MEANS ENVISAGED BY ARTICLE 37 ( 1 ). IT DOES NOT PROHIBIT THE CREATION OF ANY STATE MONOPOLIES, BUT MERELY THOSE ' OF A COMMERCIAL CHARACTER ', AND THEN ONLY IN SO FAR AS THEY TEND TO INTRODUCE THE CASES OF DISCRIMINATION REFERRED TO . TO FALL UNDER THIS PROHIBITION THE STATE MONOPOLIES AND BODIES IN QUESTION MUST, FIRST, HAVE AS THEIR OBJECT TRANSACTIONS REGARDING A COMMERCIAL PRODUCT CAPABLE OF BEING THE SUBJECT OF COMPETITION AND TRADE BETWEEN MEMBER STATES, AND SECONDLY MUST PLAY AN EFFECTIVE PART IN SUCH TRADE .*

*IT IS A MATTER FOR THE COURT DEALING WITH THE MAIN ACTION TO ASSESS IN EACH CASE WHETHER THE ECONOMIC ACTIVITY UNDER REVIEW RELATES TO SUCH A PRODUCT WHICH, BY VIRTUE OF ITS NATURE AND THE TECHNICAL OR INTERNATIONAL CONDITIONS TO WHICH IT IS SUBJECT, IS CAPABLE OF PLAYING AN EFFECTIVE PART IN IMPORTS OR EXPORTS BETWEEN NATIONALS OF THE MEMBER STATES .*

Decision on costs

*THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY AND THE ITALIAN GOVERNMENT, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE AND AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION*

ARE CONCERNED, A STEP IN THE ACTION PENDING BEFORE THE GIUDICE CONCILIATORE, MILAN, THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

THE COURT

RULING UPON THE PLEA OF INADMISSIBILITY BASED ON ARTICLE 177 HEREBY DECLARES :

AS A SUBSEQUENT UNILATERAL MEASURE CANNOT TAKE PRECEDENCE OVER COMMUNITY LAW, THE QUESTIONS PUT BY THE GIUDICE CONCILIATORE, MILAN, ARE ADMISSIBLE IN SO FAR AS THEY RELATE IN THIS CASE TO THE INTERPRETATION OF PROVISIONS OF THE EEC TREATY;

AND ALSO RULES :

1 . ARTICLE 102 CONTAINS NO PROVISIONS WHICH ARE CAPABLE OF CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT;

2 . THOSE INDIVIDUAL PORTIONS OF ARTICLE 93 TO WHICH THE QUESTION RELATES EQUALLY CONTAIN NO SUCH PROVISIONS;

3 . ARTICLE 53 CONSTITUTES A COMMUNITY RULE CAPABLE OF CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT . IT PROHIBITS ANY NEW MEASURE WHICH SUBJECTS THE ESTABLISHMENT OF NATIONALS OF OTHER MEMBER STATES TO MORE SEVERE RULES THAN THOSE PRESCRIBED FOR NATIONALS OF THE COUNTRY OF ESTABLISHMENT, WHATEVER THE LEGAL SYSTEM GOVERNING THE UNDERTAKINGS .

4 . ARTICLE 37 ( 2 ) IS IN ALL ITS PROVISIONS A RULE OF COMMUNITY LAW CAPABLE OF CREATING INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .

IN SO FAR AS THE QUESTION PUT TO THE COURT IS CONCERNED, IT PROHIBITS THE INTRODUCTION OF ANY NEW MEASURE CONTRARY TO THE PRINCIPLES OF ARTICLE 37 ( 1 ), THAT IS, ANY MEASURE HAVING AS ITS OBJECT OR EFFECT A NEW DISCRIMINATION BETWEEN NATIONALS OF MEMBER STATES REGARDING THE CONDITIONS IN WHICH GOODS ARE PROCURED AND MARKETED, BY MEANS OF MONOPOLIES OR BODIES WHICH MUST, FIRST, HAVE AS THEIR OBJECT TRANSACTIONS REGARDING A COMMERCIAL PRODUCT CAPABLE OF BEING THE SUBJECT OF COMPETITION AND TRADE BETWEEN MEMBER STATES, AND SECONDLY MUST PLAY AN EFFECTIVE PART IN SUCH TRADE;

AND FURTHER DECLARES :

THE DECISION ON THE COSTS OF THE PRESENT ACTION IS A MATTER FOR THE GUIDICE CONCILIATORE, MILAN .

## **Charter of Fundamental Rights of the European Union, 26 October 2012**

The European Parliament, the Council and the Commission solemnly proclaim the following text as the Charter of Fundamental Rights of the European Union.

### **CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION**

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

#### **TITLE I**

#### **DIGNITY**

##### **Article 1**

##### **Human dignity**

Human dignity is inviolable. It must be respected and protected.

##### **Article 2**

##### **Right to life**

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

### Article 3

#### Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
  - (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
  - (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
  - (c) the prohibition on making the human body and its parts as such a source of financial gain;
  - (d) the prohibition of the reproductive cloning of human beings.

### Article 4

#### Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### Article 5

#### Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

## TITLE II

## FREEDOMS

### Article 6

#### Right to liberty and security

Everyone has the right to liberty and security of person.

### Article 7

#### Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

### Article 8

#### Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

#### Article 9

##### Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

#### Article 10

##### Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

#### Article 11

##### Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

#### Article 12

##### Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

#### Article 13

##### Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

#### Article 14

##### Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and

pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

#### Article 15

Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

#### Article 16

Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

#### Article 17

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

#### Article 18

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

#### Article 19

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

### TITLE III

### EQUALITY

#### Article 20

Equality before the law

Everyone is equal before the law.

Article 21

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 22

Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23

Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26

Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

#### TITLE IV

#### SOLIDARITY

##### Article 27

###### Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

##### Article 28

###### Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

##### Article 29

###### Right of access to placement services

Everyone has the right of access to a free placement service.

##### Article 30

###### Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

##### Article 31

###### Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

##### Article 32

###### Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

## Article 33

### Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

## Article 34

### Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

## Article 35

### Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

## Article 36

### Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

## Article 37

### Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

## Article 38

### Consumer protection

Union policies shall ensure a high level of consumer protection.

## TITLE V

## CITIZENS' RIGHTS

### Article 39

#### Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

### Article 40

#### Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

### Article 41

#### Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
  - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
  - (c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

### Article 42

#### Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

### Article 43

#### European Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

## Article 44

### Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

## Article 45

### Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

## Article 46

### Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

## TITLE VI

## JUSTICE

## Article 47

### Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

## Article 48

### Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

## Article 49

### Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier

penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

#### Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

### TITLE VII

#### GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

#### Article 51

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

#### Article 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are

implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

#### Article 53

##### Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

#### Article 54

##### Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

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The above text adapts the wording of the Charter proclaimed on 7 December 2000, and will replace it as from the date of entry into force of the Treaty of Lisbon.



## 2. PERFECTING THE INTERNAL MARKET

The main project for which EU law has been put into action has been – and remains – the establishment and functioning of a common market, now named internal market. Article 26(2) of the Treaty on the Functioning of the European Union aptly describes the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. On the basis of fundamental economic freedoms enshrined in the Treaties themselves, persons, goods, services and capital can roam freely within the territories of the Member States. The Court of Justice consistently recognised the direct effect of those fundamental free movement rights, thus enabling individuals to invoke them against Member States or EU institutions restricting their freedom to trade with or within another Member State.

The importance of the internal market notwithstanding, its construction and functioning have never proven perfect. To that extent, EU law did intervene in attempts to perfect or complete the internal market project envisaged by the Founding Fathers of the Union. In this part of the course, we will study four situations in which the Court of Justice, the EU legislature or the Treaties themselves aimed to address certain shortcomings of the internal market. Although EU law did provide for tools or doctrines aimed at resolving those shortcomings, those tools may have created new problems from the point of view of legal coherence or political desirability of the on-going EU integration project in its current format. Four such solutions will be discussed in this course.

First of all, the Court of Justice consistently accepted the *vertical direct effect* of EU fundamental free movement rights. That means that individuals or businesses can assert their right of access to the market of another Member State vis-à-vis public authorities. A State cannot therefore refuse – without overriding interest grounds – the access of goods, workers, services providers or capital coming from another Member State in its territory. From the early days of EU integration, however, questions have arisen as to what extent one could invoke those rights against another trader, one's employer or any other individual seeking to limit one's access to the market in a particular Member State. The Court has been prudent according *horizontal* direct effect to the fundamental freedoms, which resulted in a confusing "horizontal" doctrine.

Secondly, the Treaty fundamental freedoms in themselves only promote a regime of negative integration, i.e. integration through the striking down or the prohibition of Member States' restrictive legislation. Once struck down, EU law does not necessarily offer an alternative EU law regulatory standard. In order to compensate for this, EU institutions have adopted secondary legislation, harmonising national laws. In doing so, however, and absent a clear doctrine on the relationship between primary and secondary EU law, the interaction between harmonisation instruments and the Treaty fundamental freedoms remains contentious.

Thirdly, the internal market fundamental freedoms guarantee access to other Member States' markets for economically active persons coming from another Member State, yet also facilitate the relocation of businesses to Member States where labour or social security legislation is less burdensome. It has therefore often been argued that the EU internal market fails to take social rights seriously, despite balancing or reconciliation initiatives undertaken by the Court of

Justice. It can therefore be questioned to what extent economic as well as social rights are taken care of as a matter of EU internal market law.

Fourthly, the free movement advantages of the internal market have been extended gradually to non-economically active persons, most notably employment seekers, retired workers, students and their families. As a result, EU citizenship entitlements have been recognised, first by the Court, later by the Treaties themselves. Over time, the EU citizenship framework has begun to lead a life of its own. The question to be asked therefore are to what extent citizenship fits the EU internal market project, in what ways it goes beyond such market and how it can be made to serve as a tool to enhance social protection of all EU citizens throughout the different Member States.

In all four themes discussed in this part, we will outline the legal doctrines developed to remedy the perceived shortcomings of the internal market. This will be followed by a discussion on the possibilities, but also difficulties created by EU law when proposing and structuring those solutions. In the end, you will be able to reflect more critically on the role of law as a tool to refine and perfect the internal market envisaged in Article 26 TFEU.

## LECTURE 2: THE HORIZONTAL APPLICATION OF EU FREE MOVEMENT RIGHTS

The fundamental freedoms guaranteeing cross-border movements of goods, persons, services and capital have always mainly been construed as *vertically applicable* freedoms, i.e. freedoms to be invoked against Member States' public authorities or EU institutions. At the same time, however, questions have arisen across those freedoms to what extent they can be invoked horizontally in response to action or inaction taken by other individuals or businesses. The Court's response has never been to acknowledge full horizontal invocability of the Treaty fundamental freedoms. At the same time, however, some horizontal applicability situations have been identified in the case law. The EU legislature, for its part, also used harmonisation tools to extend the application of free movement-related market access rights to horizontal situations. This lecture outlines, analyses and criticises the different approaches towards horizontality currently underlying the EU free movement provisions.

### Materials to read:

- Court of Justice, 12 December 1974, Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140.
- Court of Justice, 17 July 2008, Case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV.*, ECLI:EU:C:2008:425.
- Court of Justice, 12 July 2012, Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein*, ECLI:EU:C:2012:453.
- Commission Proposal of 25 May 2016 for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (via eCampus).
  
- D. Wyatt, "Horizontal direct effect of fundamental freedoms and the right to equality after *Viking* and *Mangold*, and the implications for Community competence, 4 *Croatian Yearbook of EU law and policy* (2008), 1-48 (via eCampus).
- H. Schepel, "Constitutionalising the market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law", 18 *European Law Journal* (2012), 177-200 (via eCampus).

### Lecture 2 outline:

- a. Foundations of the internal market
  1. Negative v. positive integration
  2. Negative integration: fundamental freedoms
  3. Applying the fundamental freedoms
    - i. Direct discrimination
    - ii. Indirect discrimination

- iii. Restrictive rules
- b. The internal market and free movement rights
  - 1. Direct effect
  - 2. Vertical direct effect
- c. Beyond vertical direct effect?
  - 1. Private regulatory bodies – Fra.bo
  - 2. Associations and professional bodies – Walrave and Koch, Bosman, Wouters
  - 3. Trade unions – Viking and Laval
  - 4. Private employers – Angonese and Raccanelli
  - 5. Private individuals? – corporate law harmonisation
- d. The scope of ‘horizontal’ direct effect in EU free movement law
  - 1. Direct discrimination on the basis of nationality
  - 2. Indirect discrimination on the basis of nationality
  - 3. Restrictive rules
- e. The limits of the present ‘horizontal’ direct effect status-quo
  - 1. Legal basis for the current setup?
  - 2. Mixed contexts: difficulties in distinguishing vertical and horizontal situations
  - 3. Alternatives for horizontal situations?
- f. Moving beyond limited ‘horizontal’ direct effect?
  - 1. Alternative 1: EU secondary legislation
    - i. Services Directive
    - ii. Geo-blocking proposal
  - 2. Alternative 2: the horizontal effect of the Charter of Fundamental Rights?
  - 3. Alternative 3: Treaty modifications?
  - 4. Alternative 4: extra-legal policy modifications...
- g. Legal limits to horizontal direct effect?
  - 1. Subsidiarity
  - 2. Coherence
  - 3. Private law differentiation?

Questions for discussion:

- Would limiting the horizontal direct effect of EU free movement provisions be incompatible with the letter and/or the spirit of the Treaty provisions guaranteeing the free movement of goods, persons, services and capital?
- Read the article by Harm Schepel: does the author agree with the Court’s position on horizontal direct effect? How does he propose to move forward?

**Case 36/74, B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale,  
Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo**

Parties

IN CASE 36/74

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE  
ARRONDISSEMENTSRECHTBANK ( DISTRICT COURT ) UTRECHT, FOR A PRELIMINARY RULING IN  
THE ACTION PENDING BEFORE THAT COURT BETWEEN

1 . BRUNO NILS OLAF WALRAVE

2 . LONGINUS JOHANNES NORBERT KOCH

AND

1 . ASSOCIATION UNION CYCLISTE INTERNATIONALE

2 . KONINKLIJKE NEDERLANDSCHE WIELREN UNIE

3 . FEDERACION ESPANOLA CICLISMO

Subject of the case

ON THE INTERPRETATION OF ARTICLES 7, 48 AND 59 OF THE EEC TREATY AND THE PROVISIONS OF  
REGULATION ( EEC ) NO 1612/68 ON FREEDOM OF MOVEMENT FOR WORKERS WITHIN THE  
COMMUNITY ( OJ L 257 OF 19 . 10 . 1968, P . 2 ),

Grounds

1 BY ORDER DATED 15 MAY 1974 FILED AT THE COURT REGISTRY ON 24 MAY 1974, THE  
ARRONDISSEMENTSRECHTBANK UTRECHT REFERRED UNDER ARTICLE 177 OF THE EEC TREATY  
VARIOUS QUESTIONS RELATING TO THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE  
7, ARTICLE 48 AND THE FIRST PARAGRAPH OF ARTICLE 59 OF THE EEC TREATY AND OF  
REGULATION NO 1612/68 OF THE COUNCIL OF 15 OCTOBER 1968 ( OJ L 257, P . 2 ) ON FREEDOM OF  
MOVEMENT FOR WORKERS WITHIN THE COMMUNITY .

2 THE BASIC QUESTION IS WHETHER THESE ARTICLES AND REGULATION MUST BE INTERPRETED  
IN SUCH A WAY THAT THE PROVISION IN THE RULES OF THE UNION CYCLISTE INTERNATIONALE  
RELATING TO MEDIUM-DISTANCE WORLD CYCLING CHAMPIONSHIPS BEHIND MOTORCYCLES,  
ACCORDING TO WHICH " L' ENTRAINEUR DOIT ETRE DE LA NATIONALITE DE COUREUR " ( THE  
PACEMAKER MUST BE OF THE SAME NATIONALITY AS THE STAYER ) IS INCOMPATIBLE WITH THEM  
.

3 THESE QUESTIONS WERE RAISED IN AN ACTION DIRECTED AGAINST THE UNION CYCLISTE  
INTERNATIONALE AND THE DUTCH AND SPANISH CYCLING FEDERATIONS BY TWO DUTCH  
NATIONALS WHO NORMALLY TAKE PART AS PACEMAKERS IN RACES OF THE SAID TYPE AND WHO  
REGARD THE AFOREMENTIONED PROVISION OF THE RULES OF UCI AS DISCRIMINATORY .

4 HAVING REGARD TO THE OBJECTIVES OF THE COMMUNITY, THE PRACTICE OF SPORT IS SUBJECT TO COMMUNITY LAW ONLY IN SO FAR AS IT CONSTITUTES AN ECONOMIC ACTIVITY WITHIN THE MEANING OF ARTICLE 2 OF THE TREATY .

5 WHEN SUCH ACTIVITY HAS THE CHARACTER OF GAINFUL EMPLOYMENT OR REMUNERATED SERVICE IT COMES MORE PARTICULARLY WITHIN THE SCOPE, ACCORDING TO THE CASE, OF ARTICLES 48 TO 51 OR 59 TO 66 OF THE TREATY .

6 THESE PROVISIONS, WHICH GIVE EFFECT TO THE GENERAL RULE OF ARTICLE 7 OF THE TREATY, PROHIBIT ANY DISCRIMINATION BASED ON NATIONALITY IN THE PERFORMANCE OF THE ACTIVITY TO WHICH THEY REFER .

7 IN THIS RESPECT THE EXACT NATURE OF THE LEGAL RELATIONSHIP UNDER WHICH SUCH SERVICES ARE PERFORMED IS OF NO IMPORTANCE SINCE THE RULE OF NON-DISCRIMINATION COVERS IN IDENTICAL TERMS ALL WORK OR SERVICES .

8 THIS PROHIBITION HOWEVER DOES NOT AFFECT THE COMPOSITION OF SPORT TEAMS, IN PARTICULAR NATIONAL TEAMS, THE FORMATION OF WHICH IS A QUESTION OF PURELY SPORTING INTEREST AND AS SUCH HAS NOTHING TO DO WITH ECONOMIC ACTIVITY .

9 THIS RESTRICTION ON THE SCOPE OF THE PROVISIONS IN QUESTION MUST HOWEVER REMAIN LIMITED TO ITS PROPER OBJECTIVE .

10 HAVING REGARD TO THE ABOVE, IT IS FOR THE NATIONAL COURT TO DETERMINE THE NATURE OF THE ACTIVITY SUBMITTED TO ITS JUDGMENT AND TO DECIDE IN PARTICULAR WHETHER IN THE SPORT IN QUESTION THE PACEMAKER AND STAYER DO OR DO NOT CONSTITUTE A TEAM .

11 THE ANSWERS ARE GIVEN WITHIN THE LIMITS DEFINED ABOVE OF THE SCOPE OF COMMUNITY LAW .

12 THE QUESTIONS RAISED RELATE TO THE INTERPRETATION OF ARTICLES 48 AND 59 AND TO A LESSER EXTENT OF ARTICLE 7 OF THE TREATY .

13 BASICALLY THEY RELATE TO THE APPLICABILITY OF THE SAID PROVISIONS TO LEGAL RELATIONSHIPS WHICH DO NOT COME UNDER PUBLIC LAW, THE DETERMINATION OF THEIR TERRITORIAL SCOPE IN THE LIGHT OF RULES OF SPORT EMANATING FROM A WORLD-WIDE FEDERATION AND THE DIRECT APPLICABILITY OF CERTAIN OF THOSE PROVISIONS .

14 THE MAIN QUESTION IN RESPECT OF ALL THE ARTICLES REFERRED TO IS WHETHER THE RULES OF AN INTERNATIONAL SPORTING FEDERATION CAN BE REGARDED AS INCOMPATIBLE WITH THE TREATY .

15 IT HAS BEEN ALLEGED THAT THE PROHIBITIONS IN THESE ARTICLES REFER ONLY TO RESTRICTIONS WHICH HAVE THEIR ORIGIN IN ACTS OF AN AUTHORITY AND NOT TO THOSE RESULTING FROM LEGAL ACTS OF PERSONS OR ASSOCIATIONS WHO DO NOT COME UNDER PUBLIC LAW .

16 ARTICLES 7, 48, 59 HAVE IN COMMON THE PROHIBITION, IN THEIR RESPECTIVE SPHERES OF APPLICATION, OF ANY DISCRIMINATION ON GROUNDS OF NATIONALITY .

17 PROHIBITION OF SUCH DISCRIMINATION DOES NOT ONLY APPLY TO THE ACTION OF PUBLIC AUTHORITIES BUT EXTENDS LIKEWISE TO RULES OF ANY OTHER NATURE AIMED AT REGULATING IN A COLLECTIVE MANNER GAINFUL EMPLOYMENT AND THE PROVISION OF SERVICES .

18 THE ABOLITION AS BETWEEN MEMBER STATES OF OBSTACLES TO FREEDOM OF MOVEMENT FOR PERSONS AND TO FREEDOM TO PROVIDE SERVICES, WHICH ARE FUNDAMENTAL OBJECTIVES OF THE COMMUNITY CONTAINED IN ARTICLE 3 ( C ) OF THE TREATY, WOULD BE COMPROMISED IF THE

*ABOLITION OF BARRIERS OF NATIONAL ORIGIN COULD BE NEUTRALIZED BY OBSTACLES RESULTING FROM THE EXERCISE OF THEIR LEGAL AUTONOMY BY ASSOCIATIONS OR ORGANIZATIONS WHICH DO NOT COME UNDER PUBLIC LAW .*

*19 SINCE, MOREOVER, WORKING CONDITIONS IN THE VARIOUS MEMBER STATES ARE GOVERNED SOMETIMES BY MEANS OF PROVISIONS LAID DOWN BY LAW OR REGULATION AND SOMETIMES BY AGREEMENTS AND OTHER ACTS CONCLUDED OR ADOPTED BY PRIVATE PERSONS, TO LIMIT THE PROHIBITIONS IN QUESTION TO ACTS OF A PUBLIC AUTHORITY WOULD RISK CREATING INEQUALITY IN THEIR APPLICATION .*

*20 ALTHOUGH THE THIRD PARAGRAPH OF ARTICLE 60, AND ARTICLES 62 AND 64, SPECIFICALLY RELATE, AS REGARDS THE PROVISION OF SERVICES, TO THE ABOLITION OF MEASURES BY THE STATE, THIS FACT DOES NOT DEFEAT THE GENERAL NATURE OF THE TERMS OF ARTICLE 59, WHICH MAKES NO DISTINCTION BETWEEN THE SOURCE OF THE RESTRICTIONS TO BE ABOLISHED .*

*21 IT IS ESTABLISHED, MOREOVER, THAT ARTICLE 48, RELATING TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY AS REGARDS GAINFUL EMPLOYMENT, EXTENDS LIKewise TO AGREEMENTS AND RULES WHICH DO NOT EMANATE FROM PUBLIC AUTHORITIES .*

*22 ARTICLE 7 ( 4 ) OF REGULATION NO 1612/68 IN CONSEQUENCE PROVIDES THAT THE PROHIBITION ON DISCRIMINATION SHALL APPLY TO AGREEMENTS AND ANY OTHER COLLECTIVE REGULATIONS CONCERNING EMPLOYMENT .*

*23 THE ACTIVITIES REFERRED TO IN ARTICLE 59 ARE NOT TO BE DISTINGUISHED BY THEIR NATURE FROM THOSE IN ARTICLE 48, BUT ONLY BY THE FACT THAT THEY ARE PERFORMED OUTSIDE THE TIES OF A CONTRACT OF EMPLOYMENT .*

*24 THIS SINGLE DISTINCTION CANNOT JUSTIFY A MORE RESTRICTIVE INTERPRETATION OF THE SCOPE OF THE FREEDOM TO BE ENSURED .*

*25 IT FOLLOWS THAT THE PROVISIONS OF ARTICLES 7, 48 AND 59 OF THE TREATY MAY BE TAKEN INTO ACCOUNT BY THE NATIONAL COURT IN JUDGING THE VALIDITY OR THE EFFECTS OF A PROVISION INSERTED IN THE RULES OF A SPORTING ORGANIZATION .*

*26 THE NATIONAL COURT THEN RAISES THE QUESTION OF THE EXTENT TO WHICH THE RULE ON NON-DISCRIMINATION MAY BE APPLIED TO LEGAL RELATIONSHIPS ESTABLISHED IN THE CONTEXT OF THE ACTIVITIES OF A SPORTING FEDERATION OF WORLD-WIDE PROPORTIONS .*

*27 THE COURT IS ALSO INVITED TO SAY WHETHER THE LEGAL POSITION MAY DEPEND ON WHETHER THE SPORTING COMPETITION IS HELD WITHIN OR OUTSIDE THE COMMUNITY .*

*28 BY REASON OF THE FACT THAT IT IS IMPERATIVE, THE RULE ON NON-DISCRIMINATION APPLIES IN JUDGING ALL LEGAL RELATIONSHIPS IN SO FAR AS THESE RELATIONSHIPS, BY REASON EITHER OF THE PLACE WHERE THEY ARE ENTERED INTO OR OF THE PLACE WHERE THEY TAKE EFFECT, CAN BE LOCATED WITHIN THE TERRITORY OF THE COMMUNITY .*

*29 IT IS FOR THE NATIONAL JUDGE TO DECIDE WHETHER THEY CAN BE SO LOCATED, HAVING REGARD TO THE FACTS OF EACH PARTICULAR CASE, AND, AS REGARDS THE LEGAL EFFECT OF THESE RELATIONSHIPS, TO DRAW THE CONSEQUENCES OF ANY INFRINGEMENT OF THE RULE ON NON-DISCRIMINATION .*

*30 FINALLY, THE NATIONAL COURT HAS RAISED THE QUESTION WHETHER THE FIRST PARAGRAPH OF ARTICLE 59, AND POSSIBLY THE FIRST PARAGRAPH OF ARTICLE 7, OF THE TREATY HAVE DIRECT EFFECTS WITHIN THE LEGAL ORDERS OF THE MEMBER STATES .*

31 AS HAS BEEN SHOWN ABOVE, THE OBJECTIVE OF ARTICLE 59 IS TO PROHIBIT IN THE SPHERE OF THE PROVISION OF SERVICES, INTER ALIA, ANY DISCRIMINATION ON THE GROUNDS OF THE NATIONALITY OF THE PERSON PROVIDING THE SERVICES .

32 IN THE SECTOR RELATING TO SERVICES, ARTICLE 59 CONSTITUTES THE IMPLEMENTATION OF THE NON-DISCRIMINATION RULE FORMULATED BY ARTICLE 7 FOR THE GENERAL APPLICATION OF THE TREATY AND BY ARTICLE 48 FOR GAINFUL EMPLOYMENT .

33 THUS, AS HAS ALREADY BEEN RULED ( JUDGMENT OF 3 DECEMBER 1974 IN CASE 33/74, VAN BINSBERGEN ) ARTICLE 59 COMPRISES, AS AT THE END OF THE TRANSITIONAL PERIOD, AN UNCONDITIONAL PROHIBITION PREVENTING, IN THE LEGAL ORDER OF EACH MEMBER STATE, AS REGARDS THE PROVISION OF SERVICES - AND IN SO FAR AS IT IS A QUESTION OF NATIONALS OF MEMBER STATES - THE IMPOSITION OF OBSTACLES OR LIMITATIONS BASED ON THE NATIONALITY OF THE PERSON PROVIDING THE SERVICES .

34 IT IS THEREFORE RIGHT TO REPLY TO THE QUESTION RAISED THAT AS FROM THE END OF THE TRANSITIONAL PERIOD THE FIRST PARAGRAPH OF ARTICLE 59, IN ANY EVENT IN SO FAR AS IT REFERS TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY, CREATE INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT .

Decision on costs

35 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE .

36 SINCE THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT, COSTS ARE A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE ARRONDISSEMENTSRECHTBANK UTRECHT, HEREBY RULES :

1 . HAVING REGARD TO THE OBJECTIVES OF THE COMMUNITY, THE PRACTICE OF SPORT IS SUBJECT TO COMMUNITY LAW ONLY IN SO FAR AS IT CONSTITUTES AN ECONOMIC ACTIVITY WITHIN THE MEANING OF ARTICLE 2 OF THE TREATY .

2 . THE PROHIBITION ON DISCRIMINATION BASED ON NATIONALITY CONTAINED IN ARTICLES 7, 48 AND 59 OF THE TREATY DOES NOT AFFECT THE COMPOSITION OF SPORT TEAMS, IN PARTICULAR NATIONAL TEAMS, THE FORMATION OF WHICH IS A QUESTION OF PURELY SPORTING INTEREST AND AS SUCH HAS NOTHING TO DO WITH ECONOMIC ACTIVITY .

3 . PROHIBITION ON SUCH DISCRIMINATION DOES NOT ONLY APPLY TO THE ACTION OF PUBLIC AUTHORITIES BUT EXTENDS LIKEWISE TO RULES OF ANY OTHER NATURE AIMED AT COLLECTIVELY REGULATING GAINFUL EMPLOYMENT AND SERVICES .

4 . THE RULE ON NON-DISCRIMINATION APPLIES IN JUDGING ALL LEGAL RELATIONSHIPS IN SO FAR AS THESE RELATIONSHIPS, BY REASON EITHER OF THE PLACE WHERE THEY ARE ENTERED INTO OR

*OF THE PLACE WHERE THEY TAKE EFFECT, CAN BE LOCATED WITHIN THE TERRITORY OF THE COMMUNITY.*

*5. THE FIRST PARAGRAPH OF ARTICLE 59, IN ANY EVENT IN SO FAR AS IT REFERS TO THE ABOLITION OF ANY DISCRIMINATION BASED ON NATIONALITY, CREATES INDIVIDUAL RIGHTS WHICH NATIONAL COURTS MUST PROTECT.*



**Case C-94/07, *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV.***

In Case C-94/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeitsgericht Bonn (Germany), made by decision of 4 November 2004, received at the Court on 20 February 2007, in the proceedings

**Andrea Raccanelli**

v

**Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV,**

THE COURT (Fifth Chamber),

[...]

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 39 EC and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 The reference has been made in the course of proceedings between Mr Raccanelli and the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV ('MPG') concerning an employment relationship which Mr Raccanelli claims that he entered into with the Max Planck Institute for Radio Astronomy in Bonn ('MPI'), which forms part of MPG.

**Legal context**

*Community legislation*

3 Article 1 of Regulation No 1612/68, which appears in Title I, headed 'Eligibility for employment', provides:

'1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

4 Article 7 of Regulation No 1612/68, which appears in Title II, headed 'Employment and equality of treatment', is worded as follows:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

...

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

#### *National legislation*

5 According to national legislation, 'BAT/2 employment contract' or 'BAT IIa half-time contract' means a contract entered into on the basis of the IIa grade of the pay scale, as applicable at the material time, of the federal collective agreement for public-sector workers (BAT), and under which the working hours correspond to 50% of a full-time post.

#### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

6 MPG is established under German private law in the form of an association operating in the public interest. It manages a number of scientific research institutes in Germany and other European States.

7 These research institutes, named 'Max Planck Institutes', conduct basic research in the general interest in the natural sciences, life sciences, the humanities and social sciences.

8 MPG operates two methods of advancement for junior researchers, enabling them, in particular, to prepare a thesis: a grant contract or an employment contract.

9 The main difference between the two means of support for doctoral students is that:

– the recipient of a grant is under no obligation to work for the institute in question, and instead may devote himself entirely to work relating to his thesis, whereas

– the holder of a BAT IIa half-time contract is under an obligation to work for the institute which employs him and may use its facilities for the purposes of his thesis only outside his working hours.

10 Moreover, the two types of contract may also be distinguished from the point of view of the contracting parties' tax obligations and their affiliation to the social security system.

11 Thus, grant recipients are exempt from income tax and are not affiliated to the social security system. By contrast, researchers holding BAT IIa half-time posts are liable to income tax and must pay social security contributions in respect of their employment.

12 In the period from 7 February 2000 to 31 July 2003, Mr Raccanelli, an Italian national, worked at MPI in connection with the preparation of his doctoral thesis. His activities were based on a letter from MPI of 7 February 2000, which was signed by him.

13 By that letter, MPI awarded him a monthly grant for the period from 7 February 2000 to 6 February 2002 to enable him to prepare his doctorate in Germany and abroad on the subject of the 'development of a bolometer camera for wavelengths below 300  $\mu\text{m}$ '.

14 The letter was worded as follows:

'Acceptance of the grant obliges you to dedicate yourself wholly to the objective of the grant. Other activities require the prior consent of the institute's management.

The grant is paid as a contribution to living costs but not as consideration for your scientific work.

Acceptance of the grant does not oblige you to undertake any work as an employee of the Max-Planck-Gesellschaft. Therefore the grant is exempt from income tax under Paragraph 3(44) of the Einkommensteuergesetz [(Law on income tax)] and exempt from tax on wages under Paragraph 6(22) of the Lohnsteuerdurchführungsverordnung [(Implementing regulation on tax on wages)] and consequently also exempt from social security contributions.'

15 By a supplementary contract dated 29 November 2001, Mr Raccanelli's 'doctoral student contract' was extended to 6 August 2002, and, subsequently, to 6 May 2003. In respect of the period from 7 May 2003 to 31 July 2003, the parties concluded an agreement on 19 May 2003 which was worded as follows:

'In the period from 7 May 2003 to 31 July 2003 Mr Raccanelli will be here as a guest of our institute. The institute will make an appropriate work place available to him and its operatives will supervise him.

Other facilities are available to him within the limits of the institute's regulations and the applicable provisions; he undertakes to comply with these provisions.

His stay as a guest does not establish any employment relationship and no allowance shall be paid.

...'

16 Mr Raccanelli brought an action before the Arbeitsgericht Bonn (Labour Court, Bonn), primarily for a declaration that there was an employment relationship between him and MPG during the period from 7 February 2000 to 31 July 2003.

17 Mr Raccanelli claims that, during that period, he was treated in the same way as German doctoral students employed under BAT IIa half-time contracts, for whom such contracts (according to Mr Raccanelli) – involving, in particular, the benefit of social-security affiliation – were reserved.

18 MPG rejects those claims.

19 Without ruling on the factual aspect of the contractual relationship between the two parties during the period in question, the referring court proceeds on the basis that the degree of Mr Raccanelli's personal dependency on MPI is not sufficient for there to have been an employment relationship between them.

20 The referring court queries whether, in view of MPG's status as a private-law association, MPG is bound by the principle of non-discrimination as if it were a public-law body.

21 In those circumstances, the Arbeitsgericht Bonn decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Should the applicant be regarded as a worker within the meaning of the Community concept of "worker" if he is not called upon to provide any more work-related services than are doctoral students with an employment contract concluded pursuant to the Bundesangestelltentarifvertrag (federal collective agreement for public-sector workers, "BAT/2")?

(2) In the event that the answer to Question 1 is in the negative: must Article 7 of Regulation ... No 1612/68 ... be interpreted as meaning that there is no discrimination only if the applicant was at least granted the right to choose between an employment contract and a grant before his period of doctoral study with the defendant began?

(3) In the event that the answer to Question 2 is that the applicant should have been granted the opportunity to conclude an employment contract, the question must be asked:

What are the consequences in law in the event of discrimination against foreign nationals?'

#### **The questions referred for a preliminary ruling**

*Admissibility of the reference for a preliminary ruling*

22 MPG submits in its written observations that the reference for a preliminary ruling must be dismissed as inadmissible.

23 According to MPG, the referring court has not established the facts of the dispute between the parties to the main proceedings, and has failed to give reasons to justify the questions raised. Therefore, it argues, the Court does not have the information necessary in order to enable it to reply usefully to those questions.

24 It must be observed in that regard that, according to settled case-law of the Court, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 22, and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I-11987, paragraph 26).

25 Moreover, the information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the Statute of the Court of Justice (order in Case C-422/98 *Colonia Versicherung and Others* [1999] ECR I-1279, paragraph 5, and Case C-20/05 *Schwibbert* [2007] ECR I-0000, paragraph 21).

26 In order to ascertain whether the information supplied by the Arbeitsgericht Bonn satisfies those requirements, the nature and scope of the questions raised have to be taken into consideration (see, to that effect, *Confederación Española de Empresarios de Estaciones de Servicio*, paragraph 29).

27 In that regard, it must be noted that the first question referred for a preliminary ruling is stated in very general terms, in that it seeks to obtain an interpretation of the Community concept of ‘worker’, as referred to in Article 39 EC and Article 7 of Regulation No 1612/68.

28 The questions raised by the Arbeitsgericht Bonn in the alternative concern the principle of non-discrimination under Article 12 EC.

29 However, while there may be gaps in the reference for a preliminary ruling, both in relation to the presentation of the facts of the main proceedings and the grounds for the reference, the Court none the less has sufficient information to enable it to determine the scope of the questions raised and to interpret the Community provisions at issue so as to reply usefully to those questions.

30 Moreover, both the Commission of the European Communities and, to a certain extent, MPG took the view that it was possible to submit written observations to the Court of Justice on the basis of the information provided by the national court.

31 In those circumstances, the reference for a preliminary ruling must be held to be admissible.

*Substance*

Question 1

32 By its first question, the referring court asks, in essence, whether a researcher in a similar situation to that of the applicant in the main proceedings, that is a researcher preparing a doctoral thesis on the basis of a grant contract concluded with MPG, must be regarded as a worker within the meaning of Article 39 EC if he is called upon to perform as much work as a researcher preparing a doctoral thesis on the basis of a BAT/2 employment contract with MPG.

33 In that regard, it must be noted that the Court has consistently held that the concept of ‘worker’ within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be

regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26; and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15).

34 The applicant in the main proceedings can therefore be acknowledged to have the status of worker only if the referring court, which alone is competent to assess the facts of the case in the main proceedings, were to establish the existence in that case of the constituent elements of any paid employment relationship, namely subordination and the payment of remuneration.

35 Consequently, since the referring court is required to verify the existence of the criteria set out in paragraph 33 of the present judgment, it follows that its examination should cover, *inter alia*, the substance of the doctoral student contract and of the supplementary contract, and the arrangements for giving effect to those documents.

36 While it must be concluded from the foregoing that Mr Raccanelli's status as a worker, within the meaning of Article 39 EC, must be determined objectively in accordance with the criteria set out in paragraph 33 of the present judgment, it is, by contrast, not possible to draw any conclusion with regard to that status from a comparison of the work of the applicant in the main proceedings and the work carried out or to be carried out by a researcher preparing a doctoral thesis on the basis of a BAT/2 employment contract concluded with MPG.

37 Accordingly, the answer to the first question must be that a researcher in a similar situation to that of the applicant in the main proceedings, that is, a researcher preparing a doctoral thesis on the basis of a grant contract concluded with MPG, must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration. It is for the referring court to undertake the necessary verification of the facts in order to establish whether such is the case in the dispute before it.

#### Question 2

38 By its second question, the referring court asks, in essence, whether there is no discrimination only if the applicant in the main proceedings was at least granted the right to choose between an employment contract and a grant before beginning his period of doctoral study with MPG.

39 As a preliminary point, it must be noted that the question whether Mr Raccanelli would have had the right, by virtue of MPG's practice, to choose between a grant contract and a BAT/2 employment contract if he did not have the status of worker within the meaning of Article 39 EC and Article 7 of Regulation No 1612/68 is a question of national law which it is not for the Court to address.

40 However, it follows from Part II of the grounds for the order of reference that, by its second question, the Arbeitsgericht Bonn is asking, in essence, whether MPG is bound – notwithstanding its establishment as a private-law association – by the principle of non-discrimination as if it had the status of a public-law body, and whether MPG is therefore obliged to accord Mr Raccanelli the right to choose between a grant contract and an employment contract.

41 In that regard, it must be borne in mind that, under Article 39 EC, freedom of movement for workers within the European Community entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment (Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 29).

42 Moreover, it must be noted that the principle of non-discrimination laid down by Article 39 EC is worded in general terms and is not addressed specifically to the Member States or to bodies governed by public law.

43 Thus, the Court has held that the prohibition of discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17, and *Angonese*, paragraph 31).

44 The Court has held that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see *Walrave and Koch*, paragraph 18, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 83).

45 The Court has thus held, with regard to Article 39 EC, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 12 EC, that the prohibition of discrimination applies equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals (see Case 43/75 *Defrenne* [1976] ECR 455, paragraph 39, and *Angonese*, paragraphs 34 and 35).

46 It must be held, therefore, that the prohibition of discrimination based on nationality laid down by Article 39 EC applies equally to private-law associations such as MPG.

47 As to the question whether MPG was, in consequence, obliged to accord Mr Raccanelli the right to choose between a grant contract and an employment contract, the answer must be that the Court has consistently held that discrimination consists in the application of different rules to comparable situations or in the application of the same rule to different situations (see, to that effect, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 26). It is for the referring court to establish whether, by reason of the application of different rules to comparable situations in circumstances such as those of the case in the main proceedings, the potential withholding of that choice resulted in inequality in the treatment of domestic and foreign doctoral students.

48 In those circumstances, the answer to the second question must be that a private-law association, such as MPG, must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 EC. It is for the referring court to establish whether, in circumstances such as those of the case in the main proceedings, there has been inequality in the treatment of domestic and foreign doctoral students.

### Question 3

49 By its third question, the referring court asks what the consequences in law are in the event that discrimination against a foreign doctoral student arises from the fact that the latter did not have the opportunity to conclude an employment contract with MPG.

50 In that regard, it must be held that neither Article 39 EC nor Regulation No 1612/68 prescribes a specific measure to be taken by the Member States or associations such as MPG in the event of a breach of the prohibition of discrimination, but leaves them free to choose between the different solutions suitable for achieving the objective of those respective provisions, depending on the different situations which may arise (see, to that effect, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 18, and Case C-460/06 *Paquay* [2007] ECR I-8511, paragraph 44).

51 Consequently, as the Commission indicates in its written observations, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which the applicant in the main proceedings would be entitled to claim.

52 In those circumstances, the answer to the third question must be that, in the event that the applicant in the main proceedings is justified in relying on damage caused by the discrimination to which he has been subject, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which he would be entitled to claim.

### Costs [...]

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **A researcher in a similar situation to that of the applicant in the main proceedings, that is, a researcher preparing a doctoral thesis on the basis of a grant contract concluded with the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, must be regarded as a worker within the meaning of Article 39 EC only if his activities are performed for a certain period of time under the direction of an institute forming part of that association and if, in return for those activities, he receives remuneration. It is for the referring**

court to undertake the necessary verification of the facts in order to establish whether such is the case in the dispute before it.

2. A private-law association, such as the Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, must observe the principle of non-discrimination in relation to workers within the meaning of Article 39 EC. It is for the referring court to establish whether, in circumstances such as those of the case in the main proceedings, there has been inequality in the treatment of domestic and foreign doctoral students.

3. In the event that the applicant in the main proceedings is justified in relying on damage caused by the discrimination to which he has been subject, it is for the referring court to assess, in the light of the national legislation applicable in relation to non-contractual liability, the nature of the compensation which he would be entitled to claim.



**Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein***

In Case C-171/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Germany), made by decision of 30 March 2011, received at the Court on 11 April 2011, in the proceedings

**Fra.bo SpA**

v

**Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein,**

THE COURT (Fourth Chamber),

[...]

after hearing the Opinion of the Advocate General at the sitting on 28 March 2012,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 28 EC, 81 and 86(2) EC.

2 That reference was made in the context of proceedings between Fra.bo SpA ('Fra.bo'), a company governed by Italian law specialised in the production and distribution of copper fittings intended in particular for piping for water or gas, and the German certification body, the Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein ('DVGW') concerning the latter's decision to withdraw or refuse to extend the certificate for copper fittings produced and distributed by Fra.bo.

**German legal context**

3 It is apparent from the order for reference and the observations of the parties concerned that the Regulation on General Conditions for Water Supply (Verordnung über Allgemeine Bedingungen für die Versorgung mit Wasser) of 20 June 1980 (BGBl. 1980 I, p. 750) ('the AVBWasserV'), lays down the general sales conditions for water supply undertakings and their customers, from which the parties are free to depart.

4 On the date of the facts in the main proceedings, Paragraph 12(4) of the AVBWasserV was worded as follows:

'Only materials and devices which comply with the recognised rules of technology may be used. The mark of a recognised inspection body (such as the DIN-DVGW, DVGW or GS mark) shall testify to the fulfilment of those requirements.'

5 The Regulation of 13 January 2010 (BGBl. 2010 I, p. 10) amended Paragraph 12(4) of the AVBWasserV as follows:

'Only products and devices supplied in accordance with the recognised rules of technology may be used. Compliance with the conditions laid down in the first sentence shall be assumed if they have specific CE marking for drinking water use. Where such CE marking is not stipulated, it shall also be assumed if the product or device bears the mark of an accredited certifying body for the industry, in particular the DIN-DVGW or DVGW mark. Products and devices which

1. were lawfully manufactured in another contracting state of the Agreement on the European Economic Area or
2. were lawfully manufactured or marketed in another Member State of the European Union or in Turkey

and do not meet the technical specifications for the mark referred to in the third sentence shall be treated as equivalent, inclusive of the inspections and surveillance carried out in the aforementioned States, if the same level of protection as required in Germany is thereby permanently ensured.’

#### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

6 It is apparent from the order for reference and the observations of the parties concerned that Fra.bo is an undertaking established in Italy which manufactures and sells copper fittings. Copper fittings are connections between two pieces of piping for water or gas, with sealing rings made of malleable material at the ends to make them watertight.

7 The DVGW is a non-profit body governed by private law, set up in 1859, the object of which, according to its articles of association, is to promote the gas and water sector. The DVGW is recognised in Germany as a ‘public benefit’ body, a status conferred under Paragraph 51 et seq. of the Regulations on Taxes (Abgabenordnung) on bodies whose activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. Under Paragraph 2(2) of its articles of association, the DVGW does not defend the interests of the manufacturers in that sector.

8 For the water sector, there are approximately 350 standards drawn up by the DVGW. Technical standard W 534 is relevant to the dispute in the main proceedings. It serves as the basis for certification, on a voluntary basis, of products which come into contact with drinking water.

9 In late 1999 Fra.bo applied to the DVGW for certification of the copper fittings at issue in the main proceedings. The DVGW instructed the Materialprüfungsanstalt Darmstadt to carry out the necessary tests. These were in turn sub-contracted to the firm Cerisie Laboratorio, established in Italy, which is approved by the relevant Italian authorities, though not by the DVGW. In November 2000, the DVGW then granted the claimant a water industry certificate for a period of five years.

10 After complaints by third parties, the DVGW instituted a re-assessment procedure in which Materialprüfungsanstalt Darmstadt was again commissioned to carry out the testing. An ozone test to establish the ozone resistance of the copper fitting’s elastomeric waterproof joint was conducted on a sample of material provided by the Italian manufacturer. In June 2005 the DVGW informed Fra.bo that its fitting had not passed the ozone test but it could, as provided for in the DVGW’s rules, produce a positive test report within three months. However, the DVGW did not recognise the test report drawn up subsequently by Cerisie Laboratorio, on the ground that it was not one of its approved testing laboratories. In the dispute in the main proceedings, the DVGW also challenges that test report on the ground that the content is insufficient, in that it did not indicate the test specifications or the material-testing conditions.

11 In the meantime, in a formalised procedure in which Fra.bo was not involved, the DVGW amended technical standard W 534 by introducing the 3 000-hour test, aimed at ensuring longer life for certified products. The DVGW’s reply to a written question from the Court indicates that the 3 000-hour test consists in exposing the copper fitting’s elastomeric waterproof joint to a temperature of 110 degrees Celsius in boiling water for 3 000 hours. According to the DVGW’s rules, certificate holders are required to obtain additional certification within three months of the entry into effect of the amendment to the technical standard, as evidence of compliance with the amended conditions. Fra.bo did not make such an application and did not subject its copper fittings to the 3 000-hour test.

12 In June 2005 the DVGW cancelled Fra.bo’s certificate for copper fittings on the ground that it had not submitted a positive test report on the 3 000-hour test. The DVGW also rejected an application for extension of the certificate on the ground that compliance certificates could no longer be extended.

13 Fra.bo brought an action against the DVGW before the Landgericht Köln (Regional Court, Cologne), arguing that the cancellation and/or the refusal to extend the certificate are contrary to European Union law. In

Fra.bo's submission, the DVGW is bound by the provisions governing the free movement of goods, namely Article 28 EC et seq., and the cancellation and the refusal to extend the certificate both restrict considerably its access to the German market. Due to the presumption of compliance conferred on products certified by the DVGW under Paragraph 12(4) of the ABVWasserV, it is virtually impossible for Fra.bo to distribute its products in Germany without that certificate. The 3 000-hour test has no objective justification and the DVGW is not entitled to reject outright test reports from laboratories which are accredited by the competent authorities in Member States other than the Federal Republic of Germany, but not by the DGVW. The DVGW ought to be regarded as an association of undertakings which, in drawing up the contested technical standards, also infringes Article 81 EC.

14 As a private-law association, the DVGW considers that it is not bound by the provisions governing the free movement of goods and that only the Federal Republic of Germany is required to answer for any infringements of Article 28 EC in connection with the adoption of Paragraph 12(4) of the ABVWasserV. Consequently, there is nothing preventing the DVGW from drawing up technical standards which go beyond those in place in Member States other than the Federal Republic of Germany and to apply them to its certification activities. It is also free, on quality-related grounds, to take account only of laboratories accredited by it. Moreover, as a standard-setting body, it does not pursue economic activities for the purpose of agreements, with the result that Article 81 EC does not apply in the present case.

15 The Landgericht Köln dismissed Fra.bo's action, holding that the DVGW was free to set out the conditions under which it would issue a compliance certificate. Fra.bo appealed against that decision before the referring court in order to have, on the same grounds, the DVGW ordered to extend the compliance certificate for the fittings in question and to pay EUR 1 000 000 in damages plus interest.

16 As it had doubts as to the applicability of the provisions governing the free movement of goods and agreements between undertakings to the DVGW's activities, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 28 EC ..., if appropriate in conjunction with Article [86(2)] EC ..., to be interpreted as meaning that private-law bodies which have been set up for the purpose of drawing up technical standards in a particular field and certifying products on the basis of those technical standards are bound by the aforementioned provisions when drawing up technical standards and in the certification process where the national legislature expressly regards the products in respect of which certificates have been issued as lawful, thus making it at least considerably more difficult in practice to distribute products in respect of which certificates have not been issued?

2. If the answer to the first question is in the negative:

Is Article 81 EC ... to be interpreted as meaning that the activity pursued by a private-law body in the field of drawing up technical standards and certifying products on the basis of those technical standards, as described in question 1, is to be regarded as "economic" where the body is controlled by those undertakings?

If the first part of this question is answered in the affirmative:

Is Article 81 EC ... to be interpreted as meaning that the drawing-up of technical standards and the certification of products on the basis of those technical standards by an association of undertakings is capable of impeding trade between the Member States if a product lawfully manufactured and distributed in another Member State cannot be distributed in the importing Member State, or can be distributed there only with considerable difficulty, because it does not meet the requirements of the technical standard and, in the light of the predominance of the technical standard on the market and of a legal provision adopted by the national legislature to the effect that a certificate from the association of undertakings must indicate compliance with the requirements laid down by law, distribution without such a certificate is virtually impossible, and if the technical standard would not be applicable if it had been adopted directly by the national legislature because it infringes the principle of the free movement of goods?'

### **The questions referred for a preliminary ruling**

#### *The first question*

17 By its first question, the referring court asks, in essence, whether Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.

18 As a preliminary point, it is common ground that the copper fittings at issue in the main proceedings are a 'construction product' within the meaning of Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 89/106'), which are not subject to a harmonised standard, a European technical approval or a national technical specification recognised at European Union level, as referred to in Article 4(2) of that directive.

19 In respect of construction products not covered by Article 4(2) of Directive 89/106, Article 6(2) of that directive provides that the Member States are to allow such products to be placed on the market in their territory if they satisfy national provisions consistent with the EC Treaty until the European technical specifications provide otherwise.

20 Thus, national provisions governing the placing on the market of a construction product not covered by technical specifications harmonised or recognised at European Union level must, as provided for by Directive 89/106, comply with obligations under the Treaty, in particular with the principle of the free movement of goods as set out in Articles 28 EC and 30 EC (see, to that effect, judgment of 13 March 2008 in Case C-227/06 *Commission v Belgium*, paragraph 34).

21 It must be ascertained, first, whether Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body in circumstances such as those in the main proceedings, as the applicant in the main proceedings claims that it does.

22 According to settled case-law, all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions, prohibited by Article 28 EC (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-270/02 *Commission v Italy* [2004] ECR I-1559, paragraph 18; and *Commission v Belgium*, paragraph 40). Thus, the mere fact that an importer might be dissuaded from introducing or marketing the products in question in the Member State concerned constitutes a restriction on the free movement of goods for the importer (judgment of 24 April 2008 in Case C-286/07 *Commission v Luxembourg*, paragraph 27).

23 Similarly, the Court has held that a Member State fails to fulfil its obligations under Articles 28 EC and 30 EC when, without valid justification, it encourages economic operators wishing to market in its territory construction products lawfully manufactured and/or marketed in another Member State to obtain national marks of conformity (see, to that effect, *Commission v Belgium*, paragraph 69) or when it refuses to recognise the equivalence of approval certificates issued by another Member State (see, to that effect, Case C-432/03 *Commission v Portugal* [2005] ECR I-9665, paragraphs 41, 49 and 52).

24 It is common ground that the DVGW is a non-profit, private-law body whose activities are not financed by the Federal Republic of Germany. It is, moreover, uncontested that that Member State has no decisive influence over the DVGW's standardisation and certification activities, although some of its members are public bodies.

25 The DVGW contends that, accordingly, Article 28 EC is not applicable to it, as it is a private body. The other parties concerned consider that private-law bodies are, in certain circumstances, bound to observe the free movement of goods as guaranteed by Article 28 EC.

26 It must therefore be determined whether, in the light of inter alia the legislative and regulatory context in which it operates, the activities of a private-law body such as the DVGW has the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State.

27 In the present case, it should be observed, firstly, that the German legislature has established, in Paragraph 12(4) of the ABVWasserV, that products certified by the DVGW are compliant with national legislation.

28 Secondly, it is not disputed by the parties to the main proceedings that the DVGW is the only body able to certify the copper fittings at issue in the main proceedings for the purposes of Paragraph 12(4) of the ABWasserV. In other words, the DVGW offers the only possibility for obtaining a compliance certificate for such products.

29 The DVGW and the German Government have referred to there being a procedure other than certification by the DVGW, which consists in entrusting an expert with the task of verifying a product's compliance with the recognised rules of technology within the meaning of Paragraph 12(4) of the ABWasserV. It is apparent, however, from the answers to the written and oral questions put by the Court that the administrative difficulties associated with the absence of specific rules of procedure governing the work of such experts, on the one hand, combined with the additional costs incurred by having an individual expert report drawn up, on the other, make that other procedure of little or no practical use.

30 Thirdly, the referring court takes the view that, in practice, the lack of certification by the DVGW places a considerable restriction on the marketing of the products concerned on the German market. Although the ABWasserV merely lays down the general sales conditions as between water supply undertakings and their customers, from which the parties are free to depart, it is apparent from the case-file that, in practice, almost all German consumers purchase copper fittings certified by the DVGW.

31 In such circumstances, it is clear that a body such as the DVGW, by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings.

32 Accordingly, the answer to the first question is that Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.

#### *The second question*

33 Since the second question was asked by the referring court only in the event of the first question being answered in the negative, there is no need to answer it.

#### **Costs**

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.**



## LECTURE 3: THE RELATIONSHIP BETWEEN PRIMARY AND SECONDARY EU INTERNAL MARKET LAW

The TFEU free movement rights have a necessarily ‘deregulatory’ effect. In striking down or prohibiting Member States’ regulations for the sake of guaranteeing free movement, EU free movement law results in negative integration. Court judgments prohibiting specific Member States rules do not indeed offer a ready-made EU law alternative. With a view to improve the functioning of the internal market, EU-wide regulations were deemed necessary. To that extent, the EU institutions added a positive integration approach to the free movement case law. Instruments of EU law aimed at harmonising market access to and market behaviour on the Member States’ territories have thus seen the light of day. Those instruments complement, yet do not necessarily replace the EU fundamental freedoms.

Almost sixty years of internal market law have not, however, clarified the complex and nuanced relationship between EU primary law (Treaty fundamental freedoms) and secondary legislation (harmonisation instruments). The Court of Justice has offered some general guidelines, but in practice, those guidelines prove difficult to implement. In this lecture, we will explore the stakes of the primary-secondary EU law relationship in the context of EU internal market law. The aim will be to identify different approaches to the primary-secondary EU law relationship presently underlying the case law. That analysis will allow us reflect on ways to make the primary-secondary legislation relationship more clear and predictable as a matter of EU law.

### Materials to read:

- Court of Justice, 5 October 1977, Case 5/77, *Carlo Tedeschi v Denkvit Commerciale s.r.l.*, ECLI:EU:C:1977:144.
- Court of Justice, 1 July 2014, Case C-573/12, *Alands Vindkraft v. Energimyndigheten*, ECLI:EU:C:2014:2037.
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, [2006] *O.J.* L376/36.
  
- K. Mortelmans, “The relationship between the Treaty rules and Community measures for the establishment and functioning of the internal market – towards a concordance rule”, 39 *Common Market Law Review* (2002), 1303-1346 (via eCampus).
- P. Syrpis, “The relationship between primary and secondary law in the EU”, 52 *Common Market Law Review* (2015), 461-488 (via eCampus).

### Lecture 3 outline:

- a. From negative to positive integration in the EU internal market
  1. The gradual emergence of EU secondary legislation
  2. Positive integration: three stages
  3. Positive integration today
- b. Positive integration as harmonisation – a typology
  1. Minimum harmonisation

2. Optional harmonisation
3. Full harmonisation
- c. Harmonised legislation and EU fundamental freedoms
  1. Lex specialis derogate generali
  2. What is a lex specialis?
  3. A case-by-case, provision-by-provision assessment?
- d. Towards a workable concordance relationship between primary and secondary EU law?
  1. Proposals for a concordance rule
  2. Implementing a concordance rule – alternative legal strategies
  3. Limits of a concordance rule?
- e. Developing a general EU law framework – the Services Directive case study
  1. Background to the Services Directive
  2. Overview of the Services Directive
  3. Concordance or dissonance – the Directive and free movement rights
  4. Future developments in the Services Directive – free movement rights interaction
- f. Concordance and its legal limits within EU internal market law
  1. Case-by-case or general framework – why is it important anyway?
  2. The need for a clear elaboration of new general principles?
  3. The lack of an EU pre-emption doctrine

Questions for discussion:

- How would you phrase a general concordance rule structuring the primary-secondary EU law relationship?
- To what extent does the Services Directive respect the current primary-secondary EU law status-quo? To what extent does it go beyond that status-quo?

**Case 5/77, Carlo Tedeschi v Denkavit Commerciale s.r.l.**

Parties

*IN CASE 5/77*

[...]

Subject of the case

*ON THE INTERPRETATION OF COUNCIL DIRECTIVE NO 74/63/EEC OF 17 DECEMBER 1973 ( OJ L 38/31 OF 11 . 2 . 1974 ) AND ON THE VALIDITY OF ARTICLE 5 THEREOF ,*

Grounds

*1 BY ORDER OF 17 DECEMBER 1976 , ENTERED IN THE REGISTER OF THE COURT OF JUSTICE ON 11 JANUARY 1977 , THE PRETURA DI LODI SUBMITTED TO THE COURT OF JUSTICE SEVERAL QUESTIONS RELATING , ON THE ONE HAND , TO THE INTERPRETATION OF DIRECTIVE NO 74/63/EEC OF THE COUNCIL OF 17 DECEMBER 1973 ON THE FIXING OF MAXIMUM PERMITTED LEVELS FOR UNDESIRABLE SUBSTANCES AND PRODUCTS IN FEEDING-STUFFS ( OJ L 38 OF 11 . 2 . 1974 ) , IN PARTICULAR ARTICLE 5 THEREOF , AND ON THE OTHER , TO THE VALIDITY OF THE SAID ARTICLE 5 .*

*2 THESE QUESTIONS HAVE BEEN SUBMITTED IN THE CONTEXT OF A DISPUTE CONCERNING THE NON-PERFORMANCE OF A CONTRACT FOR THE SUPPLY OF FEEDING-STUFFS MADE FROM POWDERED MILK IN WHICH THE DEFENDANT IN THE MAIN ACTION MAINTAINS , IN ORDER TO JUSTIFY ITS FAILURE TO DELIVER THE GOODS , THAT THEY WERE ILLEGALLY STOPPED AT THE BORDER BY THE ITALIAN HEALTH AUTHORITIES BECAUSE THEIR POTASSIUM NITRATE CONTENT EXCEEDED THAT PERMITTED BY THOSE AUTHORITIES .*

*3 THIS MEASURE WAS ADOPTED ON THE BASIS OF AN URGENT NOTE ( BIGLIETTO URGENTE ) OF 7 SEPTEMBER 1976 SENT BY THE ITALIAN MINISTER OF HEALTH TO THE VETERINARY AUTHORITIES AT FRONTIERS , PORTS AND AIRPORTS AND TO THE PROVINCIAL AUTHORITIES PROHIBITING THE IMPORTATION OF MILK-BASED FEEDING-STUFFS WHERE THE NITRATE CONTENT OF THOSE FEEDING-STUFFS EXCEEDS 30 PARTS PER MILLION IN WHOLE MILK POWDER AND SKIMMED-MILK POWDER AND 50 PARTS PER MILLION IN POWDERED WHEY .*

*4 ACCORDING TO THE DEFENDANT AND THE INTERVENERS IN THE MAIN ACTION , THE ITALIAN MEASURES ARE INCOMPATIBLE WITH DIRECTIVE NO 74/63 .*

*5 ACCORDING TO THE FOURTH RECITAL OF THE PREAMBLE TO THAT DIRECTIVE , ITS PURPOSE , TAKING INTO ACCOUNT THE FACT THAT IT IS IMPOSSIBLE TO EXCLUDE TOTALLY THE PRESENCE OF CERTAIN UNDESIRABLE SUBSTANCES OR PRODUCTS IN FEEDING-STUFFS , IS TO REDUCE THEIR CONTENT IN ORDER TO PREVENT THEM FROM HARMING ANIMAL HEALTH OR , BECAUSE OF THEIR PRESENCE IN ANIMAL PRODUCTS , HUMAN HEALTH .*

*6 UNDER ARTICLE 3 OF THE DIRECTIVE ' MEMBER STATES SHALL PRESCRIBE THAT THE SUBSTANCES AND PRODUCTS LISTED IN THE ANNEX SHALL BE TOLERATED IN FEEDING-STUFFS ONLY UNDER THE CONDITIONS THEREIN SET OUT ' , THAT IS , BELOW A MAXIMUM LEVEL .*

7 ACCORDING TO ARTICLE 7 ' MEMBER STATES SHALL ENSURE THAT FEEDING-STUFFS WHICH CONFORM TO THIS DIRECTIVE ARE NOT SUBJECT TO ANY OTHER MARKETING RESTRICTIONS AS REGARDS THE PRESENCE OF UNDESIRABLE SUBSTANCES AND PRODUCTS ' .

8 HOWEVER , ARTICLE 5 ( 1 ) PROVIDES THAT : ' WHERE A MEMBER STATE CONSIDERS THAT A MAXIMUM CONTENT FIXED IN THE ANNEX , OR THAT A SUBSTANCE OR PRODUCT NOT LISTED THEREIN , PRESENTS A DANGER TO ANIMAL OR HUMAN HEALTH , THAT MEMBER STATE MAY PROVISIONALLY REDUCE THIS CONTENT , FIX A MAXIMUM CONTENT , OR FORBID THE PRESENCE OF THAT SUBSTANCE OR PRODUCT IN FEEDING-STUFFS . IT SHALL ADVISE THE OTHER MEMBER STATES AND THE COMMISSION WITHOUT DELAY OF THE MEASURES TAKEN AND AT THE SAME TIME GIVE ITS REASONS ' .

9 UNDER ARTICLE 5 ( 2 ) , WHERE A MEMBER STATE HAS RECOURSE TO THE PROVISIONAL MEASURE REFERRED TO IN THE FIRST PARAGRAPH THEREOF , A DECISION MUST IMMEDIATELY BE TAKEN AS TO WHETHER ANY MODIFICATION TO THE ANNEX SHOULD BE MADE IN ACCORDANCE WITH THE PROCEDURE LAID DOWN IN ARTICLE 10 OF THE DIRECTIVE .

10 ARTICLE 5 ( 2 ) CONTINUES : ' SO LONG AS NO DECISION HAS BEEN MADE BY EITHER THE COUNCIL OR THE COMMISSION THE MEMBER STATE MAY MAINTAIN THE MEASURES IT HAS IMPLEMENTED ' .

11 THE FILE SHOWS THAT AS EARLY AS 27 JULY 1976 THE ITALIAN AUTHORITIES DREW THE ATTENTION OF THE COMMISSION TO THE PRESENCE ' IN CERTAIN CONSIGNMENTS OF WHEY FROM FRANCE , THE NETHERLANDS AND THE FEDERAL REPUBLIC OF GERMANY OF POTASSIUM NITRATE IN LEVELS VARYING FROM 40 TO 4 000 PARTS PER MILLION ( MILLIGRAMMES PER KILOGRAMME ) , RESIDUES FROM THE MANUFACTURE OF CERTAIN TYPES OF CHEESES ' AND ASKED ' THAT THE PROBLEM OF THE HARMONIZATION OF NATIONAL LEGISLATION CONCERNING THE PRESENCE OF THAT SUBSTANCE BE EXAMINED ' .

12 AFTER DECIDING BY AN URGENT COMMUNICATION OF 5 AUGUST 1976 TO INTENSIFY LABORATORY TESTS ON IMPORTED CONSIGNMENTS OF WHEY AND COMPOUND FODDER CONTAINING WHEY AND INITIALLY FIXING THE MAXIMUM NITRATE LEVEL AT ONE PART PER MILLION , THE ITALIAN AUTHORITIES ADOPTED THE CONTESTED MEASURE ON 7 SEPTEMBER 1976 .

13 AFTER EXCHANGES OF NOTES BETWEEN THE COMMUNITY AUTHORITIES AND THE ITALIAN AUTHORITIES DURING THE MONTHS OF AUGUST AND SEPTEMBER , ON 7 OCTOBER 1976 THE LATTER SENT THE COMMISSION DOCUMENTS AS TO TOXICITY BY WAY OF THE STATEMENT OF REASONS REFERRED TO IN ARTICLE 5 ( 1 ) OF THE DIRECTIVE .

14 THE ITALIAN GOVERNMENT CONTESTS THE RELEVANCE OF THE QUESTIONS REFERRED TO THE COURT WITH REGARD TO THE OUTCOME OF THE MAIN ACTION AND OBSERVES THAT THE MEASURE IN QUESTION WAS NOT ADOPTED ON THE BASIS OF ARTICLE 5 OF DIRECTIVE NO 74/63 BUT IN ACCORDANCE WITH COUNCIL DIRECTIVE NO 70/524 OF 23 NOVEMBER 1970 CONCERNING ADDITIVES IN FEEDING-STUFFS ( OJ , ENGLISH SPECIAL EDITION 1970 ( III ) , P . 840 ) .

15 THE DISTINCTION BETWEEN THE FIELD OF APPLICATION OF THESE TWO DIRECTIVES IS IMPORTANT BECAUSE ALL MARKETING OF FEEDING-STUFFS CONTAINING UNAUTHORIZED ADDITIVES IS CLEARLY PROHIBITED WHEREAS IN SO FAR AS UNDESIRABLE SUBSTANCES ARE CONCERNED THE PROHIBITION ON MARKETING CONCERNS ONLY FEEDING-STUFFS CONTAINING THE UNDESIRABLE SUBSTANCES EXPRESSLY LISTED IN THE ANNEX TO THE DIRECTIVE , UNLESS ARTICLE 5 AND THE PROCEDURE LAID DOWN IN ARTICLE 10 ARE APPLIED .

16 IF IT WERE NECESSARY TO CONSIDER AS AN UNAUTHORIZED ADDITIVE THE POTASSIUM NITRATE WHOSE PRESENCE IN THE IMPORTED FEEDING-STUFFS HAS BEEN ESTABLISHED IT WOULD FOLLOW THAT THE ITALIAN MEASURE PROHIBITING IT WAS ABSOLUTELY JUSTIFIED AND , MOREOVER , THAT THERE WAS NO NEED FOR THE MEASURE TO BE FOLLOWED BY THE IMPLEMENTATION OF THE PROCEDURE LAID DOWN IN ARTICLE 10 OF DIRECTIVE NO 74/63 IN

ORDER TO DECIDE WHETHER OR NOT IT IS NECESSARY TO COMPLETE THE LIST OF UNDESIRABLE SUBSTANCES.

17 ARTICLE 177 IS BASED ON A DISTINCT SEPARATION OF FUNCTIONS BETWEEN NATIONAL COURTS AND TRIBUNALS ON THE ONE HAND AND THE COURT OF JUSTICE ON THE OTHER , AND IT DOES NOT GIVE THE COURT JURISDICTION TO TAKE COGNIZANCE OF THE FACTS OF THE CASE , OR TO CRITICIZE THE REASONS FOR THE REFERENCE .

18 THEREFORE , WHEN A NATIONAL COURT OR TRIBUNAL REFERS A PROVISION OF COMMUNITY LAW FOR INTERPRETATION , IT IS TO BE SUPPOSED THAT THE SAID COURT OR TRIBUNAL CONSIDERS THIS INTERPRETATION NECESSARY TO ENABLE IT TO GIVE JUDGMENT IN THE ACTION .

19 THUS THE COURT CANNOT REQUIRE THE NATIONAL COURT OR TRIBUNAL TO STATE EXPRESSLY THAT THE PROVISION WHICH APPEARS TO THAT COURT OR TRIBUNAL TO CALL FOR AN INTERPRETATION IS APPLICABLE .

20 THE COURT MAY HOWEVER PROVIDE THE NATIONAL COURT WITH THE FACTORS OF INTERPRETATION DEPENDING ON COMMUNITY LAW WHICH MIGHT BE USEFUL TO IT IN EVALUATING THE EFFECTS OF THE PROVISION WHICH IS THE SUBJECT-MATTER OF THE QUESTIONS WHICH HAVE BEEN REFERRED TO IT .

21 DIRECTIVE NO 74/63 ( UNDESIRABLE SUBSTANCES ) SPECIFIES THAT IT APPLIES ' WITHOUT PREJUDICE ' TO THE PROVISIONS CONCERNING , IN PARTICULAR , ADDITIVES IN FEEDING-STUFFS AND IT IS THEREFORE IMPORTANT , IN ORDER TO REACH A USEFUL INTERPRETATION OF THE PROVISIONS THEREOF , TO STATE PRECISELY ITS FIELD OF APPLICATION IN RELATION TO DIRECTIVE NO 70/524 ( ADDITIVES ).

22 UNDER ARTICLE 2 OF DIRECTIVE NO 70/524 , ' ADDITIVES ' ARE SUBSTANCES WHICH , WHEN INCORPORATED IN FEEDING-STUFFS , ARE LIKELY TO AFFECT THEIR CHARACTERISTICS OR LIVESTOCK PRODUCTION .

23 THE FIFTH RECITAL OF THE PREAMBLE TO THAT DIRECTIVE SPECIFIES THAT ADDITIVES MEAN : ' AS A GENERAL RULE . . . SUBSTANCES WHICH IMPROVE BOTH THE FEEDING-STUFFS IN WHICH THEY ARE INCORPORATED AND LIVESTOCK PRODUCTION ' .

24 ALTHOUGH DIRECTIVE NO 74/63 DOES NOT DEFINE THE CONCEPT OF ' UNDESIRABLE SUBSTANCES AND PRODUCTS ' , THE THIRD AND FOURTH RECITALS OF THE PREAMBLE THERETO SPECIFY HOWEVER THAT UNDESIRABLE SUBSTANCES OR PRODUCTS WHICH ' FEEDING-STUFFS OFTEN CONTAIN ' ARE INVOLVED AND THAT ' IT IS IMPOSSIBLE TO EXCLUDE TOTALLY THE PRESENCE ' OF THEM .

25 THE FILE AND THE OBSERVATIONS SUBMITTED BY THE PARTIES DURING THE HEARING SHOW THAT THE PRESENCE OF POTASSIUM NITRATE IN THE IMPORTED FEEDING-STUFFS IN EXCESS OF THE MAXIMUM LEVELS FIXED BY THE ITALIAN GOVERNMENT RESULTS FROM THE FACT THAT A QUANTITY OF WHEY , WHICH IS A BY-PRODUCT OF THE MANUFACTURE OF CHEESE , DURING WHICH THE NITRATE IS USED AS A PRESERVATIVE , IS MIXED WITH THE SKIMMED-MILK POWDER .

26 THE ITALIAN GOVERNMENT CONSIDERS THAT THE NITRATE ADDED DURING THE CASEATION PROCESS CONTINUES TO BE AN ADDITIVE IN THE SUBSEQUENT STAGES OF THE USE OF THE WHEY AND MAY NOT BE CONSIDERED AS A SUBSTANCE WHICH IS NATURALLY OR INEVITABLY PRESENT IN THE FEEDING-STUFFS TO WHICH THE WHEY HAS BEEN ADDED .

27 ON THE OTHER HAND , THE DEFENDANT IN THE MAIN ACTION AND THE COMMISSION CLAIM THAT THE NITRATE MAY NOT BE CONSIDERED AS AN ADDITIVE BECAUSE IT WAS NOT INTENTIONALLY ADDED TO THE FEEDING-STUFFS MADE FROM POWDERED MILK BUT WAS ALREADY THERE AS A RESIDUE FROM A PREVIOUS STAGE IN THE PRODUCTION OF POWDERED MILK AND CHEESE .

28 A COMPARISON OF THE ABOVEMENTIONED RECITALS OF THE PREAMBLES TO THE DIRECTIVES SHOWS THAT DIRECTIVE NO 70/524 ( ADDITIVES ) AND DIRECTIVE NO 74/63 ( UNDESIRABLE SUBSTANCES ) ALTHOUGH BOTH RELATING TO THE COMPOSITION OF FEEDING-STUFFS MAKE , AS REGARDS THEIR RESPECTIVE FIELDS OF APPLICATION , A DISTINCTION BETWEEN CERTAIN SUBSTANCES WHICH ARE INTENTIONALLY ADDED TO THOSE FEEDING-STUFFS SO AS TO PRODUCE A FAVOURABLE EFFECT ON THEIR CHARACTERISTICS AND , ON THE OTHER , UNDESIRABLE SUBSTANCES WHICH ARE INEVITABLY PRESENT IN THOSE FEEDING-STUFFS EITHER IN THE NATURAL STATE OR AS RESIDUES FROM PROCESSING PREVIOUSLY UNDERGONE BY THOSE FEEDING-STUFFS OR BY THE CONSTITUENTS OF THOSE FEEDING-STUFFS .

29 IN THESE CIRCUMSTANCES A SUBSTANCE WHICH , BECAUSE OF A PREVIOUS ADMIXTURE , INDEPENDENT OF THE USE FOR ANIMAL FEEDING , IS NECESSARILY PRESENT IN ONE OF THE CONSTITUENTS OF THE FEEDING-STUFF AS A RESIDUE FROM THE PREVIOUS MANUFACTURE OF ANOTHER PRODUCT MAY NOT BE CONSIDERED AS AN ADDITIVE .

30 THE CONTROL OF THE PRESENCE OF SUCH SUBSTANCES COMES WITHIN DIRECTIVE NO 74/63 ( UNDESIRABLE SUBSTANCES ) AND NOT WITHIN DIRECTIVE NO 70/524 ( ADDITIVES ) .

#### THE FIRST QUESTION

31 THE FIRST QUESTION ASKS IN SUBSTANCE WHETHER , UNDER THE TERMS OF DIRECTIVE NO 74/63 AND IN VIEW OF A POSSIBLE APPLICATION OF THE PROVISIONAL MEASURE REFERRED TO IN ARTICLE 5 THEREOF , THE MEMBER STATES STILL HAVE THE POWER TO CONSIDER AS UNDESIRABLE SUBSTANCES CERTAIN SUBSTANCES ( IN THIS CASE NITRATES ) WHICH , ALTHOUGH KNOWN WHEN DIRECTIVE NO 74/63 WAS ADOPTED AND INCORPORATED INTO THE NATIONAL LEGAL SYSTEMS , WERE EXCLUDED FROM THE LIST OF UNDESIRABLE SUBSTANCES ANNEXED TO THE DIRECTIVE .

32 UNDER ARTICLE 1 ( G ) OF REGULATION NO 804/68 OF THE COUNCIL OF 27 JUNE 1968 ON THE COMMON ORGANIZATION ON THE MARKET IN MILK AND MILK PRODUCTS ( OJ , ENGLISH SPECIAL EDITION 1968 ( I ) , P . 176 ) , DAIRY-BASED FEEDING-STUFFS COME WITHIN THAT ORGANIZATION OF THE MARKET AND MUST , UNDER ARTICLE 22 OF THE SAME REGULATION , BE ADMITTED TO FREE CIRCULATION BETWEEN THE MEMBER STATES .

33 NATIONAL MEASURES REGULATING THE COMPOSITION OF FEEDING-STUFFS MAY IN CERTAIN CASES CONSTITUTE MEASURES HAVING AN EFFECT EQUIVALENT TO QUANTITATIVE RESTRICTIONS WHICH ARE HOWEVER CAPABLE , WHERE THEY ARE JUSTIFIED BY THE PROTECTION OF ANIMAL OR HUMAN HEALTH , OF COMING WITHIN THE APPLICATION OF ARTICLE 36 OF THE TREATY .

34 ARTICLE 36 IS NOT DESIGNED TO RESERVE CERTAIN MATTERS TO THE EXCLUSIVE JURISDICTION OF MEMBER STATES BUT PERMITS NATIONAL LAWS TO DEROGATE FROM THE PRINCIPLE OF THE FREE MOVEMENT OF GOODS TO THE EXTENT TO WHICH SUCH DEROGATION IS AND CONTINUES TO BE JUSTIFIED FOR THE ATTAINMENT OF THE OBJECTIVES REFERRED TO IN THAT ARTICLE .

35 WHERE , IN APPLICATION OF ARTICLE 100 OF THE TREATY , COMMUNITY DIRECTIVES PROVIDE FOR THE HARMONIZATION OF THE MEASURES NECESSARY TO ENSURE THE PROTECTION OF ANIMAL AND HUMAN HEALTH AND ESTABLISH COMMUNITY PROCEDURES TO CHECK THAT THEY ARE OBSERVED , RECOURSE TO ARTICLE 36 IS NO LONGER JUSTIFIED AND THE APPROPRIATE CHECKS MUST BE CARRIED OUT AND THE MEASURES OF PROTECTION ADOPTED WITHIN THE FRAMEWORK OUTLINED BY THE HARMONIZING DIRECTIVE .

36 DIRECTIVE NO 74/63 WAS ADOPTED AND A COMMUNITY CONTROL PROCEDURE WAS INTRODUCED FOR THE PURPOSE OF HARMONIZING THE NATIONAL PROVISIONS .

37 WITHIN THE CONTEXT OF THE HARMONIZATION WHICH HAS BEEN BROUGHT ABOUT , ARTICLE 5 HOWEVER PERMITS MEMBER STATES PROVISIONALLY TO PREVENT THE MARKETING ON THEIR TERRITORY OF FEEDING-STUFFS WHICH CONTAIN SUBSTANCES WHICH MAY BE UNDESIRABLE FOR

ANIMAL OR HUMAN HEALTH ALTHOUGH THEY ARE NOT MENTIONED IN THE ANNEXES TO THE DIRECTIVE .

38 ALTHOUGH ARTICLES 6 AND 9 OF THE DIRECTIVE PROVIDE THAT , FOLLOWING A COMMUNITY PROCEDURE , IT WILL BE POSSIBLE TO AMEND THE LIST OF UNDESIRABLE SUBSTANCES ON THE BASIS OF THE DEVELOPMENT OF SCIENTIFIC OR TECHNICAL KNOWLEDGE , IT WAS HOWEVER JUSTIFIED IN ALSO PROVIDING FOR THE MEANS OF REMEDYING A LACUNA IN THE HARMONIZED LEGISLATION WHEN A DANGER REQUIRING IMMEDIATE ACTION ARISES .

39 THE EVENTUALITY PROVIDED FOR IN ARTICLE 5 COVERS THE CASE IN WHICH SUBSTANCES WHICH WERE PREVIOUSLY CONSIDERED NOT TO BE HARMFUL PROVE TO BE SO , IN PARTICULAR IF , CONSIDERED IN A PREVIOUS STAGE AS NOT HARMFUL BECAUSE THEY ARE ONLY PRESENT IN MINUTE QUANTITIES , IT APPEARED THAT IN OTHER FEEDING-STUFF MIXTURES OR IN MIXTURES MADE IN NEW PROPORTIONS , THEY ARE PRESENT IN A PROPORTION WHICH MAY MAKE THEM UNDESIRABLE .

40 IT IS THEREFORE NECESSARY TO REPLY TO THE FIRST QUESTION THAT EVEN AFTER THE ENTRY INTO FORCE OF THE HARMONIZING DIRECTIVE , DIRECTIVE NO 74/63 , THE MEMBER STATES HAVE , WITHIN THE CONTEXT OF ARTICLE 5 OF THAT DIRECTIVE AND SUBJECT TO THE MATERIAL AND PROCEDURAL REQUIREMENTS LAID DOWN THEREIN , THE POWER PROVISIONALLY TO CONSIDER AS UNDESIRABLE CERTAIN SUBSTANCES WHICH ALTHOUGH KNOWN WHEN THAT DIRECTIVE WAS ADOPTED , DO NOT APPEAR IN THE LIST ANNEXED THERETO , PROVIDED THAT THE MEASURES ADOPTED APPLY ON IDENTICAL TERMS TO BOTH NATIONAL PRODUCTS AND TO PRODUCTS IMPORTED FROM OTHER MEMBER STATES .

#### THE SECOND QUESTION

41 THE SECOND QUESTION ASKS IN SUBSTANCE WHETHER ARTICLE 5 OF DIRECTIVE NO 74/63 ENABLES A MEMBER STATE TO FIX UNILATERALLY THE MAXIMUM PERMITTED LEVEL OF A SUBSTANCE CONTAINED IN IMPORTED FEEDING-STUFFS MADE FROM POWDERED MILK WHEN IN THE PAST NO MAXIMUM LEVEL HAD EVER BEEN FIXED EITHER IN THE EXPORTING MEMBER STATE OR IN THE IMPORTING MEMBER STATE .

42 SUBJECT TO THE OBLIGATION NOT TO DISCRIMINATE BETWEEN IMPORTED PRODUCTS AND NATIONAL PRODUCTS , IT IS NECESSARY , FOR THE REASONS PUT FORWARD IN REPLY TO THE FIRST QUESTION , TO REPLY TO THE SECOND QUESTION IN THE AFFIRMATIVE .

43 IN FACT , ALTHOUGH SUBSTANCES HAVE NOT BEEN RECOGNIZED AS UNDESIRABLE BECAUSE IN A PREVIOUS STAGE THE COMPOSITION OF FEEDING-STUFFS WAS SUCH THAT THOSE SUBSTANCES ONLY APPEAR IN MINUTE QUANTITIES , IT IS POSSIBLE THAT DIFFERENT MIXTURES MAY CONTAIN THE SAME SUBSTANCES IN QUANTITIES SUCH THAT BECAUSE OF THEIR LEVEL THEY MAY BE CONSIDERED AS UNDESIRABLE .

[...]

Operative part

#### THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE PRETURA DI LODI BY ORDER OF 17 DECEMBER 1976 HEREBY RULES :

( 1 ) EVEN AFTER THE ENTRY INTO FORCE OF HARMONIZING DIRECTIVE NO 74/63 , THE MEMBER STATES HAVE , WITHIN THE CONTEXT OF ARTICLE 5 OF THAT DIRECTIVE AND SUBJECT TO THE MATERIAL AND PROCEDURAL REQUIREMENTS LAID DOWN THEREIN , THE POWER PROVISIONALLY TO CONSIDER AS UNDESIRABLE CERTAIN SUBSTANCES WHICH , ALTHOUGH KNOWN AND RECOGNIZED WHEN THAT DIRECTIVE WAS ADOPTED , DO NOT APPEAR IN THE LIST ANNEXED

*THERETO , PROVIDED THAT THE MEASURES ADOPTED APPLY ON IDENTICAL TERMS TO BOTH NATIONAL PRODUCTS AND TO PRODUCTS IMPORTED FROM OTHER MEMBER STATES ;*

*( 2 ) SUBJECT TO THE OBLIGATION NOT TO DISCRIMINATE BETWEEN IMPORTED PRODUCTS AND NATIONAL PRODUCTS , ARTICLE 5 OF DIRECTIVE NO 74/63 ENABLES A MEMBER STATE TO FIX , ON A PROVISIONAL BASIS , THE MAXIMUM PERMITTED LEVEL OF A SUBSTANCE CONTAINED IN IMPORTED FEEDING-STUFFS MADE FROM POWDERED MILK EVEN THOUGH NO MAXIMUM LEVEL HAS EVER BEEN FIXED IN THE PAST EITHER IN THE EXPORTING MEMBER STATE OR IN THE IMPORTING MEMBER STATE ;*

*[...] .*

## Case C-573/12, *Ålands Vindkraft v. Energimyndigheten*

1 This request for a preliminary ruling concerns the interpretation of point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16), and of Article 34 TFEU.

2 The request has been made in proceedings between Ålands Vindkraft AB and the Energimyndigheten (Swedish Energy Agency) concerning the Energimyndigheten's refusal to authorise, for the purposes of the award of electricity certificates, a wind farm in Finland operated by Ålands Vindkraft.

### Legal context

#### *EU law*

3 Directive 2009/28 entered into force on 25 June 2009 and required transposition into national law by 5 December 2010. With effect from 1 January 2012, Directive 2009/28 repealed Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ 2001 L 283, p. 33).

4 Recitals 1, 15, 25, 52 and 56 in the preamble to Directive 2009/28 state:

‘(1) The control of European energy consumption and the increased use of energy from renewable sources, together with energy savings and increased energy efficiency, constitute important parts of the package of measures needed to reduce greenhouse gas emissions and comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and with further Community and international greenhouse gas emission reduction commitments beyond 2012. Those factors also have an important part to play in promoting the security of energy supply, promoting technological development and innovation and providing opportunities for employment and regional development, especially in rural and isolated areas.

...

(15) The starting point, the renewable energy potential and the energy mix of each Member State vary. It is therefore necessary to translate the Community 20% target into individual targets for each Member State, with due regard to a fair and adequate allocation taking account of Member States' different starting points and potentials, including the existing level of energy from renewable sources and the energy mix. It is appropriate to do this by sharing the required total increase in the use of energy from renewable sources between Member States on the basis of an equal increase in each Member State's share weighted by their [gross domestic product (GDP)], modulated to reflect their starting points, and by accounting in terms of gross final consumption of energy, with account being taken of Member States' past efforts with regard to the use of energy from renewable sources.

...

(25) Member States have different renewable energy potentials and operate different schemes of support for energy from renewable sources at the national level. The majority of Member States apply support schemes that grant benefits solely to energy from renewable sources that is produced on their territory. For the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials. One important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes, as under Directive [2001/77], in order to maintain investor confidence and allow Member States to design effective national measures for target compliance. This Directive aims at facilitating cross-border support of energy from renewable sources without affecting national support schemes. It introduces optional cooperation mechanisms between Member States which allow them to agree on the extent to which one Member State supports the energy production in another and on the extent to which the energy production from renewable sources should count towards the national overall target of one or the other. In order to ensure the effectiveness of both measures of target compliance, i.e. national support schemes and cooperation mechanisms, it is essential that Member States are able to determine if and to what

extent their national support schemes apply to energy from renewable sources produced in other Member States and to agree on this by applying the cooperation mechanisms provided for in this Directive.

...

(52) Guarantees of origin issued for the purpose of this Directive have the sole function of proving to a final customer that a given share or quantity of energy was produced from renewable sources. A guarantee of origin can be transferred, independently of the energy to which it relates, from one holder to another. However, with a view to ensuring that a unit of electricity from renewable energy sources is disclosed to a customer only once, double counting and double disclosure of guarantees of origin should be avoided. Energy from renewable sources in relation to which the accompanying guarantee of origin has been sold separately by the producer should not be disclosed or sold to the final customer as energy from renewable sources. It is important to distinguish between green certificates used for support schemes and guarantees of origin.

...

(56) Guarantees of origin do not by themselves confer a right to benefit from national support schemes.’

5 Article 1 of Directive 2009/28, entitled ‘Subject-matter and scope’, states:

‘This Directive establishes a common framework for the promotion of energy from renewable sources. It sets mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy ... It lays down rules relating to statistical transfers between Member States, joint projects between Member States and with third countries, guarantees of origin, administrative procedures, information and training, and access to the electricity grid for energy from renewable sources. ...’

6 Points (j), (k) and (l) of the second paragraph of Article 2 of Directive 2009/28 lay down the following definitions:

‘...’

(j) “guarantee of origin” means an electronic document which has the sole function of providing proof to a final customer that a given share or quantity of energy was produced from renewable sources as required by Article 3(6) of Directive 2003/54/EC [of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37)];

(k) “support scheme” means any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments;

(l) “renewable energy obligation” means a national support scheme requiring energy producers to include a given proportion of energy from renewable sources in their production, requiring energy suppliers to include a given proportion of energy from renewable sources in their supply, or requiring energy consumers to include a given proportion of energy from renewable sources in their consumption. This includes schemes under which such requirements may be fulfilled by using green certificates’.

7 Under Article 3(1), (2) and (3) of Directive 2009/28:

‘1. Each Member State shall ensure that the share of energy from renewable sources, calculated in accordance with Articles 5 to 11, in gross final consumption of energy in 2020 is at least its national overall target for the share of energy from renewable sources in that year, as set out in the third column of the table in part A of Annex I. Such mandatory national overall targets are consistent with a target of at least a 20% share of energy from renewable sources in the Community’s gross final consumption of energy in 2020. ...’

2. Member States shall introduce measures effectively designed to ensure that the share of energy from renewable sources equals or exceeds that shown in the indicative trajectory set out in part B of Annex I.

3. In order to reach the targets set in paragraphs 1 and 2 of this Article Member States may, inter alia, apply the following measures:

(a) support schemes;

(b) measures of cooperation between different Member States and with third countries for achieving their national overall targets in accordance with Articles 5 to 11.

Without prejudice to Articles [107 TFEU] and [108 TFEU], Member States shall have the right to decide, in accordance with Articles 5 to 11 of this Directive, to which extent they support energy from renewable sources which is produced in a different Member State.’

8 Under Article 5(1) and (3) of Directive 2009/28:

‘1. The gross final consumption of energy from renewable sources in each Member State shall be calculated as the sum of:

(a) gross final consumption of electricity from renewable energy sources;

...

3. For the purposes of paragraph 1(a), gross final consumption of electricity from renewable energy sources shall be calculated as the quantity of electricity produced in a Member State from renewable energy sources, ...’

9 Paragraph 1 of Article 11 of Directive 2009/28, which is entitled ‘Joint support schemes’, provides:

‘Without prejudice to the obligations of Member States under Article 3, two or more Member States may decide, on a voluntary basis, to join or partly coordinate their national support schemes. In such cases, a certain amount of energy from renewable sources produced in the territory of one participating Member State may count towards the national overall target of another participating Member State if the Member States concerned:

(a) make a statistical transfer of specified amounts of energy from renewable sources from one Member State to another Member State in accordance with Article 6; or

(b) set up a distribution rule agreed by participating Member States that allocates amounts of energy from renewable sources between the participating Member States. Such a rule shall be notified to the Commission no later than three months after the end of the first year in which it takes effect.’

10 Article 15 of Directive 2009/28, which concerns guarantees of origin, provides inter alia:

‘1. For the purposes of proving to final customers the share or quantity of energy from renewable sources in an energy supplier’s energy mix in accordance with Article 3(6) of Directive [2003/54], Member States shall ensure that the origin of electricity produced from renewable energy sources can be guaranteed as such within the meaning of this Directive, in accordance with objective, transparent and non-discriminatory criteria.

2. ...

The guarantee of origin shall have no function in terms of a Member State’s compliance with Article 3. Transfers of guarantees of origin, separately or together with the physical transfer of energy, shall have no effect on the decision of Member States to use statistical transfers, joint projects or joint support schemes for target compliance or on the calculation of the gross final consumption of energy from renewable sources in accordance with Article 5.

...

9. Member States shall recognise guarantees of origin issued by other Member States in accordance with this Directive exclusively as proof of the elements referred to in paragraph 1 and paragraph 6(a) to (f). ...

...?

*Swedish law*

11 The electricity certificate scheme was established by Law (2003:113) on electricity certificates (lagen (2003:113) om elcertifikat) ('the Law of 2003'). It is a support scheme for the production of electricity from renewable energy sources ('green electricity'). That law was replaced, with effect from 1 January 2012, by Law (2011:1200) on electricity certificates (lagen (2011:1200) om elcertifikat) ('the Law of 2011'), which was intended, inter alia, to ensure the transposition of Directive 2009/28 into Swedish law.

12 Pursuant to the Law of 2011, approved producers are awarded an electricity certificate for each megawatt-hour (MWh) of green electricity produced. The förvaltningsrätten i Linköping (Administrative Court, Linköping; or 'the referring court') states that, although there is no express mention of any such restriction in the wording of the Law of 2011, it is apparent from the preparatory work for that law and for the Law of 2003 that approval for the award of such certificates is reserved to green electricity production installations located in Sweden. The approval of installations located outside Sweden is, by contrast, impossible.

13 Although it is not compulsory under the Law of 2011 to buy a corresponding volume of electricity when purchasing electricity certificates, the possibility of making such package purchases is not precluded.

14 The electricity certificates are tradable on an open competitive market where price is determined by the interplay of supply and demand.

15 The demand for electricity certificates stems from the fact that electricity suppliers and certain users are under an obligation to hold, and to surrender to the State on 1 April of each year, a certain number (quota) of certificates corresponding to a proportion of the total quantity of electricity supplied or consumed during the preceding year.

16 In Chapter 4 of the Law of 2011, Paragraph 1 provides:

'The following shall be subject to the quota obligation:

- (1) electricity suppliers;
- (2) electricity users who use electricity that they have themselves produced where the volume used is greater than 60 MWh per reference year in an installation whose capacity is greater than 50 [kilowatts (kW)];
- (3) electricity users to the extent that they have imported or purchased electricity from the Nordic electricity exchange; and
- (4) electro-intensive companies which have been registered.'

17 The electricity certificates quota — which is determined according to the objective pursued by the Kingdom of Sweden in terms of the production of green electricity — varies according to the periods concerned. For the period from 2010 to 2012, the quota was set at 0.179.

18 The purchase price for electricity certificates is passed on by the supplier to the consumer.

19 It also emerges from the observations made by the parties to the main proceedings and reproduced in the order for reference that, where they are unable to surrender the requisite number of electricity certificates by the due date, the electricity suppliers and users concerned are required to pay a sum of money. In its written

observations submitted to the Court, the Swedish Government also referred to the obligation to pay such a fee, which it referred to as ‘specific’ (‘the specific fee’).

20 It is common ground, moreover, that, in the absence of an international agreement concluded pursuant to Article 11 of Directive 2009/28, the quota obligation can be fulfilled only by means of electricity certificates awarded under the Law of 2011.

21 In Chapter 1 of the Law of 2011, Paragraph 5 provides in that regard:

‘Electricity certificates which have been awarded for the production of renewable electricity in another State may be used to fulfil a quota obligation under the present Law, provided that the Swedish electricity certificate scheme has been coordinated with the electricity certificate scheme of that other State by an international agreement.’

22 On 29 June 2011, the Kingdom of Sweden concluded such an agreement with the Kingdom of Norway. No such agreement exists, however, between the Kingdom of Sweden and the Republic of Finland.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

23 On 30 November 2009, Ålands Vindkraft sought approval from the competent Swedish authority for the Oskar wind farm — located in the Åland archipelago in Finland — with a view to being awarded electricity certificates.

24 That application was refused by the Energimyndigheten, by decision of 9 June 2010, on the grounds that only green electricity production installations located in Sweden may be approved for the award of electricity certificates.

25 Ålands Vindkraft brought an action before the förvaltningsrätten i Linköping for annulment of that decision and approval of its application. In particular, it alleges infringement of Article 34 TFEU, arguing in that regard that, as a result of the electricity certificates quota, set for the period under consideration at 0.179, the effect of the electricity certificate scheme is that approximately 18% of the Swedish electricity consumption market is reserved to green electricity producers located in Sweden, to the detriment of electricity imports from other Member States. According to Ålands Vindkraft, a barrier to trade of that nature cannot be justified by considerations relating to protection of the environment, given, in particular, that the consumption of green electricity in Sweden would be promoted just as effectively through the award of electricity certificates for green electricity consumed in Sweden but produced in other Member States.

26 The förvaltningsrätten i Linköping notes at the outset that, although the decision was adopted pursuant to the Law of 2003, the dispute before it must, under Swedish law, be settled in accordance with the law applicable at the time of the court’s assessment of that decision, that is to say, in the circumstances, in accordance with the Law of 2011. In any case, that law made only very slight changes to the rules applicable to the points at issue in the main proceedings.

27 The referring court considers it important, first, to determine whether the electricity certificate scheme at issue indeed constitutes a support scheme covered by point (k) of the second paragraph of Article 2 of Directive 2009/28 and by Article 3(3) thereof, given, in particular, that the scheme promotes the production of green electricity while those provisions refer, on the other hand, to the use or the consumption of green electricity. If the scheme does indeed constitute such a support scheme, it will be necessary to determine whether that scheme is authorised by Directive 2009/28, notwithstanding the fact that the directive excludes from its scope installations that produce green electricity in other Member States.

28 Next, the referring court notes that the scheme at issue enables Swedish producers of green electricity to obtain a direct economic advantage over producers in other Member States. Moreover, even though the Law of 2011 does not formally link sale of the electricity certificates to sale of the electricity, it is indirectly capable of promoting trade in electricity from Sweden in that suppliers may have an additional incentive to acquire electricity from Swedish producers because the latter are also able to provide them with the certificates that those suppliers need in order to fulfil their quota obligation.

29 According to the referring court, on the assumption that that legislation constitutes a measure having equivalent effect to a quantitative restriction on imports for the purposes of Article 34 TFEU, it is accordingly appropriate to consider whether that measure may, in the circumstances, be justified by overriding reasons relating to the protection of the environment.

30 In that context, the *förvaltningsrätten i Linköping* is uncertain, in particular, as to the possible relevance of *PreussenElektra* (C-379/98, EU:C:2001:160), given that, unlike the German support scheme at issue in the case which gave rise to that judgment, the Swedish electricity certificates scheme does not formally require electricity suppliers to purchase electricity from Swedish producers, and that, since the delivery of the judgment in *PreussenElektra*, EU law has evolved in various ways, notably as a result of the adoption of Directives 2001/77 and 2009/28.

31 Lastly, the referring court wonders whether, particularly in the light of the principle of legal certainty, the exclusion of green electricity produced outside Sweden from the scope of the support scheme at issue in the main proceedings should have been expressly provided for in the Law of 2011.

32 In those circumstances, the *förvaltningsrätten i Linköping* decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. The Swedish electricity certificate scheme is a national support scheme which requires electricity suppliers and certain electricity users of that Member State to purchase electricity certificates corresponding, respectively, to a share of their supplies or use, without there being a specific requirement also to purchase electricity from the same source. The electricity certificates are awarded by the Kingdom of Sweden and are proof that a certain volume of electricity has been produced from renewable energy sources. The producers of [green] electricity receive, through the sale of those certificates, income additional to that derived from the sale of electricity. Are point (k) [of the second paragraph] of Article 2 of [Directive 2009/28] and Article 3(3) [thereof] to be interpreted as permitting a Member State to implement a national support scheme, such as that described above, from which only producers established in the territory of that State may benefit, the result of which is that those producers have an economic advantage over producers who are not eligible for electricity certificates?’

2. In the light of Article 34 TFEU, can a system such as that described in Question 1 be regarded as constituting a quantitative restriction on imports or a measure having equivalent effect?

3. If the answer to Question 2 is affirmative, can such a scheme be regarded as compatible with Article 34 TFEU in the light of its objective of promoting the production of [green] electricity?

4. Does the fact that there is no express provision in national law requiring the support scheme to be confined to national producers have any bearing on the answers to the above questions?’

#### **Procedure before the Court**

[...]

#### **The questions referred for a preliminary ruling**

##### *Question 1*

38 By its first question, the referring court asks in essence whether point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28 must be interpreted as allowing a Member State to establish a support scheme such as that at issue in the main proceedings, which provides for the award of tradable certificates to producers of green electricity solely in respect of green electricity produced in the territory of that State and which places suppliers and certain electricity users under an obligation to deliver annually to the competent authority a certain number of those certificates, corresponding to a proportion of the total volume of electricity that they have supplied or consumed.

39 It is appropriate, in the first place, to consider whether a green electricity support system such as that at issue in the main proceedings constitutes a ‘support scheme’ within the meaning of point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28.

40 In that regard, it should be observed at the outset that recital 25 to Directive 2009/28 shows that the EU legislature believed that one important means of achieving the aim of the directive was to ensure that the national support schemes provided for under Directive 2001/77 functioned properly.

41 Express reference is made in recital 14 to Directive 2001/77 to the fact that the various types of national support mechanism provided for under that directive include those which, in common with the support scheme at issue in the main proceedings, use ‘green certificates’.

42 Furthermore, points (k) and (l) of the second paragraph of Article 2 of Directive 2009/28 also refer specifically to national support schemes which use ‘green certificates’.

43 As regards the fact that the scheme at issue supports the ‘production’ of green electricity rather than its ‘use’ or ‘consumption’ for the purposes of point (k) of the second paragraph of Article 2 and Article 3(1) of Directive 2009/28, the following observations should be made.

44 As regards the fact that the definition of ‘support scheme’ laid down in point (k) of the second paragraph of Article 2 of Directive 2009/28 relates — as was noted by the referring court — to instruments, schemes or mechanisms designed to promote the ‘use’ of green energy, sometimes by means of an obligation to ‘use’ it, it should be noted first that Article 1 of Directive 2009/28, which concerns its subject-matter and scope, states that the directive establishes a common framework for the promotion of energy from renewable sources.

45 Secondly, it should be noted that point (l) of the second paragraph of Article 2 of Directive 2009/28 gives the meaning to be attributed to the words ‘renewable energy obligation’, as used in point (k) of that paragraph. In that connection, point (l) refers to national support schemes requiring producers to ‘include’ a given proportion of green energy ‘in their production’ or ‘requiring energy suppliers to include a given proportion of energy from renewable sources in their supply, or requiring energy consumers to include a given proportion of energy from renewable sources in their consumption’, while stating expressly that that category includes schemes under which such requirements may be fulfilled through the use of green certificates.

46 And, indeed, the support scheme at issue in the main proceedings displays just such characteristics, since it imposes upon electricity suppliers and certain consumers an obligation to use green certificates for the purposes of meeting their respective obligations to include a given proportion of green electricity in their supply or to include a given proportion of green electricity in their consumption.

47 On the other hand, as regards the fact that the mandatory national targets, to which the support schemes referred to in Article 3(3) of Directive 2009/28 are to contribute, are identified in Article 3(1) of the directive in terms of the proportion of green energy in the ‘final consumption’ of energy, it should be noted that, under Article 5(1) and (3) of the directive, that consumption is in reality calculated by reference to the volume of green electricity ‘produced’ in a Member State.

48 It thus follows from the considerations set out in paragraphs 40 to 47 above that a support scheme for green electricity production using green certificates, such as that at issue in the main proceedings, has the necessary characteristics to be categorised as a ‘support scheme’ within the meaning of point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28.

49 With regard, in the second place, to the referring court’s doubts concerning the fact that the support scheme at issue in the main proceedings provides for the award of electricity certificates solely in respect of green electricity produced in the national territory, it is clear that, in adopting Directive 2009/28, the EU legislature left open the possibility of such a territorial limitation.

50 In that regard, first of all, it can be seen from recital 25 to Directive 2009/28 that, having found that most Member States apply support schemes that promote only green energy produced in their territory, the EU legislature indicated that, in order to ensure the effectiveness of those schemes as measures intended to help meet the respective national overall targets, it is essential that Member States be able to determine whether and, if so,

to what extent their national support schemes are to apply to green energy produced in other Member States and to agree on this by applying the cooperation mechanisms provided for under the directive.

51 Next, Article 3(3) of Directive 2009/28 expressly provides that, without prejudice to Articles 107 TFEU and 108 TFEU, Member States have the right to decide, in accordance with Articles 5 to 11 of the directive, to what extent they will support energy from renewable sources that is produced in another Member State.

52 Lastly, with regard more specifically to national schemes using green certificates, it should be noted that the EU legislature expressly took care to specify, in recitals 52 and 56 to Directive 2009/28, that the guarantees of origin issued in the various Member States in accordance with the directive must be distinguished from green certificates used in the context of national support schemes and that they do not, of themselves, confer the right to participate in such schemes. As can be seen, moreover, from point (j) of the second paragraph of Article 2 and from Article 15(1) and (9) of Directive 2009/28, mutual recognition between Member States of guarantees of origin whose sole purpose is to reveal to final customers the proportion of energy from renewable sources in an energy supplier's energy mix must be confined within those terms.

53 Those specifications in turn confirm that the EU legislature did not intend to require Member States who opted for a support scheme using green certificates to extend that scheme to cover green electricity produced on the territory of another Member State.

54 In the light of all the foregoing considerations, the answer to Question 1 is that point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28 must be interpreted as allowing a Member State to establish a support scheme, such as that at issue in the main proceedings, which provides for the award of tradable certificates to producers of green electricity solely in respect of green electricity produced in the territory of that State and which places suppliers and certain electricity users under an obligation to deliver annually to the competent authority a certain number of those certificates, corresponding to a proportion of the total volume of electricity that they have supplied or consumed.

### *Questions 2 and 3*

55 By its second and third questions, which it is appropriate to examine together, the referring court asks in essence whether Article 34 TFEU must be interpreted as meaning that national legislation such as that at issue in the main proceedings — which provides for the award of tradable certificates to producers of green electricity solely in respect of green electricity produced in the territory of the Member State concerned and which places suppliers and certain electricity users under an obligation to surrender annually to the competent authority a certain number of those certificates, corresponding to a proportion of the total volume of electricity that they have supplied or used, failing which they must pay a specific fee — constitutes a measure having equivalent effect to a quantitative restriction on imports for the purposes of that provision. If so, the referring court asks whether such legislation may nevertheless be justified in the light of its objective of promoting the production of green electricity.

### *The applicability of Article 34 TFEU*

56 According to the Energimyndigheten and the Swedish and German Governments, there is no need to examine, in the light of Article 34 TFEU, the restriction curtailing the territorial scope of the legislation at issue in the main proceedings, inasmuch as Directive 2009/28 is a harmonisation measure which expressly provides that Member States are under no obligation to open up their support schemes to green electricity produced in other Member States and that such a course of action is merely an option for those States, which, if taken up, must be exercised strictly in the manner prescribed by the directive.

57 In that regard, it should be noted that the Court has consistently held that, where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law (see, *inter alia*, *Radlberger Getränkegesellschaft and S. Spitz*, C-309/02, EU:C:2004:799, paragraph 53 and the case-law cited).

58 In the circumstances of the present case, it is therefore necessary to determine whether the harmonisation brought about by Directive 2009/28 ought to be regarded as being of such a kind as to preclude an examination of whether legislation such as that at issue is compatible with Article 34 TFEU.

59 In that regard, it should be noted at the outset that, far from seeking to bring about exhaustive harmonisation of national support schemes for green energy production, the EU legislature — as is apparent, inter alia, from recital 25 to Directive 2009/28 — based its approach on the finding that Member States apply different support schemes and on the principle that it is important to ensure the proper functioning of those schemes in order to maintain investor confidence and to enable those States to define effective national measures in order to achieve their mandatory national overall targets under the directive.

60 The definition of ‘support scheme’, for the purposes of Directive 2009/28, as laid down in point (k) of the second paragraph of Article 2 thereof, also highlights the fact that the instruments, schemes or support mechanisms are essentially measures adopted by the State, while confining itself to referring, in quite broad terms, to the existing types of national incentive designed to promote the use of energy from renewable sources.

61 In Article 1 of Directive 2009/28, which describes the subject-matter of that directive, there is nothing else to suggest that the directive is intended to bring about harmonisation of characteristics specific to the various national support schemes.

62 Nor does Article 3(3) of Directive 2009/28, which in substance simply authorises and encourages national support schemes for green energy production, contain any guidance on such characteristics, apart from the clarification that Member States have the right to decide, in accordance with Articles 5 to 11 of that directive, to what extent they support green energy produced in another Member State.

63 Against that background, it cannot be considered that, in covering that aspect of the territorial scope of national support schemes, the harmonisation brought about by Directive 2009/28 in the field of support schemes was of such a kind as to preclude an examination of their compatibility with Article 34 TFEU (see, by analogy, *Radlberger Getränkegesellschaft and S. Spitz*, EU:C:2004:799, paragraphs 54 to 57).

64 In the light of the foregoing considerations, it is appropriate to proceed with the interpretation of the Treaty provisions relating to the free movement of goods from the perspective contemplated in Questions 2 and 3.

The existence of a barrier to trade

65 The free movement of goods between Member States is a fundamental principle of the Treaty which finds its expression in the prohibition set out in Article 34 TFEU (see, inter alia, *Commission v Denmark*, C-192/01, EU:C:2003:492, paragraph 38).

66 It is settled case-law that, in prohibiting between Member States measures having equivalent effect to quantitative restrictions on imports, Article 34 covers any national measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, inter alia, *Dassonville*, 8/74, EU:C:1974:82, paragraph 5, and *PreussenElektra*, EU:C:2001:160, paragraph 69).

67 As it is, it must be noted in that regard that the legislation at issue is capable, in various ways, of hindering — at least indirectly and potentially — imports of electricity, especially green electricity, from other Member States.

68 In the first place, it follows from that legislation that suppliers and certain consumers are required to hold on the annual due date a certain number of electricity certificates for the purposes of meeting their quota obligation, which depends on the total volume of electricity that they supply or consume.

69 However, in the absence, inter alia, of an international agreement to that effect, only certificates awarded under the national scheme can be used to meet that obligation. Accordingly, those suppliers and consumers are as a rule required, on the basis of the electricity that they import, to purchase such certificates, failing which they have to pay a specific fee.

70 Such measures are thus capable of impeding electricity imports from other Member States (see, inter alia, by analogy, *Ligur Carni and Others*, C-277/91, C-318/91 and C-319/91, EU:C:1993:927, paragraph 36).

71 In the second place, the referring court notes both in its order and in its questions that, although green electricity producers may, in the context of the support scheme established by the legislation at issue in the main

proceedings, trade their electricity certificates on an open, competitive market that is dedicated to that trade, there is nothing in that legislation to stop the producers from selling those certificates together with the electricity that they produce, as a package.

72 The existence of such a possibility seems capable in practice of facilitating the opening of negotiations and the establishment of contractual relationships — in some cases, on a long-term basis — concerning the supply of national electricity by those producers to suppliers or electricity users, the latter being able to obtain, in that way, both the electricity and the green certificates that they need in order to meet their quota obligation.

73 It follows that, to that extent also, the effect of the support scheme at issue in the main proceedings is, at least potentially, to curb electricity imports from other Member States (see, to that effect, *Commission v Ireland*, 249/81, EU:C:1982:402, paragraphs 27 to 29).

74 In that context, it should in particular be noted that failure by a Member State to adopt adequate measures to prevent barriers to the free movement of goods that have been created, in particular, through the actions of traders but made possible by specific legislation that that State has introduced, is just as likely to obstruct intra-Community trade as is a positive act (see, to that effect, *Commission v France*, C-265/95, EU:C:1997:595, paragraph 31, and *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 58).

75 In the light of all the foregoing, it must be held that legislation such as that at issue in the main proceedings is capable of impeding imports of electricity, especially green electricity, from other Member States and that, in consequence, it constitutes a measure having equivalent effect to quantitative restrictions on imports, in principle incompatible with the obligations under EU law resulting from Article 34 TFEU, unless that legislation can be objectively justified (see, to that effect, inter alia, *Commission v Austria*, C-320/03, EU:C:2005:684, paragraph 69).

#### The possible justification

76 The Court has consistently held that national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on one of the public interest grounds listed in Article 36 TFEU or by overriding requirements. In either case, the national provision must, in accordance with the principle of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective (see, inter alia, *Commission v Austria*, C-524/07, EU:C:2008:717, paragraph 54 and the case-law cited).

– The objective of promoting the use of renewable energy sources

77 According to settled case-law, national measures that are capable of hindering intra-Community trade may inter alia be justified by overriding requirements relating to protection of the environment (see, to that effect, *Commission v Austria*, EU:C:2008:717, paragraph 57 and the case-law cited).

78 In that regard, it should be noted that the use of renewable energy sources for the production of electricity, which legislation such as that at issue in the main proceedings seeks to promote, is useful for the protection of the environment inasmuch as it contributes to the reduction in greenhouse gas emissions, which are amongst the main causes of climate change that the European Union and its Member States have pledged to combat (see, to that effect, *PreussenElektra*, EU:C:2001:160, paragraph 73).

79 That being so, the increase in the use of renewable energy sources constitutes — as is explained, in particular, in recital 1 to Directive 2009/28 — one of the important components of the package of measures needed to reduce greenhouse gas emissions and to comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and with other Community and international greenhouse gas emission reduction commitments beyond the year 2012.

80 As the Court has pointed out, such an increase is also designed to protect the health and life of humans, animals and plants, which are among the public interest grounds listed in Article 36 TFEU (see, to that effect, *PreussenElektra*, EU:C:2001:160, paragraph 75).

81 It is also clear from Article 194(1)(c) TFEU that the development of renewable energy is one of the objectives that must guide EU energy policy.

82 In the light of the foregoing considerations, it must be acknowledged that the objective of promoting the use of renewable energy sources for the production of electricity, such as the objective pursued by the legislation at issue in the main proceedings, is in principle capable of justifying barriers to the free movement of goods.

– Proportionality

83 As was noted in paragraph 76 above, in order for the national legislation to be capable of justification, it must nevertheless meet the requirements flowing from the principle of proportionality, that is to say, it must be appropriate for securing the attainment of the legitimate objective pursued and it must be necessary for those purposes.

84 It is appropriate, at the outset and in response to some questions raised in that regard by the referring court, to review, in the light of the developments undergone by the relevant EU legislation, certain features of the electricity market taken into consideration by the Court in the review of proportionality that it undertook in *PreussenElektra* (EU:C:2001:160).

85 In particular, as was pointed out by the Advocate General in points 83 to 86 of his Opinion, the finding made by the Court in paragraph 78 of the judgment in *PreussenElektra* — that Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20), then in force, merely marked a phase in the liberalisation of the electricity market and left in place some barriers to trade in electricity between Member States — no longer holds true.

86 It should be noted that the European Union subsequently adopted various legislative instruments whose purpose was gradually to dismantle those barriers so as to enable a fully operational internal market in electricity to be established, in which the cross-border trade in electricity within the European Union is intensified and all suppliers will be able to supply their goods and consumers will be free to choose their supplier. Particular examples of such instruments are: Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37) and its successor, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54 (OJ 2009 L 211, p. 55); and Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (OJ 2003 L 176, p. 1) and its successor, Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation No 1228/2003 (OJ 2009 L 211, p. 15).

87 On the other hand, the finding made by the Court in paragraph 79 of the judgment in *PreussenElektra* (EU:C:2001:160) — to the effect that the nature of electricity is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced — remains valid.

88 The fact that, under Directive 2001/77 and its successor, Directive 2009/28, the origin of green electricity may be attested by guarantees of origin is not capable of calling that finding into question.

89 In the first place, as was pointed out in paragraph 52 above, the sole purpose of those guarantees of origin is to indicate to final customers the proportion of energy from renewable sources in an electricity supplier's energy mix.

90 In the second place, it must be stated that, given the fungible nature of the electricity in the transmission and distribution systems, those guarantees cannot serve as confirmation that a certain volume of electricity supplied by those networks is precisely the electricity from renewable energy sources in respect of which those guarantees were given and, accordingly, the systematic identification of electricity as green electricity at the distribution and consumption stages remains difficult to put into practice.

91 In the light of those preliminary considerations, it is appropriate first to examine one of the aspects of the legislation at issue in the main proceedings, highlighted by the referring court in its questions and on the strength of which approval was refused to Ålands Vindkraft, namely, the fact that, under that legislation, electricity certificates are to be awarded solely in respect of green electricity produced in the national territory.

92 In that regard, it must be acknowledged that, as EU law currently stands, such a territorial limitation may in itself be regarded as necessary in order to attain the legitimate objective pursued in the circumstances, which is to promote increased use of renewable energy sources in the production of electricity.

93 It is admittedly true that, as Ålands Vindkraft, among others, has argued, it seems at first sight possible for the environmental protection objective underlying the increased production and consumption of green electricity — specifically, the objective of reducing greenhouse gas emissions — to be pursued within the European Union, together with the related objectives of protecting human, animal and plant life or health, regardless of whether that increase flows from installations located in the territory of a particular Member State.

94 However, since, in particular, EU law has not harmonised the national support schemes for green electricity, it is possible in principle for Member States to limit access to such schemes to green electricity production located in their territory.

95 First, the fact that a national support scheme is designed to favour directly the production of green electricity, rather than solely its consumption, can be explained, in particular, by the fact that the green nature of the electricity relates only to its method of production and that, accordingly, it is primarily at the production stage that the environmental objectives in terms of the reduction of greenhouse gases can actually be pursued.

96 By contrast, and as was pointed out in paragraphs 87 and 90 above, once the green electricity has been allowed into the transmission or distribution system, it is difficult to determine its specific origin and, accordingly, its systematic identification at the consumption stage as green electricity is difficult to put into practice.

97 It is also important to remember that, as is apparent from recitals 1 and 25 to Directive 2009/28 and Articles 3(1) and 5(1) and (3) thereof, and as was observed in relation to Question 1, in order to ensure the implementation of the international environmental commitments entered into by the European Union, the EU legislature has assigned the various Member States mandatory national targets formulated in terms of quotas for the production of green electricity.

98 Secondly, and in relation to the fact that the support scheme at issue in the main proceedings is designed to apply solely to green electricity production located in the national territory, it should be observed that, as was noted by the EU legislature in recital 15 to Directive 2009/28, the starting points, the renewable energy potential and the energy mix of each Member State vary, a fact which moved the EU legislature to consider it appropriate, taking into account those differences, to allocate among those States a fair and appropriate share of the effort required to satisfy the European Union's international commitments.

99 Furthermore, as was also noted by the EU legislature in recital 25 to Directive 2009/28, it is essential, in order to ensure the proper functioning of the national support schemes, that Member States be able to 'control the effect and costs of their national support schemes according to their different potentials', while maintaining investor confidence.

100 It should be noted, moreover, that while preserving the national and, in principle, territorial nature of the existing support schemes, the EU legislature has none the less also established various mechanisms to enable Member States to cooperate, in so far as is possible, in order to achieve their mandatory targets under Directive 2009/28. One of those mechanisms is the establishment, provided for under Article 11 of the directive, of joint support schemes.

101 As was pointed out in paragraph 22 above, that option was exercised by the Kingdom of Sweden and the Kingdom of Norway, which took steps to merge the green certificate support schemes that they had each set up.

102 As regards Ålands Vindkraft's contention that, according to certain indicators, the Kingdom of Sweden now has a green electricity production capacity enabling it to meet its mandatory national targets under Directive

2009/28, it must be held that, even supposing that to be the case, it cannot support the inference that the territorial limitation characterising the support scheme at issue in the main proceedings is no longer necessary.

103 In that regard, it need only be observed that a green energy support scheme, whose production costs seem — as the Swedish Government and the Commission, in particular, have maintained — to be still quite high as compared with the costs of electricity produced from non-renewable energy sources, is inherently designed to foster, from a long-term perspective, investment in new installations, by giving producers certain guarantees about the future marketing of their green electricity. Accordingly, the effectiveness of such a scheme requires by definition a measure of continuity sufficient, in particular, to ensure the fulfilment of the legitimate expectations of investors who have committed themselves to such projects, and the continued operation of those installations.

104 In the light of all the foregoing, it does not appear that, merely by reserving a support scheme using green certificates, such as that at issue in the main proceedings, exclusively to green electricity produced in the national territory, the Kingdom of Sweden has acted in breach of the principle of proportionality. As EU law currently stands, the Kingdom of Sweden was legitimately able to consider that such a territorial limitation does not go beyond what is necessary in order to attain the objective — pursued both by Directive 2009/28 and by the national scheme which falls within the scope of that directive — of increasing the production and, indirectly, the consumption of green electricity in the European Union.

105 Secondly, it is none the less important to examine whether, considered together with that territorial limitation, the other features of the legislation at issue in the main proceedings to which the referring court refers support the conclusion that, viewed as a whole, that legislation meets the requirements entailed by the principle of proportionality.

106 In that regard, it should be noted that, according to the order for reference, that legislation is characterised *inter alia* by an annual obligation for suppliers and certain users of electricity to hold and to surrender to the competent authority a certain number of electricity certificates, corresponding to a proportion of the total volume of electricity that they have supplied or consumed, failing which they must pay a specific fee.

107 It can also be seen from the order for reference that interested parties can obtain electricity certificates sold by producers on a specific market open to competition in which the price of the certificate is determined by the interplay of supply and demand, and that the legislation does not require, or prohibit, the purchase of both the electricity and the certificates from a single producer.

108 It therefore follows from the legislation at issue in the main proceedings that, in the case of imports to Sweden of green electricity produced by Ålands Vindkraft in Finland, the marketing or consumption of that electricity will require, in general, the suppliers or consumers concerned — including, as the case may be, Ålands Vindkraft in its capacity as a supplier — to purchase electricity certificates in proportion to the volume of electricity imported.

109 In those respects, it should be noted first that a national support scheme which, like the scheme at issue in the main proceedings, uses green certificates, is designed in particular to have the additional cost of producing green electricity borne directly by the market, that is to say, by the suppliers and users of electricity, who are required to meet the quota obligation, and, ultimately, by the consumers.

110 In choosing to do this, a Member State does not exceed the bounds of the discretion to which it remains entitled in the pursuit of the legitimate objective of increasing the production of green electricity.

111 Secondly, it must be noted that, unlike, for example, investment aid, the purpose of this type of scheme is to support the operation of installations producing green electricity once they become active. In that regard, the quota obligation is designed in particular to guarantee green electricity producers a demand for the certificates they have been awarded and in that way to facilitate the sale of the green energy that they produce at a price higher than the market price for conventional energy.

112 The effect of that scheme in terms of offering an incentive for electricity producers in general — including, in particular, for those who are both producers, on the one hand, and suppliers or consumers, on the other — to increase their production of green electricity does not appear to be open to doubt; nor, consequently, does it appear

possible to call in question the ability of that scheme to attain the legitimate objective pursued in the circumstances of this case.

113 However, it should be noted, thirdly, that, by its very nature, such a scheme requires for its proper functioning market mechanisms that are capable of enabling traders — who are subject to the quota obligation and who do not yet possess the certificates required to discharge that obligation — to obtain certificates effectively and under fair terms.

114 It is therefore important that mechanisms be established which ensure the creation of a genuine market for certificates in which supply can match demand, reaching some kind of balance, so that it is actually possible for the relevant suppliers and users to obtain certificates under fair terms.

115 According to the findings of the referring court, the green certificates are actually sold, in the Member State concerned, on a market that is open to competition and, accordingly, the price of those certificates is determined by the interplay of supply and demand.

116 As regards the fact that, under the legislation at issue in the main proceedings, suppliers and users which do not meet their quota obligation must pay a specific fee, it is appropriate to state the following. While the imposition of such a fee may admittedly be considered necessary as an incentive, on the one hand, to producers to increase their production of green electricity, and on the other, to traders subject to a quota obligation to take steps to acquire the requisite certificates, it is none the less necessary that neither the method for determining that fee nor the amount of that fee go beyond what is necessary for the purposes of providing such an incentive; in particular, it is necessary in that connection that no excessive penalties be imposed on the traders concerned.

117 Fourthly, it should be noted that the referring court states that the legislation at issue in the main proceedings does not preclude suppliers and users under a quota obligation from obtaining both the electricity and the electricity certificates from domestic green electricity producers. Ålands Vindkraft submits that, as a result, domestic green electricity producers can, by coupling the sale of electricity and electricity certificates, promote the sale of the latter.

118 In that regard, it should be noted that, provided that there is a market for green certificates which meets the conditions set out in paragraphs 113 and 114 above and on which traders who have imported electricity from other Member States are genuinely able to obtain certificates under fair terms, the fact that the national legislation at issue in the main proceedings does not prohibit producers of green electricity from selling to traders under the quota obligation both the electricity and the certificates does not mean that the legislation goes beyond what is necessary to attain the objective of increasing the production of green electricity. The fact that such a possibility remains open appears to be an additional incentive for producers to increase their production of green electricity.

119 In the light of all the foregoing considerations, the answer to Questions 2 and 3 is that Article 34 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides for the award of tradable certificates to green electricity producers solely in respect of green electricity produced in the territory of the Member State concerned and which places suppliers and certain electricity users under an obligation to surrender annually to the competent authority a certain number of those certificates, corresponding to a proportion of the total volume of electricity that they have supplied or used, failing which they must pay a specific fee.

#### *Question 4*

120 By its fourth question, read in the light of the grounds stated in the order for reference, the referring court asks, in essence, whether, on the assumption that Article 34 TFEU must be interpreted as not precluding legislation such as that at issue in the main proceedings, in so far as that legislation reserves the support measures introduced to green electricity production in the territory of the Member State concerned, EU law — including, in particular, the principle of legal certainty enshrined therein — does, on the other hand, preclude a situation in which the restriction of the territorial scope is not expressly laid down in that legislation.

121 In that regard, it should be noted that the referring court finds that, under the legislation at issue in the main proceedings, the electricity certificate scheme is not open to green electricity production installations located outside Sweden. The referring court states that, although that restriction is not expressly laid down in that

legislation, the legislation must be construed to that effect, particularly in view of the related *travaux préparatoires*.

122 The Commission argues in that connection that the restriction is laid down expressly in Article 5 of Chapter 1 of the Law of 2011 and that, accordingly, there is no need for the Court to answer the question.

123 It should be noted, however, that the question whether — and, if so, to what extent — the restriction of the territorial scope of the legislation at issue in the main proceedings is apparent from the wording of that legislation pertains to the interpretation of that legislation and accordingly falls under the exclusive jurisdiction of the national courts (see, to that effect, *inter alia*, *CEZ*, C-115/08, EU:C:2009:660, paragraph 57 and the case-law cited).

124 As regards the question raised by the referring court, it should be noted first of all that, in keeping with the answer given by the Court to Question 1, the support scheme at issue in the main proceedings constitutes a support scheme within the meaning of point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28, the purpose of which — as is apparent from the latter provision — is accordingly to help the Kingdom of Sweden meet its mandatory targets under the directive in relation to the production of green electricity in its territory.

125 It is settled case-law that where Member States adopt, in that way, measures by which they implement EU law, they are required to respect the general principles of that law, which include the principle of legal certainty (see, to that effect, *inter alia*, *Plantanol*, C-201/08, EU:C:2009:539, paragraph 43 and the case-law cited, and *IBV & Cie*, C-195/12, EU:C:2013:598, paragraph 49).

126 It is for the referring court to determine whether national legislation such as that at issue in the main proceedings is consistent with that principle, as the Court, when giving a preliminary ruling under Article 267 TFEU, has jurisdiction only to provide the national court with all the criteria for the interpretation of EU law which may enable it to determine the issue of compatibility (see, to that effect, *inter alia*, *Plantanol*, EU:C:2009:539, paragraph 45 and the case-law cited).

127 In that regard, it should be noted that, according to the Court's established case-law, the principle of legal certainty requires, on the one hand, that rules of law be clear and precise and, on the other, that their application be foreseeable by those subject to them (see, *inter alia*, *Plantanol*, EU:C:2009:539, paragraph 46 and the case-law cited).

128 Specifically, in order to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly (see, *inter alia*, *ArcelorMittal Luxembourg v Commission* and *Commission v ArcelorMittal Luxembourg and Others*, C-201/09 P and C-216/09 P, EU:C:2011:190, paragraph 68 and the case-law cited).

129 As regards the territorial scope of the support scheme provided for under the national legislation at issue in the main proceedings, the referring court may, in order to determine whether the requirements of the principle of legal certainty are met, consider all relevant elements which emerge from the terms, objectives or general scheme of that legislation (see, by analogy, *Mitsui & Co. Deutschland*, C-256/07, EU:C:2009:167, paragraph 32).

130 That court may also take into account the fact that the context to which the national legislation belongs is the implementation of Directive 2009/28, to which the *travaux préparatoires* for the Law of 2011 expressly refer, to the extent that, in particular, as is apparent from the Court's examination of Question 1, that directive expressly permits the establishment by Member States of similar support schemes subject to a territorial limitation, for the purposes, *inter alia*, of enabling those States to meet their mandatory targets under the directive with regard to the production of green energy in their territory.

131 In view of the foregoing and subject to final assessments which fall within the exclusive jurisdiction of the national court, it does not appear that the legislation at issue in the main proceedings is in breach of the principle of legal certainty.

132 In the light of all of the foregoing considerations, the answer to Question 4 is that it is for the national court to determine, taking into account all relevant factors — which may include the EU legislative context in which

the legislation at issue in the main proceedings arises — whether, in terms of its territorial scope, that legislation meets the requirements of the principle of legal certainty.

#### **Costs**

[...]

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

**1. Point (k) of the second paragraph of Article 2 and Article 3(3) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC must be interpreted as allowing a Member State to establish a support scheme, such as that at issue in the main proceedings, which provides for the award of tradable certificates to producers of green electricity solely in respect of green electricity produced in the territory of that State and which places suppliers and certain electricity users under an obligation to deliver annually to the competent authority a certain number of those certificates, corresponding to a proportion of the total volume of electricity that they have supplied or consumed.**

**2. Article 34 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides for the award of tradable certificates to green electricity producers solely in respect of green electricity produced in the territory of the Member State concerned and which places suppliers and certain electricity users under an obligation to surrender annually to the competent authority a certain number of those certificates, corresponding to a proportion of the total volume of electricity that they have supplied or used, failing which they must pay a specific fee.**

**3. It is for the national court to determine, taking into account all relevant factors — which may include the EU legislative context in which the legislation at issue in the main proceedings arises — whether, in terms of its territorial scope, that legislation meets the requirements of the principle of legal certainty.**

**Directive 2006/123/EC of the European Parliament and of the Council of  
12 December 2006 on services in the internal market**

[...]

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.
2. This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services.
3. This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by Community rules on competition.

This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to.

4. This Directive does not affect measures taken at Community level or at national level, in conformity with Community law, to protect or promote cultural or linguistic diversity or media pluralism.
5. This Directive does not affect Member States' rules of criminal law. However, Member States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive.
6. This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.
7. This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.

Article 2

Scope

1. This Directive shall apply to services supplied by providers established in a Member State.
2. This Directive shall not apply to the following activities:
  - (a) non-economic services of general interest;

- (b) financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC;
- (c) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC;
- (d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty;
- (e) services of temporary work agencies;
- (f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;
- (g) audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting;
- (h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions;
- (i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;
- (j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;
- (k) private security services;
- (l) services provided by notaries and bailiffs, who are appointed by an official act of government.

3. This Directive shall not apply to the field of taxation.

#### Article 3

##### Relationship with other provisions of Community law

1. If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. These include:

- (a) Directive 96/71/EC;
- (b) Regulation (EEC) No 1408/71;
- (c) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ;
- (d) Directive 2005/36/EC.

2. This Directive does not concern rules of private international law, in particular rules governing the law applicable to contractual and non contractual obligations, including those which guarantee that consumers benefit from the protection granted to them by the consumer protection rules laid down in the consumer legislation in force in their Member State.

3. Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.

#### Article 4

##### Definitions

For the purposes of this Directive, the following definitions shall apply:

- 1) 'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty;
- 2) 'provider' means any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service;
- 3) 'recipient' means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service;

- 4) 'Member State of establishment' means the Member State in whose territory the provider of the service concerned is established;
- 5) 'establishment' means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out;
- 6) 'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;
- 7) 'requirement' means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;
- 8) 'overriding reasons relating to the public interest' means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;
- 9) 'competent authority' means any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof;
- 10) 'Member State where the service is provided' means the Member State where the service is supplied by a provider established in another Member State;
- 11) 'regulated profession' means a professional activity or a group of professional activities as referred to in Article 3(1)(a) of Directive 2005/36/EC;
- 12) 'commercial communication' means any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not in themselves constitute commercial communications:
  - (a) information enabling direct access to the activity of the undertaking, organisation or person, including in particular a domain name or an electronic-mailing address;
  - (b) communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration.

## CHAPTER II

### ADMINISTRATIVE SIMPLIFICATION

#### Article 5

##### Simplification of procedures

1. Member States shall examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined under this paragraph are not sufficiently simple, Member States shall simplify them.
2. The Commission may introduce harmonised forms at Community level, in accordance with the procedure referred to in Article 40(2). These forms shall be equivalent to certificates, attestations and any other documents required of a provider.
3. Where Member States require a provider or recipient to supply a certificate, attestation or any other document proving that a requirement has been satisfied, they shall accept any document from another Member State which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied. They may not require a document from another Member State to be produced in its original form, or as a certified copy

or as a certified translation, save in the cases provided for in other Community instruments or where such a requirement is justified by an overriding reason relating to the public interest, including public order and security.

The first subparagraph shall not affect the right of Member States to require non-certified translations of documents in one of their official languages.

4. Paragraph 3 shall not apply to the documents referred to in Article 7(2) and 50 of Directive 2005/36/EC, in Articles 45(3), 46, 49 and 50 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, in the First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community and in the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State .

## Article 6

### Points of single contact

1. Member States shall ensure that it is possible for providers to complete the following procedures and formalities through points of single contact:

- (a) all procedures and formalities needed for access to his service activities, in particular, all declarations, notifications or applications necessary for authorisation from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association;
- (b) any applications for authorisation needed to exercise his service activities.

2. The establishment of points of single contact shall be without prejudice to the allocation of functions and powers among the authorities within national systems.

## Article 7

### Right to information

1. Member States shall ensure that the following information is easily accessible to providers and recipients through the points of single contact:

- (a) requirements applicable to providers established in their territory, in particular those requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities;
- (b) the contact details of the competent authorities enabling the latter to be contacted directly, including the details of those authorities responsible for matters concerning the exercise of service activities;
- (c) the means of, and conditions for, accessing public registers and databases on providers and services;
- (d) the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers;
- (e) the contact details of the associations or organisations, other than the competent authorities, from which providers or recipients may obtain practical assistance.

2. Member States shall ensure that it is possible for providers and recipients to receive, at their request, assistance from the competent authorities, consisting in information on the way in which the requirements referred to in point (a) of paragraph 1 are generally interpreted and applied. Where appropriate, such advice shall include a simple step-by-step guide. The information shall be provided in plain and intelligible language.

3. Member States shall ensure that the information and assistance referred to in paragraphs 1 and 2 are provided in a clear and unambiguous manner, that they are easily accessible at a distance and by electronic means and that they are kept up to date.

4. Member States shall ensure that the points of single contact and the competent authorities respond as quickly as possible to any request for information or assistance as referred to in paragraphs 1 and 2 and, in cases where the request is faulty or unfounded, inform the applicant accordingly without delay.

5. Member States and the Commission shall take accompanying measures in order to encourage points of single contact to make the information provided for in this Article available in other Community languages. This does not interfere with Member States' legislation on the use of languages.

6. The obligation for competent authorities to assist providers and recipients does not require those authorities to provide legal advice in individual cases but concerns only general information on the way in which requirements are usually interpreted or applied.

## Article 8

### Procedures by electronic means

1. Member States shall ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities.

2. Paragraph 1 shall not apply to the inspection of premises on which the service is provided or of equipment used by the provider or to physical examination of the capability or of the personal integrity of the provider or of his responsible staff.

3. The Commission shall, in accordance with the procedure referred to in Article 40(2), adopt detailed rules for the implementation of paragraph 1 of this Article with a view to facilitating the interoperability of information systems and use of procedures by electronic means between Member States, taking into account common standards developed at Community level.

## CHAPTER III

### FREEDOM OF ESTABLISHMENT FOR PROVIDERS

#### SECTION 1

##### Authorisations

## Article 9

### Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

- (a) the authorisation scheme does not discriminate against the provider in question;
- (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;
- (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

2. In the report referred to in Article 39(1), Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1 of this Article.

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.

## Article 10

### Conditions for the granting of authorisation

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

- (a) non-discriminatory;
- (b) justified by an overriding reason relating to the public interest;
- (c) proportionate to that public interest objective;
- (d) clear and unambiguous;
- (e) objective;
- (f) made public in advance;
- (g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.

5. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

6. Except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.

7. This Article shall not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations.

## Article 11

### Duration of authorisation

1. An authorisation granted to a provider shall not be for a limited period, except where:

- (a) the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements;
- (b) the number of available authorisations is limited by an overriding reason relating to the public interest;

or

- (c) a limited authorisation period can be justified by an overriding reason relating to the public interest.

2. Paragraph 1 shall not concern the maximum period before the end of which the provider must actually commence his activity after receiving authorisation.

3. Member States shall require a provider to inform the relevant point of single contact provided for in Article 6 of the following changes:

- (a) the creation of subsidiaries whose activities fall within the scope of the authorisation scheme;
- (b) changes in his situation which result in the conditions for authorisation no longer being met.

4. This Article shall be without prejudice to the Member States' ability to revoke authorisations, when the conditions for authorisation are no longer met.

## Article 12

### Selection from among several candidates

1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.

3. Subject to paragraph 1 and to Articles 9 and 10, Member States may take into account, in establishing the rules for the selection procedure, considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law.

## Article 13

### Authorisation procedures

1. Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.

2. Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.

3. Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.

4. Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

5. All applications for authorisation shall be acknowledged as quickly as possible. The acknowledgement must specify the following:

- (a) the period referred to in paragraph 3;
- (b) the available means of redress;
- (c) where applicable, a statement that in the absence of a response within the period specified, the authorisation shall be deemed to have been granted.

6. In the case of an incomplete application, the applicant shall be informed as quickly as possible of the need to supply any additional documentation, as well as of any possible effects on the period referred to in paragraph 3.

7. When a request is rejected because it fails to comply with the required procedures or formalities, the applicant shall be informed of the rejection as quickly as possible.

## SECTION 2

Requirements prohibited or subject to evaluation

### Article 14

Prohibited requirements

Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:

1) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office, including in particular:

(a) nationality requirements for the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies;

(b) a requirement that the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies be resident within the territory;

2) a prohibition on having an establishment in more than one Member State or on being entered in the registers or enrolled with professional bodies or associations of more than one Member State;

3) restrictions on the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have its principal establishment in their territory, or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;

4) conditions of reciprocity with the Member State in which the provider already has an establishment, save in the case of conditions of reciprocity provided for in Community instruments concerning energy;

5) the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest;

6) the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority; this prohibition shall not concern the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large;

7) an obligation to provide or participate in a financial guarantee or to take out insurance from a provider or body established in their territory. This shall not affect the possibility for Member States to require insurance or financial guarantees as such, nor shall it affect requirements relating to the participation in a collective compensation fund, for instance for members of professional bodies or organisations;

8) an obligation to have been pre-registered, for a given period, in the registers held in their territory or to have previously exercised the activity for a given period in their territory.

### Article 15

Requirements to be evaluated

1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

- (a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;
- (b) an obligation on a provider to take a specific legal form;
- (c) requirements which relate to the shareholding of a company;
- (d) requirements, other than those concerning matters covered by Directive 2005/36/EC or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;
- (e) a ban on having more than one establishment in the territory of the same State;
- (f) requirements fixing a minimum number of employees;
- (g) fixed minimum and/or maximum tariffs with which the provider must comply;
- (h) an obligation on the provider to supply other specific services jointly with his service.

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

- (a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;
- (b) necessity: requirements must be justified by an overriding reason relating to the public interest;
- (c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.

5. In the mutual evaluation report provided for in Article 39(1), Member States shall specify the following:

- (a) the requirements that they intend to maintain and the reasons why they consider that those requirements comply with the conditions set out in paragraph 3;
- (b) the requirements which have been abolished or made less stringent.

6. From 28 December 2006 Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3.

7. Member States shall notify the Commission of any new laws, regulations or administrative provisions which set requirements as referred to in paragraph 6, together with the reasons for those requirements. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall not prevent Member States from adopting the provisions in question.

Within a period of 3 months from the date of receipt of the notification, the Commission shall examine the compatibility of any new requirements with Community law and, where appropriate, shall adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them.

The notification of a draft national law in accordance with Directive 98/34/EC shall fulfil the obligation of notification provided for in this Directive.

## CHAPTER IV

### FREE MOVEMENT OF SERVICES

#### SECTION 1

Freedom to provide services and related derogations

## Article 16

### Freedom to provide services

1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

- (a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;
- (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
- (c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

- (a) an obligation on the provider to have an establishment in their territory;
- (b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;
- (c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;
- (d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
- (e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
- (f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;
- (g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

4. By 28 December 2011 the Commission shall, after consultation of the Member States and the social partners at Community level, submit to the European Parliament and the Council a report on the application of this Article, in which it shall consider the need to propose harmonisation measures regarding service activities covered by this Directive.

## Article 17

### Additional derogations from the freedom to provide services

Article 16 shall not apply to:

- 1) services of general economic interest which are provided in another Member State, inter alia:

- (a) in the postal sector, services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service;
  - (b) in the electricity sector, services covered by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity;
  - (c) in the gas sector, services covered by Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas);
  - (d) water distribution and supply services and waste water services;
  - (e) treatment of waste;
- 2) matters covered by Directive 96/71/EC;
  - 3) matters covered by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
  - 4) matters covered by Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services ;
  - 5) the activity of judicial recovery of debts;
  - 6) matters covered by Title II of Directive 2005/36/EC, as well as requirements in the Member State where the service is provided which reserve an activity to a particular profession;
  - 7) matters covered by Regulation (EEC) No 1408/71;
  - 8) as regards administrative formalities concerning the free movement of persons and their residence, matters covered by the provisions of Directive 2004/38/EC that lay down administrative formalities of the competent authorities of the Member State where the service is provided with which beneficiaries must comply;
  - 9) as regards third country nationals who move to another Member State in the context of the provision of a service, the possibility for Member States to require visa or residence permits for third country nationals who are not covered by the mutual recognition regime provided for in Article 21 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders or the possibility to oblige third country nationals to report to the competent authorities of the Member State in which the service is provided on or after their entry;
  - 10) as regards the shipment of waste, matters covered by Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community;
  - 11) copyright, neighbouring rights and rights covered by Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products and by Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, as well as industrial property rights;
  - 12) acts requiring by law the involvement of a notary;
  - 13) matters covered by Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audit of annual accounts and consolidated accounts;
  - 14) the registration of vehicles leased in another Member State;
  - 15) provisions regarding contractual and non-contractual obligations, including the form of contracts, determined pursuant to the rules of private international law.

## Article 18

### Case-by-case derogations

1. By way of derogation from Article 16, and in exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures relating to the safety of services.
2. The measures provided for in paragraph 1 may be taken only if the mutual assistance procedure laid down in Article 35 is complied with and the following conditions are fulfilled:
  - (a) the national provisions in accordance with which the measure is taken have not been subject to Community harmonisation in the field of the safety of services;
  - (b) the measures provide for a higher level of protection of the recipient than would be the case in a measure taken by the Member State of establishment in accordance with its national provisions;
  - (c) the Member State of establishment has not taken any measures or has taken measures which are insufficient as compared with those referred to in Article 35(2);
  - (d) the measures are proportionate.

3. Paragraphs 1 and 2 shall be without prejudice to provisions, laid down in Community instruments, which guarantee the freedom to provide services or which allow derogations therefrom.

## SECTION 2

### Rights of recipients of services

#### Article 19

##### Prohibited restrictions

Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular the following requirements:

- (a) an obligation to obtain authorisation from or to make a declaration to their competent authorities;
- (b) discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.

#### Article 20

##### Non-discrimination

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.
2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

#### Article 21

##### Assistance for recipients

1. Member States shall ensure that recipients can obtain, in their Member State of residence, the following information:
  - (a) general information on the requirements applicable in other Member States relating to access to, and exercise of, service activities, in particular those relating to consumer protection;
  - (b) general information on the means of redress available in the case of a dispute between a provider and a recipient;
  - (c) the contact details of associations or organisations, including the centres of the European Consumer Centres Network, from which providers or recipients may obtain practical assistance.

Where appropriate, advice from the competent authorities shall include a simple step-by-step guide. Information and assistance shall be provided in a clear and unambiguous manner, shall be easily accessible at a distance, including by electronic means, and shall be kept up to date.

2. Member States may confer responsibility for the task referred to in paragraph 1 on points of single contact or on any other body, such as the centres of the European Consumer Centres Network, consumer associations or Euro Info Centres.

Member States shall communicate to the Commission the names and contact details of the designated bodies. The Commission shall transmit them to all Member States.

3. In fulfilment of the requirements set out in paragraphs 1 and 2, the body approached by the recipient shall, if necessary, contact the relevant body for the Member State concerned. The latter shall send the information requested as soon as possible to the requesting body which shall forward the information to the recipient. Member States shall ensure that those bodies give each other mutual assistance and shall put in place all possible measures for effective cooperation. Together with the Commission, Member States shall put in place practical arrangements necessary for the implementation of paragraph 1.

4. The Commission shall, in accordance with the procedure referred to in Article 40(2), adopt measures for the implementation of paragraphs 1, 2 and 3 of this Article, specifying the technical mechanisms for the exchange of information between the bodies of the various Member States and, in particular, the interoperability of information systems, taking into account common standards.

## CHAPTER V

### QUALITY OF SERVICES

#### Article 22

##### Information on providers and their services

1. Member States shall ensure that providers make the following information available to the recipient:
  - (a) the name of the provider, his legal status and form, the geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;
  - (b) where the provider is registered in a trade or other similar public register, the name of that register and the provider's registration number, or equivalent means of identification in that register;
  - (c) where the activity is subject to an authorisation scheme, the particulars of the relevant competent authority or the single point of contact;
  - (d) where the provider exercises an activity which is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment;
  - (e) in the case of the regulated professions, any professional body or similar institution with which the provider is registered, the professional title and the Member State in which that title has been granted;
  - (f) the general conditions and clauses, if any, used by the provider;
  - (g) the existence of contractual clauses, if any, used by the provider concerning the law applicable to the contract and/or the competent courts;
  - (h) the existence of an after-sales guarantee, if any, not imposed by law;
  - (i) the price of the service, where a price is pre-determined by the provider for a given type of service;
  - (j) the main features of the service, if not already apparent from the context;
  - (k) the insurance or guarantees referred to in Article 23(1), and in particular the contact details of the insurer or guarantor and the territorial coverage.
2. Member States shall ensure that the information referred to in paragraph 1, according to the provider's preference:
  - (a) is supplied by the provider on his own initiative;
  - (b) is easily accessible to the recipient at the place where the service is provided or the contract concluded;
  - (c) can be easily accessed by the recipient electronically by means of an address supplied by the provider;
  - (d) appears in any information documents supplied to the recipient by the provider which set out a detailed description of the service he provides.
3. Member States shall ensure that, at the recipient's request, providers supply the following additional information:
  - (a) where the price is not pre-determined by the provider for a given type of service, the price of the service or, if an exact price cannot be given, the method for calculating the price so that it can be checked by the recipient, or a sufficiently detailed estimate;

- (b) as regards the regulated professions, a reference to the professional rules applicable in the Member State of establishment and how to access them;
- (c) information on their multidisciplinary activities and partnerships which are directly linked to the service in question and on the measures taken to avoid conflicts of interest. That information shall be included in any information document in which providers give a detailed description of their services;
- (d) any codes of conduct to which the provider is subject and the address at which these codes may be consulted by electronic means, specifying the language version available;
- (e) where a provider is subject to a code of conduct, or member of a trade association or professional body which provides for recourse to a non-judicial means of dispute settlement, information in this respect. The provider shall specify how to access detailed information on the characteristics of, and conditions for, the use of non-judicial means of dispute settlement.

4. Member States shall ensure that the information which a provider must supply in accordance with this Chapter is made available or communicated in a clear and unambiguous manner, and in good time before conclusion of the contract or, where there is no written contract, before the service is provided.

5. The information requirements laid down in this Chapter are in addition to requirements already provided for in Community law and do not prevent Member States from imposing additional information requirements applicable to providers established in their territory.

6. The Commission may, in accordance with the procedure referred to in Article 40(2), specify the content of the information provided for in paragraphs 1 and 3 of this Article according to the specific nature of certain activities and may specify the practical means of implementing paragraph 2 of this Article.

## Article 23

### Professional liability insurance and guarantees

1. Member States may ensure that providers whose services present a direct and particular risk to the health or safety of the recipient or a third person, or to the financial security of the recipient, subscribe to professional liability insurance appropriate to the nature and extent of the risk, or provide a guarantee or similar arrangement which is equivalent or essentially comparable as regards its purpose.

2. When a provider establishes himself in their territory, Member States may not require professional liability insurance or a guarantee from the provider where he is already covered by a guarantee which is equivalent, or essentially comparable as regards its purpose and the cover it provides in terms of the insured risk, the insured sum or a ceiling for the guarantee and possible exclusions from the cover, in another Member State in which the provider is already established. Where equivalence is only partial, Member States may require a supplementary guarantee to cover those aspects not already covered.

When a Member State requires a provider established in its territory to subscribe to professional liability insurance or to provide another guarantee, that Member State shall accept as sufficient evidence attestations of such insurance cover issued by credit institutions and insurers established in other Member States.

3. Paragraphs 1 and 2 shall not affect professional insurance or guarantee arrangements provided for in other Community instruments.

4. For the implementation of paragraph 1, the Commission may, in accordance with the regulatory procedure referred to in Article 40(2), establish a list of services which exhibit the characteristics referred to in paragraph 1 of this Article. The Commission may also, in accordance with the procedure referred to in Article 40(3), adopt measures designed to amend non-essential elements of this Directive by supplementing it by establishing common criteria for defining, for the purposes of the insurance or guarantees referred to in paragraph 1 of this Article, what is appropriate to the nature and extent of the risk.

5. For the purpose of this Article

— ‘direct and particular risk’ means a risk arising directly from the provision of the service,

- ‘health and safety’ means, in relation to a recipient or a third person, the prevention of death or serious personal injury,
- ‘financial security’ means, in relation to a recipient, the prevention of substantial losses of money or of value of property,
- ‘professional liability insurance’ means insurance taken out by a provider in respect of potential liabilities to recipients and, where applicable, third parties arising out of the provision of the service.

#### Article 24

##### Commercial communications by the regulated professions

1. Member States shall remove all total prohibitions on commercial communications by the regulated professions.
2. Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy, in a manner consistent with the specific nature of each profession. Professional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.

[...]



## LECTURE 4: ECONOMIC FREEDOMS AND SOCIAL RIGHTS IN THE INTERNAL MARKET

The EU internal market is built on free movement rights. Those rights enable above all commodities or economically active persons to move around freely. Moving around freely nevertheless also entails at least some possibility to go abroad and establish oneself in a jurisdiction that has lower or less burdensome regulatory standards in terms of labour law or social security protection. As a result, EU internal market law is said to enable social dumping. The Court of Justice has never accepted the premise that the internal market necessarily downgrades social protection legislation. Indeed, it has tried to balance, in a nuanced way, economic free movement and social protection rights. In this lecture, we analyse to what extent the European Union has indeed done so and whether the legal doctrines thus established allow indeed to reconcile an economic and social European integration project. Attention will also be paid to the fundamental rights nature of certain social rights and to the question whether fundamental rights occupy a special place in EU internal market reasoning. You will be invited to reflect critically on the role of EU internal market law in striking that balance and on potential adaptations to the current regulatory regime and Treaty setup. One of the questions considered will also be to what extent the European free movement entitlements can be used by trade unions to move to countries with stronger social or labour law protection regimes.

### Materials to read:

- Court of Justice, 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.
  - Court of Justice, 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772.
  - Court of Justice, 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECLI:EU:C:2007:809.
  - Court of Justice, 11 November 2014, C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, ECLI:EU:C:2014:2358.
- 
- D. Schiek, *EU Social and Labour Rights and EU Internal Market Law*, Study for the EMPL Committee of the European Parliament, 2015 (via eCampus).

### Lecture 4 outline:

- a. The economic v. social rights dilemma in EU internal market law
  1. Free movement rights as businesses' rights
  2. Regulatory competition and races to the social bottom
  3. Social dumping: theory and practice
- b. Fundamental social rights and fundamental freedoms
  1. Fundamental social rights: right of association – right to social assistance – right to strike

2. Balancing fundamental rights and fundamental freedoms – Schmidberger
3. Balancing in practice
- c. Beyond “fundamental social rights”?
  1. Industrial action as a limitation on free movement?
  2. The Viking saga
  3. The Laval saga
  4. Lessons to learn from Viking and Laval
- d. Social assistance rights
  1. Social assistance for everyone in the EU?
  2. Limits on social assistance – Dano
  3. Balancing free movement and financial responsibilities
- e. Avoiding social dumping in the internal market
  1. EU legislative interventions: from posted workers to newly proposed legislation
  2. Empowering trade unions through free movement rights?
  3. Enabling EU-wide labour negotiations?
- f. Recalibrating the economic v. social rights dilemma in EU law
  1. A false balancing regime?
  2. The redistributive impact of EU law
  3. Politicising EU internal market law more explicitly?

Questions for discussion:

- Are social rights subordinate to economic rights – or do they constitute an inherent part of EU free movement rights?
- What legal strategies seem feasible – in the current EU Treaty setup – to avoid social dumping and to ensure that no single Member State bears a disproportionate social assistance burden as a consequence of free movement?

**Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich**

In Case C-112/00,

REFERENCE to the Court under Article 234 EC by the Oberlandesgericht Innsbruck (Austria) for a preliminary ruling in the proceedings pending before that court between

**Eugen Schmidberger, Internationale Transporte und Planzüge**

and

**Republik Österreich,**

on the interpretation of Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC) read together with Article 5 of the EC Treaty (now Article 10 EC), and on the conditions for liability of a Member State for damage caused to individuals by a breach of Community law,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissechet, M. Wathelet and R. Schintgen (Rapporteur) (Presidents of Chambers), C. Gulmann, D.A.O. Edward, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl (Principal Administrator),

after considering the written observations submitted on behalf of:

- Eugen Schmidberger, Internationale Transporte und Planzüge, by K.-H. Plankel, H. Mayrhofer and R. Schneider, Rechtsanwälte,
- the Republic of Austria, by A. Riccabona, acting as Agent,
- the Austrian Government, by H. Dossi, acting as Agent,
- the Greek Government, by N. Dafniou and G. Karipsiadis, acting as Agents,
- the Italian Government, by U. Leanza, acting as Agent, assisted by O. Fiumara, vice avvocato generale dello Stato,
- the Netherlands Government, by M.A. Fierstra, acting as Agent,
- the Commission of the European Communities, by J.C. Schieferer, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Eugen Schmidberger, Internationale Transporte und Planzüge, represented by R. Schneider; the Republic of Austria, represented by A. Riccabona; the Austrian Government, represented by E. Riedl, acting as Agent; the Greek Government, represented by N. Dafniou and G. Karipsiadis; the Italian Government, represented by O. Fiumara; the Netherlands Government, represented by H.G. Sevenster, acting as

Agent; the Finnish Government, represented by T. Pynnä, acting as Agent; and the Commission, represented by J.C. Schieferer and J. Grunwald, acting as Agent, at the hearing on 12 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

#### Judgment

1.

By order of 1 February 2000, received at the Court on 24 March 2000, the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) referred under Article 234 EC six questions for a preliminary ruling on the interpretation of Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC) read together with Article 5 of the EC Treaty (now Article 10 EC), and on the conditions for liability of a Member State for damage caused to individuals by a breach of Community law.

2.

Those questions were raised in proceedings between Eugen Schmidberger, Internationale Transporte und Planzüge ('Schmidberger') and the Republic of Austria concerning the permission implicitly granted by the competent authorities of that Member State to an environmental group to organise a demonstration on the Brenner motorway, the effect of which was to completely close that motorway to traffic for almost 30 hours.

#### National law

3.

Paragraph 2 of the Versammlungsgesetz (Law on assembly) of 1953, as subsequently amended ('VslgG') provides:

'(1) A person desirous of arranging a popular meeting or any meeting accessible to the public and not limited to invited guests must give written notice thereof to the authority (Paragraph 16) at least 24 hours in advance of the proposed event, stating the purpose, place and time of the meeting. The notice must reach the authority at least 24 hours before the time of the proposed meeting.

(2) On demand the authority shall forthwith issue a certificate concerning the notice ...'.

4.

Paragraph 6 of the VslgG provides:

'Meetings whose purpose runs counter to the criminal law or which, if held, are likely to endanger public order or the common weal are to be banned by the authorities.'

5.

Paragraph 16 of the VslgG provides:

'For the purposes of the present law, the usual meaning of "the authority" is:

(a) in places within their competence, the Federal Police;

(b) in the place where the Landeshauptmann [head of government of the Land] has his seat of government, where there is no Federal Police presence, the Sicherheitsdirektion [the security services];  
...

(c) in all other places, the Bezirksverwaltungsbehörde [district administrative authority]’.

6.

Paragraph 42(1) of the Straßenverkehrsordnung (Highway Code) of 1960, as subsequently amended (‘the StVO’), prohibits the transport by road of heavy goods trailers on Saturdays from 15.00 hrs to midnight and on Sundays and bank holidays from midnight to 22.00 hrs where the maximum permitted total weight of the heavy goods vehicle or of the trailer exceeds 3.5 tonnes. Further, according to Paragraph 42(2), during the periods stated in Paragraph 42(1) the movement of heavy goods vehicles, articulated lorries and rigid-chassis lorries having a maximum permitted total weight in excess of 7.5 tonnes is prohibited. Certain exceptions are permitted, in particular for the transport of milk, perishable foodstuffs or animals for slaughter (except for the transport of cattle on motorways).

7.

Under Paragraph 42(6) of the StVO, the movement of heavy goods vehicles having a maximum permitted total weight in excess of 7.5 tonnes is prohibited between 22.00 hrs and 05.00 hrs. The journeys made by vehicles emitting noise below a certain level are not affected by that prohibition.

8.

Pursuant to Paragraph 45(2) et seq. of the StVO, derogations in respect of road use may be granted in respect of individual applications and subject to certain conditions.

9.

Paragraph 86 of the StVO provides:

‘Marches. Unless provided otherwise, where it is intended to use a road for outdoor meetings, public or customary marches, local fêtes, parades or other such assemblies, these must be declared in advance by their organisers to the authority ...’.

#### **The main proceedings and the questions referred for a preliminary ruling**

10.

According to the file in the main proceedings, on 15 May 1998 the Transitforum Austria Tirol, an association ‘to protect the biosphere in the Alpine region’, gave notice to the Bezirkshauptmannschaft Innsbruck (Innsbruck provincial government) under Paragraph 2 of the VslgG and Paragraph 86 of the StVO of a demonstration to be held from 11.00 hrs on Friday 12 June 1998 to 15.00 hrs on Saturday 13 June 1998 on the Brenner motorway (A13), resulting in that motorway being closed to all traffic on the section from the Europabrücke service area to the Schönberg toll station (Austria).

11.

On the same day, the chairman of that association gave a press conference following which the Austrian and German media disseminated information concerning the closure of the Brenner motorway. The German and Austrian motoring organisations were also notified and they too offered practical information to motorists, advising them in particular to avoid that motorway during the period in question.

12.

On 21 May 1998, the Bezirkshauptmannschaft requested the Sicherheitsdirektion für Tirol (Directorate of security for Tyrol) to provide instructions concerning the proposed demonstration. On 3 June 1998,

the Sicherheitsdirektor issued an order that it was not to be banned. On 10 June 1998, there was a meeting of members of various local authorities in order to ensure that the demonstration would be free of trouble.

13.

Considering that that demonstration was lawful as a matter of Austrian law, the Bezirkshauptmannschaft decided not to ban it, but it did not consider whether its decision might infringe Community law.

14.

The demonstration took place at the stated place and time. Consequently, heavy goods vehicles which should have used the Brenner motorway were immobilised from 09.00 hrs on Friday 12 June 1998. The motorway was reopened to traffic on Saturday 13 June 1998 at approximately 15.30 hrs, subject to the prohibition on the movement of lorries in excess of 7.5 tonnes during certain hours on Saturdays and Sundays applicable under Austrian legislation.

15.

Schmidberger is an international transport undertaking based at Rot an der Rot (Germany) which operates six articulated heavy goods vehicles with 'reduced noise and soot emission'. Its main activity is the transport of timber from Germany to Italy and steel from Italy to Germany. Its vehicles generally use the Brenner motorway for that purpose.

16.

Schmidberger brought an action before the Landesgericht Innsbruck (Innsbruck Regional Court) (Austria) seeking damages of ATS 140 000 against the Republic of Austria on the basis that five of its lorries were unable to use the Brenner motorway for four consecutive days because, first, Thursday 11 June 1998 was a bank holiday in Austria, whilst 13 and 14 June 1998 were a Saturday and Sunday, and second, the Austrian legislation prohibits the movement of lorries in excess of 7.5 tonnes most of the time at weekends and on bank holidays. That motorway is the sole transit route for its vehicles between Germany and Italy. The failure on the part of the Austrian authorities to ban the demonstration and to intervene to prevent that trunk route from being closed amounted to a restriction of the free movement of goods. Since it could not be justified by the protesters' right to freedom of expression and freedom of assembly the restriction was a breach of Community law in respect of which the Member State concerned incurred liability. In the present case, the damage suffered by Schmidberger consisted of the immobilisation of its heavy goods vehicles (ATS 50 000), the fixed costs in respect of the drivers (ATS 5 000) and a loss of profit arising from concessions on payment allowed to customers on account of the substantial delays in transporting the goods and the failure to make six journeys between Germany and Italy (ATS 85 000).

17.

The Republic of Austria contended that the claim should be rejected on the grounds that the decision not to ban the demonstration was taken following a detailed examination of the facts, that information as to the date of the closure of the Brenner motorway had been announced in advance in Austria, Germany and Italy, and that the demonstration did not result in substantial traffic jams or other incidents. The restriction on free movement arising from a demonstration is permitted provided that the obstacle it creates is neither permanent nor serious. Assessment of the interests involved should lean in favour of the freedoms of expression and assembly, since fundamental rights are inviolable in a democratic society.

18.

Having found that Schmidberger had not shown either that its lorries would have had to use the Brenner motorway on 12 and 13 June 1998 or that it had not been possible, after it had become aware that the demonstration was due to take place, to change its routes in order to avoid loss, the Landesgericht Innsbruck dismissed the action by judgment of 23 September 1999 on the grounds that the transport company had neither discharged the burden (under Austrian substantive law) of making out and proving its claim for pecuniary loss nor complied with its obligation (under Austrian procedural law) to present

all the facts on which the application was based and which were necessary for the dispute to be determined.

19.

Schmidberger then lodged an appeal against that judgment before the Oberlandesgericht Innsbruck, which considers that it is necessary to have regard to the requirements of Community law where, as in the present case, claims are made which are, at least in part, founded on Community law.

20.

It considers that it is necessary in that regard to determine first whether the principle of the free movement of goods, possibly in conjunction with Article 5 of the Treaty, requires a Member State to keep open major transit routes and whether that obligation takes precedence over fundamental rights such as the freedom of expression and the freedom of assembly guaranteed by Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').

21.

If so, the national court asks, secondly, whether the breach of Community law thus established is sufficiently serious to give rise to State liability. Questions of interpretation arise in particular in determining the degree of precision and clarity of Article 5 as well as Articles 30, 34 and 36 of the Treaty.

22.

In the present case State liability might be incurred as a result of either legislative defect - the Austrian legislature having failed to adapt the legislation on freedom of assembly to comply with the obligations arising under Community law, in particular under the principle of the free movement of goods - or by reason of administrative fault - the competent national authorities being required by the obligation of cooperation and loyalty laid down by Article 5 of the Treaty to interpret national law in such a way as to comply with the requirements of that Treaty as regards the free movement of goods, in so far as those obligations arising from Community law are directly applicable.

23.

Thirdly, the court seeks guidance as to the nature and extent of the right to compensation based on State liability. It asks how stringent are the requirements as to proof of the cause and amount of the damage occasioned by a breach of Community law resulting from legislation or administrative action and wishes to know, in particular, whether a right to compensation also exists where the amount of the damage can only be assessed by general estimate.

24.

Lastly, the referring court harbours doubts as to the national requirements for establishing a right to compensation based on State liability. It asks whether the Austrian rules on the burden and standard of proof and on the obligation to submit all facts necessary for the determination of the dispute comply with the principle of legal effectiveness, in so far as the rights based on Community law cannot always be defined *ab initio* in their entirety and the applicant faces genuine difficulty in stating correctly all the facts required under Austrian law. Thus, in the present case, the content of the right to compensation based on State liability is so unclear, as regards its nature and extent, as to make a reference for a preliminary ruling necessary. The reasoning of the court ruling at first instance is likely to curtail claims based on Community law by rejecting the application on the basis of principles of national law and circumventing on purely formal grounds relevant questions of Community law.

25.

Considering that the resolution of the dispute thus required an interpretation of Community law, the Oberlandesgericht Innsbruck decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Are the principles of the free movement of goods under Article 30 et seq. of the EC Treaty (now Article 28 et seq. EC), or other provisions of Community law, to be interpreted as meaning that a Member State is obliged, either absolutely or at least as far as reasonably possible, to keep major transit routes clear of all restrictions and impediments, *inter alia*, by requiring that a political demonstration to be held on a transit route, of which notice has been given, may not be authorised or must at least be later dispersed, if or as soon as it can also be held at a place away from the transit route with a comparable effect on public awareness?

2. Where, on account of the failure by a Member State to indicate in its national provisions on freedom of assembly and the right to exercise it that, in the weighing of freedom of assembly against the public interest, the principles of Community law, primarily the fundamental freedoms and, in this particular case, the provisions on the free movement of goods, are also to be observed, a political demonstration of 28 hours' duration is authorised and held which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, *inter alia*, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that failure constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

3. Where a national authority decides that there is nothing in the provisions of Community law, in particular those concerning the free movement of goods and the general duty of cooperation and solidarity under Article 5 of the EC Treaty (now Article 10 EC), to preclude, and thus no ground on which to ban, a political demonstration of 28 hours' duration which, in conjunction with a pre-existing national generally applicable ban on holiday driving, causes an essential intra-Community goods transit route to be closed, *inter alia*, to the majority of heavy goods traffic for four days, with a short interruption of a few hours, does that decision constitute a sufficiently serious infringement of Community law in order to establish liability on the part of the Member State under the principles of Community law, provided that the other requirements for such liability are met?

4. Is the objective of an officially authorised political demonstration, namely that of working for a healthy environment and of drawing attention to the danger to public health caused by the constant increase in the transit traffic of heavy goods vehicles, to be deemed to be of a higher order than the provisions of Community law on the free movement of goods under Article 28 EC?

5. Is there loss giving rise to a claim founded on State liability where the person incurring the loss can prove that he was in a position to earn income, in the present case from the international transport of goods by means of the heavy goods vehicles operated by him but rendered idle by the 28 hour demonstration, yet is unable to prove the loss of a specific transport journey?

6. If the reply to Question 4 is in the negative:

In order to comply with the obligation of cooperation and solidarity incumbent under Article 5 of the EC Treaty (now Article 10 EC) on national authorities, in particular the courts, and with the principle of effectiveness, must application of national rules of substantive or procedural law curtailing the ability to assert claims which are well founded under Community law, such as in the present case a claim founded on State liability, be deferred pending full elucidation of the substance of the claim at Community law, if necessary following a reference to the Court of Justice for a preliminary ruling?

#### **Admissibility**

26.

The Republic of Austria harbours doubts as to the admissibility of the present reference and submits essentially that the questions referred by the Oberlandesgericht Innsbruck are purely hypothetical and irrelevant to the determination of the dispute in the main proceedings.

27.

The legal action brought by Schmidberger, seeking to establish the liability of a Member State for breach of Community law, requires the company to adduce evidence of genuine damage resulting from the alleged breach.

28.

Before the two national courts successively seised of the dispute Schmidberger failed to establish either the existence of specific individual loss - by substantiating with specific evidence the statement that its heavy goods vehicles had to use the Brenner motorway on the days when the demonstration took place there, as part of transport operations between Germany and Italy - or, if appropriate, that it had complied with its obligation to mitigate the damage that it claims to have suffered, by explaining why it was not able to choose a route other than the one closed.

29.

In those circumstances, answers to the questions referred are not necessary in order to enable the referring court to decide the case or, at least, the request for a preliminary ruling is premature as long as the facts have not been found and relevant evidence has not been fully adduced before that court.

30.

In that regard, according to settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, *inter alia*, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 33; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 18; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 31).

31.

In the context of that cooperation, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, *inter alia*, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31, and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 41).

32.

However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court (see, to that effect, *PreussenElektra*, cited above, paragraph 39). The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (*Bosman*, paragraph 60; *Der Weduwe*, paragraph 32, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 42).

33.

Thus, the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Bosman*, paragraph 61, and *Bacardi-Martini and Cellier des Dauphins*, paragraph 43).

34.

In the present case, it is by no means clear that the questions referred by the national court fall within one or other of the situations referred to in the case-law cited in the preceding paragraph.

35.

The action brought by Schmidberger seeks compensation from the Republic of Austria for the damage which the alleged breach of Community law is said to have caused it, consisting in the fact that the Austrian authorities did not ban the demonstration which resulted in the Brenner motorway being closed to all traffic for a continuous period of almost 30 hours.

36.

It follows that the request for an interpretation of Community law made by the national court has undeniably arisen in the context of a genuine dispute between the parties to the main proceedings and which cannot therefore be regarded as hypothetical.

37.

Furthermore, it is apparent from the order for reference that the national court has set out in precise and detailed terms the reasons why it considers it necessary for the determination of the dispute before it to refer to the Court various questions on the interpretation of Community law including, in particular, that relating to the factors to be taken into account when taking evidence of the damage allegedly suffered by Schmidberger.

38.

Moreover, it follows from the observations submitted by the Member States in response to the notification of the order for reference and by the Commission pursuant to Article 23 of the EC Statute of the Court of Justice that the information in that order enabled them properly to state their position on all the questions submitted to the Court.

39.

It is clear from the second paragraph of Article 234 EC that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5, and Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 30).

40.

It is equally undeniable that the referring court has defined to the requisite legal standard both the factual and legal context of its request for interpretation of Community law and that it has provided the Court with all the information necessary to enable it to reply usefully to that request.

41.

Furthermore, it is logical that the referring court requests the Court, first, to determine which types of damage can be taken into consideration for the purposes of State liability for breach of Community law - and, in particular, requests it to clarify the question whether compensation is in respect only of damage in fact suffered or if it also covers loss of profit based on general estimates, and whether and to what extent the victim must try to avoid or mitigate that loss -, before that court rules on the specific evidence recognised as being relevant by the Court in the assessment of the damage in fact suffered by Schmidberger.

42.

Lastly, in the context of an action for liability on the part of a Member State, the referring court not only asks the Court about the requirement that there be damage and the forms which that may take and the detailed rules of evidence in that regard, but also considers it necessary to pose several questions on the other requirements to be met in making out a claim based on such liability and, in particular, as to

whether the conduct of the relevant national authorities in the main case constitutes a breach of Community law and whether that breach is such as to entitle the alleged victim to compensation.

43.

In the light of the foregoing, it cannot be maintained that as regards the main proceedings the Court is called upon to rule on a question which is purely hypothetical or irrelevant for the purposes of the decision which the national court is called upon to give.

44.

On the contrary, it follows from those considerations that the questions referred by that court meet an objective need for the purpose of settling the dispute before it, in the course of which it is called upon to give a decision capable of taking account of the Court's judgment, and the information provided to the latter, in particular in the order for reference, enables it to reply usefully to those questions.

45.

Consequently, the reference for a preliminary ruling made by the Oberlandesgericht Innsbruck is admissible.

#### **The questions referred for a preliminary ruling**

46.

It should be noted at the outset that the questions referred by the national court raise two distinct, albeit related, issues.

47.

First, the Court is asked to rule on whether the fact that the Brenner motorway was closed to all traffic for almost 30 hours without interruption, in circumstances such as those at issue in the main proceedings, amounts to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law. Second, the questions relate more specifically to the circumstances in which the liability of a Member State may be established in respect of damage caused to individuals as a result of an infringement of Community law.

48.

On the latter question, the national court asks in particular for clarification of whether, and if so to what extent, in circumstances such as those of the case before it, the breach of Community law - if made out - is sufficiently manifest and serious to give rise to liability on the part of the Member State concerned. It also asks the Court about the nature and evidence of the damage to be compensated.

49.

Given that, logically, this second series of questions need be examined only if the first issue, as defined in the first sentence of paragraph 47 of the present judgment, is answered in the affirmative, the Court must first give a ruling on the various points raised by that issue, which is essentially the subject of the first and fourth questions.

50.

In the light of the evidence in the file of the main case sent by the referring court and the written and oral observations presented to the Court, those questions must be understood as seeking to determine whether the fact that the authorities of a Member State did not ban a demonstration with primarily environmental aims which resulted in the complete closure of a major transit route, such as the Brenner motorway, for almost 30 hours without interruption amounts to an unjustified restriction of the free movement of goods which is a fundamental principle laid down by Articles 30 and 34 of the Treaty, read together, if necessary, with Article 5 thereof.

*Whether there is a restriction of the free movement of goods*

51.

It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Community.

52.

Thus, Article 3 of the EC Treaty (now, after amendment, Article 3 EC), inserted in the first part thereof, entitled 'Principles', provides in subparagraph (c) that for the purposes set out in Article 2 of the Treaty the activities of the Community are to include an internal market characterised by the abolition, as between Member States, of obstacles to *inter alia* the free movement of goods.

53.

The second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14 EC) provides that the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.

54.

That fundamental principle is implemented primarily by Articles 30 and 34 of the Treaty.

55.

In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Similarly, Article 34 prohibits, between Member States, quantitative restrictions on exports and all measures having equivalent effect.

56.

It is settled case-law since the judgment in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5) that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see, to that effect, Case C-265/95 *Commission v France* [1997] ECR I-6959, paragraph 29).

57.

In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State (*Commission v France*, cited above, paragraph 30).

58.

The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act (*Commission v France*, cited above, paragraph 31).

59.

Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (*Commission v France*, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty.

60.

Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods.

61.

Paragraph 53 of the judgment in *Commission v France*, cited above, shows that the case giving rise to that judgment concerned not only imports but also the transit through France of products from other Member States.

62.

It follows that, in a situation such as that at issue in the main proceedings, where the competent national authorities are faced with restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty, such as the free movement of goods, which result from actions taken by individuals, they are required to take adequate steps to ensure that freedom in the Member State concerned even if, as in the main proceedings, those goods merely pass through Austria en route for Italy or Germany.

63.

It should be added that that obligation of the Member States is all the more important where the case concerns a major transit route such as the Brenner motorway, which is one of the main land links for trade between northern Europe and the north of Italy.

64.

In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.

*Whether the restriction may be justified*

65.

In the context of its fourth question, the referring court asks essentially whether the purpose of the demonstration on 12 and 13 June 1998 - during which the demonstrators sought to draw attention to the threat to the environment and public health posed by the constant increase in the movement of heavy goods vehicles on the Brenner motorway and to persuade the competent authorities to reinforce measures to reduce that traffic and the pollution resulting therefrom in the highly sensitive region of the Alps - is such as to frustrate Community law obligations relating to the free movement of goods.

66.

However, even if the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, as the Advocate General pointed out at paragraph 54 of his Opinion, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.

67.

Indeed, for the purposes of determining the conditions in which a Member State may be liable and, in particular, with regard to the question whether it infringed Community law, account must be taken only of the action or omission imputable to that Member State.

68.

In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.

69.

It is apparent from the file in the main case that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.

70.

In its order for reference, the national court also raises the question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.

71.

According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25).

72.

The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (*Bosman*, cited above, paragraph 79). That provision states that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

73.

It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, *inter alia*, *ERT*, cited above, paragraph 41, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14).

74.

Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.

75.

It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR (see to that effect, *inter alia*, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28).

76.

In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.

77.

The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.

78.

First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649.

79.

Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42, and *Eur. Court HR, Steel and Others v. The United Kingdom* judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, § 101).

80.

Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed (see, to that effect, Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 *P X v Commission* [1994] ECR I-4737, paragraph 18).

81.

In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.

82.

The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

83.

As regards the main case, it should be emphasised at the outset that the circumstances characterising it are clearly distinguishable from the situation in the case giving rise to the judgment in *Commission v France*, cited above, referred to by Schmidberger as a relevant precedent in the course of its legal action against Austria.

84.

By comparison with the points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in *Commission v France*, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it.

85.

Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in *Commission v France*, cited above.

86.

Third, it is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission v France*, cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.

87.

Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.

88.

Moreover, it is not in dispute that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission v France*, cited above.

89.

Finally, concerning the other possibilities envisaged by Schmidberger with regard to the demonstration in question, taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.

90.

The imposition of stricter conditions concerning both the site - for example by the side of the Brenner motorway - and the duration - limited to a few hours only - of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.

91.

An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.

92.

In that regard, the Republic of Austria submits, without being contradicted on that point, that in any event, all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed.

93.

Consequently, the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.

94.

In the light of those considerations, the answer to the first and fourth questions must be that the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.

*The conditions for liability of the Member State*

95.

It follows from the answer given to the first and fourth questions that, having regard to all the circumstances of a case such as that before the referring court, the competent national authorities cannot be said to have committed a breach of Community law such as to give rise to liability on the part of the Member State concerned.

96.

In those circumstances, there is no need to rule on the other questions referred concerning some of the conditions necessary for a Member State to incur liability for damage caused to individuals by that Member State's infringement of Community law.

**Costs**

97.

The costs incurred by the Austrian, Greek, Italian, Netherlands and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberlandesgericht Innsbruck by order of 1 February 2000, hereby rules:

**The fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the EC Treaty (now, after amendment, Articles 28 EC and 29 EC), read together with Article 5 of the EC Treaty (now Article 10 EC).**

**Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti***

In Case C-438/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 23 November 2005, received at the Court on 6 December 2005, in the proceedings

**International Transport Workers' Federation,**

**Finnish Seamen's Union,**

v

**Viking Line ABP,**

**OÜ Viking Line Eesti,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts, U. Lohmus and L. Bay Larsen, Presidents of Chambers, R. Schintgen (Rapporteur), R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Kūris, E. Levits and A. Ó Caoimh, Judges,

Advocate General: M. Poiares Maduro,

Registrar: L. Hewlett, Principal Administrator,

[...]

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation first, of Article 43 EC, and secondly, of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1).

2 The reference has been made in connection with a dispute between the International Transport Workers' Federation ('ITF') and the Finnish Seamen's Union (Suomen Merimies-Unioni ry, 'FSU'), on the one hand, and Viking Line ABP ('Viking') and its subsidiary OÜ Viking Line Eesti ('Viking Eesti'), on the other, concerning actual or threatened collective action liable to deter Viking from reflagging one of its vessels from the Finnish flag to that of another Member State.

**Legal context**

*Community law*

3 Article 1(1) of Regulation No 4055/86 provides:

'Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

### *National law*

4 According to the order for reference, Article 13 of the Finnish constitution, which confers on all individuals the freedom to form trade unions and freedom of association in order to safeguard other interests, has been interpreted as allowing trade unions to initiate collective action against companies in order to defend workers' interests.

5 In Finland, however, the right to strike is subject to certain limitations. Thus, according to Finland's Supreme Court, it may not be relied on, inter alia, where the strike is *contra bonos mores* or is prohibited under national law or under Community law.

### **The dispute in the main proceedings and questions referred**

6 Viking, a company incorporated under Finnish law, is a large ferry operator. It operates seven vessels, including the *Rosella* which, under the Finnish flag, plies the route between Tallinn (Estonia) and Helsinki (Finland).

7 FSU is a Finnish union of seamen which has about 10 000 members. The crew of the *Rosella* are members of the FSU. FSU is affiliated to the ITF, which is an international federation of transport workers' unions with its headquarters in London (United Kingdom). The ITF groups together 600 unions in 140 different States.

8 According to the order for reference, one of the principal ITF policies is its 'Flag of Convenience' ('FOC') policy. The primary objectives of this policy are, on the one hand, to establish a genuine link between the flag of the ship and the nationality of the owner and, on the other, to protect and enhance the conditions of seafarers on FOC ships. ITF considers that a vessel is registered under a flag of convenience where the beneficial ownership and control of the vessel is found to lie in a State other than the State of the flag. In accordance with the ITF policy, only unions established in the State of beneficial ownership have the right to conclude collective agreements covering the vessel concerned. The FOC campaign is enforced by boycotts and other solidarity actions amongst workers.

9 So long as the *Rosella* is under the Finnish flag, Viking is obliged under Finnish law and the terms of a collective bargaining agreement to pay the crew wages at the same level as those applicable in Finland. Estonian crew wages are lower than Finnish crew wages. The *Rosella* was running at a loss as a result of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it by registering it in either Estonia or Norway, in order to be able to enter into a new collective agreement with a trade union established in one of those States.

10 In accordance with Finnish law, Viking gave notice of its plans to the FSU and to the crew of the *Rosella*. During meetings between the parties, FSU made clear that it was opposed to those plans.

11 On 4 November 2003, FSU sent an email to ITF which referred to the plan to reflag the *Rosella*. The email further stated that 'the *Rosella* was beneficially owned in Finland and that FSU therefore kept the right to negotiate with Viking'. FSU asked ITF to pass this information on to all affiliated unions and to request them not to enter into negotiations with Viking.

12 On 6 November 2003, ITF sent a circular ('the ITF circular') to its affiliates asking them to refrain from entering into negotiations with Viking or Viking Eesti. The affiliates were expected to follow this recommendation because of the principle of solidarity between trade unions and the sanctions which they could face if they failed to comply with that circular.

13 The manning agreement for the *Rosella* expired on 17 November 2003 and therefore FSU was, as from that date, no longer under an obligation of industrial peace under Finnish law. Consequently, it gave notice of a strike requiring Viking, on the one hand, to increase the manning on the *Rosella* by eight and, on the other, to give up its plans to reflag the *Rosella*.

14 Viking conceded the extra eight crew but refused to give up its plans to reflag.

15 FSU was still not prepared, however, to agree to a renewal of the manning agreement and, by letter of 18 November 2003, it indicated that it would only accept such renewal on two conditions: first, that Viking, regardless of a possible change of the *Rosella*'s flag, gave an undertaking that it would continue to follow Finnish law, the collective bargaining agreement, the general agreement and the manning agreement on the *Rosella* and, second, that the possible change of flag would not lead to any laying-off of employees on any Finnish flag vessel belonging to Viking, or to changes to the terms and conditions of employment without the consent of the employees. In press statements FSU justified its position by the need to protect Finnish jobs.

16 On 17 November 2003, Viking started legal proceedings before the employment tribunal (Finland) for a declaration that, contrary to the view of the FSU, the manning agreement remained binding on the parties. On the basis of its view that the manning agreement was at an end, FSU gave notice, in accordance with Finnish law on industrial dispute mediation, that it intended to commence strike action in relation to the *Rosella* on 2 December 2003.

17 On 24 November 2003, Viking learnt of the existence of the ITF circular. The following day it brought proceedings before the Court of First Instance of Helsinki (Finland) to restrain the planned strike action. A preparatory hearing date was set for 2 December 2003.

18 According to the referring court, FSU was fully aware of the fact that its principal demand, that in the event of reflagging the crew should continue to be employed on the conditions laid down by Finnish law and the applicable collective agreement, would render reflagging pointless, since the whole purpose of such reflagging was to enable Viking to reduce its wage costs. Furthermore, a consequence of reflagging the *Rosella* to Estonia would be that Viking would, at least as regards the *Rosella*, no longer be able to claim State aid which the Finnish Government granted to Finnish flag vessels.

19 In the course of conciliation proceedings, Viking gave an undertaking, at an initial stage, that the reflagging would not involve any redundancies. Since FSU nevertheless refused to defer the strike, Viking put an end to the dispute on 2 December 2003 by accepting the trade union's demands and discontinuing judicial proceedings. Furthermore, it undertook not to commence reflagging prior to 28 February 2005.

20 On 1 May 2004, the Republic of Estonia became a member of the European Union.

21 Since the *Rosella* continued to run at a loss, Viking pursued its intention to reflag the vessel to Estonia. Because the ITF circular remained in force, on account of the fact that the ITF had never withdrawn it, the request to affiliated unions from the ITF in relation to the *Rosella* consequently remained in effect.

22 On 18 August 2004, Viking brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) (United Kingdom), requesting it to declare that the action taken by ITF and FSU was contrary to Article 43 EC, to order the withdrawal of the ITF circular and to order FSU not to infringe the rights which Viking enjoys under Community law.

23 By decision of 16 June 2005, that court granted the form of order sought by Viking, on the grounds that the actual and threatened collective action by the ITF and FSU imposed restrictions on freedom of establishment contrary to Article 43 EC and, in the alternative, constituted unlawful restrictions on freedom of movement for workers and freedom to provide services under Articles 39 EC and 49 EC.

24 On 30 June 2005, ITF and FSU brought an appeal against that decision before the referring court. In support of their appeal they claimed, inter alia, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title XI of the EC Treaty and, in particular, Article 136 EC, the first paragraph of which provides that '[t]he Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'.

25 It was argued that the reference to the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers incorporated a reference to the right to strike recognised by those legal

instruments. Consequently, the trade unions had the right to take collective action against an employer established in a Member State to seek to persuade him not to move part or all of his undertaking to another Member State.

26 The question therefore arises whether the Treaty intends to prohibit trade union action where it is aimed at preventing an employer from exercising his right of establishment for economic reasons. By analogy with the Court's rulings regarding Title VI of the Treaty (Case C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451; and Case C-222/98 *Van der Woude* [2000] ECR I-7111), it is argued that Title III of the Treaty and the articles relating to free movement of persons and of services do not apply to 'genuine trade union activities'.

27 In those circumstances, since it considered that the outcome of the case before it depended on the interpretation of Community law, the Court of Appeal (England and Wales) (Civil Division) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

*'Scope of the free movement provisions'*

(1) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action fall outside the scope of Article 43 EC and/or Regulation No 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in ... *Albany* (paragraphs 52 to 64)?

*Horizontal direct effect*

(2) Do Article 43 EC and/or Regulation No 4055/86 have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party and, in particular, a trade union or association of trade unions in respect of collective action by that union or association of unions?

*Existence of restrictions on free movement*

(3) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State, which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action constitute a restriction for the purposes of Article 43 EC and/or Regulation No 4055/86?

(4) Is a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86?

(5) In determining whether collective action by a trade union or association of trade unions is a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86, is the subjective intention of the union taking the action relevant or must the national court determine the issue solely by reference to the objective effects of that action?

*Establishment/services*

(6) Where a parent company is established in Member State A and intends to undertake an act of establishment by reflagging a vessel to Member State B to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company:

(a) is threatened or actual collective action by a trade union or association of trade unions which would seek to render the above a pointless exercise capable of constituting a restriction on the parent company's right of establishment under Article 43, and

(b) after reflagging of the vessel, is the subsidiary entitled to rely on Regulation No 4055/86 in respect of the provision of services by it from Member State B to Member State A?

*Justification*

Direct discrimination

(7) If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 EC or Regulation No 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 EC on the basis that:

(a) the taking of collective action (including strike action) is a fundamental right protected by Community law; and/or

(b) the protection of workers?

The policy of [ITF]: objective justification

(8) Does the application of a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services, and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

FSU's actions: objective justification

(9) Where:

– a parent company in Member State A owns a vessel flagged in Member State A and provides ferry services between Member State A and Member State B using that vessel;

– the parent company wishes to re-flag the vessel to Member State B to apply terms and conditions of employment which are lower than in Member State A;

– the parent company in Member State A wholly owns a subsidiary in Member State B and that subsidiary is subject to its direction and control;

– it is intended that the subsidiary will operate the vessel once it has been re-flagged in Member State B with a crew recruited in Member State B covered by a collective bargaining agreement negotiated with an ITF affiliated trade union in Member State B;

– the vessel will remain beneficially owned by the parent company and be bareboat chartered to the subsidiary;

– the vessel will continue to provide ferry services between Member State A and Member State B on a daily basis;

– a trade union established in Member State A takes collective action so as to require the parent and/or subsidiary to enter into a collective bargaining agreement with it which will apply terms and conditions acceptable to the union in Member State A to the crew of the vessel even after reflagging and which has the effect of making it pointless for the parent to re-flag the vessel to Member State B,

does that collective action strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

(10) Would it make any difference to the answer to [Question] 9 if the parent company provided an undertaking to a court on behalf of itself and all the companies within the same group that they will not by reason of the reflagging terminate the employment of any person employed by them (which undertaking did not require the renewal of short term employment contracts or prevent the redeployment of any employee on equivalent terms and conditions)?'

### **The questions referred**

#### *Preliminary observations*

28 It must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. However, the Court has regarded itself as not having jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious, inter alia, that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (see Case C-415/93 *Bosman* [1995] ECR I-4921 and Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 43).

29 In the present case, the reference for a preliminary ruling concerns the interpretation, first, of provisions of the Treaty on freedom of establishment, and secondly, of Regulation No 4055/86 applying the principle of freedom to provide services to maritime transport.

30 However, since the question on freedom to provide services can arise only after the reflagging of the *Rosella* envisaged by Viking, and since, on the date on which the questions were referred to the Court, the vessel had not yet been re-flagged, the reference for a preliminary ruling is hypothetical and thus inadmissible in so far as it relates to the interpretation of Regulation No 4055/86.

31 In those circumstances, the questions referred by the national court can be answered only in so far as they concern the interpretation of Article 43 EC.

#### *The first question*

32 By its first question, the national court is essentially asking whether Article 43 EC must be interpreted as meaning that collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, falls outside the scope of that article.

33 In this regard, it must be borne in mind that, according to settled case-law, Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; *Bosman*, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

34 Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application (see, by analogy, *Walrave and Koch*, paragraph 19; *Bosman*, paragraph 84; and *Angonese*, paragraph 33).

35 In the present case, it must be stated, first, that the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law.

36 Secondly, as FSU and ITF submit, collective action such as that at issue in the main proceedings, which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking.

37 It follows that collective action such as that described in the first question referred by the national court falls, in principle, within the scope of Article 43 EC.

38 This view is not called into question by the various arguments put forward by FSU, ITF and certain Member States which submitted observations to the Court to support the position contrary to that set out in the previous paragraph.

39 First of all, the Danish Government submits that the right of association, the right to strike and the right to impose lock-outs fall outside the scope of the fundamental freedom laid down in Article 43 EC since, in accordance with Article 137(5) EC, as amended by the Treaty of Nice, the Community does not have competence to regulate those rights.

40 In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law (see, by analogy, in relation to social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; in relation to direct taxation, Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

41 Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC.

42 Next, according to the observations of the Danish and Swedish Governments, the right to take collective action, including the right to strike, constitutes a fundamental right which, as such, falls outside the scope of Article 43 EC.

43 In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

44 Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law.

45 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

46 However, in *Schmidberger* and *Omega*, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

47 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to the collective action at issue in the main proceedings.

48 Finally, FSU and ITF submit that the Court's reasoning in *Albany* must be applied by analogy to the case in the main proceedings, since certain restrictions on freedom of establishment and freedom to provide services are inherent in collective action taken in the context of collective negotiations.

49 In that regard, it should be noted that in paragraph 59 of *Albany*, having found that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers, the Court nevertheless held that the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the EC Treaty (now, Article 81(1) EC) when seeking jointly to adopt measures to improve conditions of work and employment.

50 The Court inferred from this, in paragraph 60 of *Albany*, that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

51 The Court must point out, however, that that reasoning cannot be applied in the context of the fundamental freedoms set out in Title III of the Treaty.

52 Contrary to the claims of FSU and ITF, it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree.

53 Furthermore, the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances (see, to that effect, Case C-519/04 *P Meca-Medina and Majcen v Commission* [2006] ECR I-6991).

54 Finally, the Court has held that the terms of collective agreements are not excluded from the scope of the Treaty provisions on freedom of movement for persons (Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47; Case C-35/97 *Commission v France* [1998] ECR I-5325; and Case C-400/02 *Merida* [2004] ECR I-8471).

55 In the light of the foregoing, the answer to the first question must be that Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.

#### *The second question*

56 By that question, the referring court is asking in essence whether Article 43 EC is such as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

57 In order to answer that question, the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège*, paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others*, paragraph 120).

58 Moreover, the Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively (see, to that effect, *Case 43/75 Defrenne* [1976] ECR 455, paragraphs 31 and 39).

59 Such considerations must also apply to Article 43 EC which lays down a fundamental freedom.

60 In the present case, it must be borne in mind that, as is apparent from paragraphs 35 and 36 of the present judgment, the collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organisations which are not public law entities but exercise the legal autonomy conferred on them, *inter alia*, by national law.

61 It follows that Article 43 EC must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions.

62 This interpretation is also supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State (see *Case C-265/95 Commission v France* [1997] ECR I-6959, paragraph 30, and *Schmidberger*, paragraphs 57 and 62).

63 The interpretation set out in paragraph 61 of the present judgment is also not called into question by the fact that the restriction at issue in the proceedings before the national court stems from the exercise of a right conferred by Finnish national law, such as, in this case, the right to take collective action, including the right to strike.

64 It must be added that, contrary to the claims, in particular, of ITF, it does not follow from the case-law of the Court referred to in paragraph 57 of the present judgment that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.

65 There is no indication in that case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.

66 In the light of those considerations, the answer to the second question must be that Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

#### *The third to tenth questions*

67 By those questions, which can be examined together, the national court is essentially asking the Court of Justice whether collective action such as that at issue in the main proceedings constitutes a restriction within the meaning of Article 43 EC and, if so, to what extent such a restriction may be justified.

#### The existence of restrictions

68 The Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period. Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies or firms referred to in Article 48 EC (*Case 81/87 Daily Mail and General Trust* [1988] ECR 5483, paragraph 15).

69 Furthermore, the Court has considered that, even though the provisions of the Treaty concerning freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from

hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which also comes within the definition contained in Article 48 EC. The rights guaranteed by Articles 43 EC to 48 EC would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State (*Daily Mail and General Trust*, paragraph 16).

70 Secondly, according to the settled case-law of the Court, the definition of establishment within the meaning of those articles of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period and registration of a vessel cannot be separated from the exercise of the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes fixed establishment in the State of registration (Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraphs 20 to 22).

71 The Court concluded from this that the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Articles 43 EC to 48 EC (*Factortame and Others*, paragraph 23).

72 In the present case, first, it cannot be disputed that collective action such as that envisaged by FSU has the effect of making less attractive, or even pointless, as the national court has pointed out, Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.

73 Secondly, collective action taken in order to implement ITF's policy of combating the use of flags of convenience, which seeks, primarily, as is apparent from ITF's observations, to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.

74 It follows that collective action such as that at issue in the main proceedings constitutes a restriction on freedom of establishment within the meaning of Article 43 EC.

#### Justification of the restrictions

75 It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Bosman*, paragraph 104).

76 ITF, supported, in particular, by the German Government, Ireland and the Finnish Government, maintains that the restrictions at issue in the main proceedings are justified since they are necessary to ensure the protection of a fundamental right recognised under Community law and their objective is to protect the rights of workers, which constitutes an overriding reason of public interest.

77 In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, *Schmidberger*, paragraph 74) and that the protection of workers is one of the overriding reasons of public interest recognised by the Court (see, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33).

78 It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

79 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

80 In the present case, it is for the national court to ascertain whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers.

81 First, as regards the collective action taken by FSU, even if that action – aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the *Rosella* – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.

82 This would be the case, in particular, if it transpired that the undertaking referred to by the national court in its 10th question was, from a legal point of view, as binding as the terms of a collective agreement and if it was of such a nature as to provide a guarantee to the workers that the statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained.

83 In so far as the exact legal scope to be attributed to an undertaking such as that referred to in the 10th question is not clear from the order for reference, it is for the national court to determine whether the jobs or conditions of employment of that trade union's members who are liable to be affected by the reflagging of the *Rosella* were jeopardised or under serious threat.

84 If, following that examination, the national court came to the conclusion that, in the case before it, the jobs or conditions of employment of the FSU's members liable to be adversely affected by the reflagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.

85 In that regard, it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it.

86 As regards the appropriateness of the action taken by FSU for attaining the objectives pursued in the case in the main proceedings, it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members (European Court of Human Rights, *Syndicat national de la police belge v Belgium*, of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others v United Kingdom* of 2 July 2002, 2002-V, § 44).

87 As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action.

88 Secondly, in relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, it must be emphasised that, to the extent that that policy results in shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. Nevertheless, as the national court points out, the objective of that policy is also to protect and improve seafarers' terms and conditions of employment.

89 However, as is apparent from the file submitted to the Court, in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State.

90 In the light of those considerations, the answer to the third to tenth questions must be that Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

#### **Costs**

91 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.**
- 2. Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.**
- 3. Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article.**

**That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.**

**Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet***

In Case C-341/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbetsdomstolen (Sweden), made by decision of 15 September 2005, received at the Court on 19 September 2005, in the proceedings

**Laval un Partneri Ltd**

v

**Svenska Byggnadsarbetareförbundet,**

**Svenska Byggnadsarbetareförbundets avd. 1, Byggettan,**

**Svenska Elektrikerförbundet,**

THE COURT (Grand Chamber),

[...]

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC and 49 EC and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

2 The reference was made in the context of proceedings between Laval un Partneri Ltd ('Laval'), a company incorporated under Latvian law and having its registered office in Riga (Latvia), on the one hand, and Svenska Byggnadsarbetareförbundet (Swedish building and public works trade union, 'Byggnads'), Svenska Byggnadsarbetareförbundet avdelning 1, Byggettan (local branch No 1 of that trade union, 'Byggettan') and Svenska Elektrikerförbundet (Swedish electricians' trade union, 'Elektrikerna'), on the other, brought by Laval for the purposes of obtaining, first, a declaration that the collective action by Byggnads and Byggettan affecting all Laval's worksites and the Elektrikerna sympathy action consisting of blockading all electrical work being carried out is unlawful, second, an order that such action should cease, and, third, an order that the trade unions pay compensation for the loss suffered by Laval.

**Legal context**

*Community law*

3 Recitals 6, 13, 17 and 22 in the preamble to Directive 96/71 state:

'... the transnationalisation of the employment relationship raises problems with regard to the legislation applicable to the employment relationship; ... it is in the interests of the parties to lay down the terms and conditions governing the employment relationship envisaged;

... the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided; ... such coordination can be achieved only by means of Community law;

... the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers;

... this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions’.

4 Article 1 of Directive 96/71 provides:

‘1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.

...

3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:

(a) ...

or

(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting

...’

5 Article 3 of that directive provides:

‘Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision,

and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, in so far as they concern the activities referred to in the Annex:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

- (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

...

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

8. “Collective agreements or arbitration awards which have been declared universally applicable” means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned,

and/or

- collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1(1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and

- are required to fulfil such obligations with the same effects.

...

10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:

- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions;

- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.’

6 According to Article 4 of Directive 96/71:

#### ‘Cooperation on information

1. For the purposes of implementing this directive, Member States shall, in accordance with national legislation and/or practice, designate one or more liaison offices or one or more competent national bodies.
2. Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for monitoring the terms and conditions of employment referred to in Article 3. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

The Commission and the public authorities referred to in the first subparagraph shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3(10).

Mutual administrative assistance shall be provided free of charge.

3. Each Member State shall take the appropriate measures to make the information on the terms and conditions of employment referred to in Article 3 generally available.
4. Each Member State shall notify the other Member States and the Commission of the liaison offices and/or competent bodies referred to in paragraph 1.’

#### *National law*

##### The transposition of Directive 96/71

7 It is apparent from the Court’s file that Sweden does not have a system for declaring collective agreements universally applicable, and, in order to avoid the creation of discriminatory situations, Swedish law does not require foreign undertakings to apply Swedish collective agreements, since not all Swedish employers are bound by a collective agreement.

8 Directive 96/71 was transposed in Sweden by the Law on the posting of workers (lag om utstationering av arbetstagare (1999:678) (‘Law on the posting of workers’)). According to the procedural documents, terms and conditions of employment applicable to posted workers in relation to Article 3(1), first subparagraph, (a), (b) and (d) to (g) of Directive 96/71 are laid down by law within the meaning of the first indent of the first subparagraph of Article 3(1) of the directive. The Swedish legislation does not provide, however, for minimum rates of pay as referred to in the Article 3(1), first subparagraph, (c).

9 It is clear from the file that the liaison office (Arbetsmiljöverket, ‘the liaison office’), set up in accordance with Article 4(1) of Directive 96/71, is responsible, inter alia, for informing interested persons of the existence of collective agreements that may be applicable in the event of workers being posted to Sweden and for referring such interested persons to the parties to the collective agreement for further information.

##### The right to take collective action

10 Chapter 2 of the Swedish Basic Law (Regeringsformen) sets out the freedoms and fundamental rights enjoyed by citizens. Under Article 17 thereof, workers’ associations, employers and employers’ associations have the right to take collective action, unless otherwise provided by law or agreement.

11 The Law on workers’ participation in decisions (Medbestämmandelagen, ‘the MBL’) of 10 June 1976 lays down rules applicable to the right of association and of negotiation, collective agreements, mediation of collective labour disputes and the obligation of social peace, and contains provisions restricting the right of trade unions to take collective action.

12 It is apparent from Article 41 of the MBL that there is a mandatory social truce between employers and workers bound by a collective agreement and it is prohibited, inter alia, to take collective action with the aim of

obtaining amendments to the agreement. However, collective action is authorised where management and labour have not entered into a collective agreement between themselves.

13 Article 42 of the MBL provides:

‘Employers’ or workers’ associations shall not be entitled to organise or encourage illegal collective action in any way whatsoever. Nor shall they be entitled to participate in any illegal collective action, by providing support or in any other way. An association which is itself bound by a collective agreement shall also, in the event of collective action which its members are preparing to take or are taking, seek to prevent such action or help to bring it to an end.

If any illegal collective action is taken, third parties shall be prohibited from participating in it.

The provisions of the first two sentences of the first paragraph shall apply only if an association takes collective action by reason of terms and conditions of employment falling directly within the scope of the present Law’.

14 As the case-law on the first paragraph of Article 42 of the MBL, it is prohibited to take collective action with the aim of having a collective agreement between other parties set aside or amended. In the ‘*Britannia*’ judgment (1989, No 120), the Arbetsdomstolen held that that prohibition extends to collective action taken in Sweden in order to have a collective agreement concluded between foreign parties in a workplace abroad set aside or amended, if such collective action is prohibited by the foreign legislation applicable to the signatories to that collective agreement.

15 By the ‘Lex Britannia’, which entered into force on 1 July 1991, the legislature sought to reduce the scope of the principle expounded in the *Britannia* judgment. The Lex Britannia consists of three provisions inserted into the MBL, namely Articles 25a, 31a and the third paragraph of Article 42.

16 It is apparent from the explanations provided by the national court that, since the introduction of the third paragraph of Article 42 of the MBL, collective action against a foreign employer carrying out temporary activities in Sweden is no longer prohibited where, considered as a whole, the particular situation suggests that the link with that Member State is too tenuous for the MBL to be deemed to apply directly to the terms and conditions of employment in question.

The collective agreement for the building sector

17 Byggnads is a trade union which groups together workers in the construction sector in Sweden. According to Byggnads’ observations, in 2006, it comprised 31 local sections, including Byggettan, and had a membership of 128 000, 95 000 being of working age. Its membership included carpenters and builders, masons, parquet layers, workers in the construction and road sector, and plumbers. Around 87% of building sector workers were affiliated to that trade union.

18 A collective agreement was entered into between, on the one hand, Byggnads, in its capacity as the central organisation representing building workers, and the central organisation for employers in the construction sector (Sveriges Bygginindustrier) (‘the collective agreement for the building sector’).

19 The collective agreement for the building sector contains specific rules relating to working time and annual leave, matters in which collective agreements may depart from the legislative provisions. In addition, the agreement includes provisions relating to temporary unemployment and waiting time, reimbursement of travelling expenses and subsistence allowances, employment protection, training leave and training.

20 Being a party to the collective agreement for the building sector also requires the undertakings concerned to accept a number of pecuniary obligations. Thus, they are required to pay to Byggettan a sum equal to 1.5% of total gross wages for the purposes of the pay review which that section of the trade union carries out, and to the insurance company, FORA, sums representing first, 0.8% of total gross wages for the purposes of a charge ‘Tilläggsören’ [penny supplement] or ‘special building supplement’, and, second, a further 5.9% for the purposes of a number of insurance premiums.

21 The 'tilläggsören' or 'special building supplement' is intended to finance group life insurance contracts, contingency contracts and insurance contracts covering accidents occurring outside working hours, the research fund for Swedish building undertakings (Svenska Byggbranschens Utvecklingsfond), the Galaxen organisation, managed by employers and which has as its objective the adaptation of work places for persons with reduced mobility and the re-training of such persons, the promotion of training development in building trades and administrative and management costs.

22 The various insurance contracts proposed by FORA guarantee workers supplementary retirement insurance, payment of health benefits, unemployment benefits, compensation for accidents at work, and financial assistance for survivors in the event of the death of the worker.

23 After signing the collective agreement for the building sector, employers, including those who post workers to Sweden, are, in principle, bound by all the terms of that agreement, although some of those rules are applicable on a case-by-case basis according to, in essence, the nature of the site and the way in which the work is carried out.

#### Determination of wages

24 It is apparent from the observations of the Swedish Government that, in Sweden, employees' remuneration is decided on by management and labour by way of collective negotiation. Generally, collective agreements do not provide for a minimum wage as such. The lowest level of pay appearing in numerous collective agreements is aimed at employees without qualifications or work experience, which means that, as a general rule, it concerns only a very small number of persons. As regards other employees, their pay is determined by way of negotiations conducted at the place of work, having regard to the qualifications of the particular employee and the tasks performed by the latter.

25 According to the observations submitted in this case by the three defendant trade unions, in the collective agreement for the building sector, performance-related pay follows the usual model of remuneration in the construction sector. The rules on performance-related pay require new pay agreements to be concluded in respect of each construction project. It is open to the employers and the local branch of the trade union, however, to agree on the application of an hourly wage in respect of a specific site. No system of monthly wages is applicable to the type of workers concerned in the main proceedings.

26 According to those trade unions, negotiations on pay are conducted in the context of a social truce which must follow the conclusion of a collective agreement. The agreement on pay is concluded, in principle, at local level between the trade union and the employer. If management and labour fail to reach an agreement at this level, negotiations on pay are centralised, at which point Byggnads acts as the principal party on the side of the employees. If management and labour still do not reach an agreement in such negotiations, the basic wage is then determined according to the 'fall-back clause'. According to those trade unions, the 'fall-back' wage, which in fact represents only a negotiating mechanism of last resort, and does not constitute a minimum wage, amounted to SEK 109 approximately (EUR 12) per hour for the second half of 2004.

#### The dispute in the main proceedings

27 It is apparent from the order of reference that Laval is a company incorporated under Latvian law, whose registered office is in Riga. Between May and December 2004, it posted around 35 workers to Sweden to work on building sites operated by L&P Baltic Bygg AB ('Baltic'), a company incorporated under Swedish law whose entire share capital was held by Laval until the end of 2003, inter alia, for the purposes of the construction of school premises in Vaxholm.

28 Laval, which had signed, on 14 September and 20 October 2004, in Latvia, collective agreements with the Latvian building sector's trade union, was not bound by any collective agreement entered into with Byggnads, Byggettan or Elektrikerna, none of whose members were employed by Laval. Around 65% of the Latvian workers concerned were members of the building workers' trade union in their State of origin.

29 It is clear from the file that, in June 2004, contacts were established between Byggettan, on the one hand, and Baltic and Laval, on the other, and negotiations were begun with a view to Laval's signing the collective agreement for the building sector. Laval asked for wages and other terms and conditions of employment to be

defined in parallel with the negotiations, so that the level of pay and terms and conditions of employment would already be fixed by the time that agreement was signed. Byggettan agreed to this request, even though, generally, the negotiation of a collective agreement needs to have been completed before discussions on wages and other terms and conditions of employment are entered into in the framework of the mandatory social truce. Byggettan refused to allow the introduction of a system of monthly wages, but did agree to Laval's proposal on the principle of an hourly wage.

30 According to the order for reference, during the negotiations held on 15 September 2004, Byggettan had demanded that Laval, first, sign the collective agreement for the building sector in respect of the Vaxholm site, and secondly, guarantee that the posted workers would receive an hourly wage of SEK 145 (approximately EUR 16). That hourly wage was based on statistics on wages for the Stockholm (Sweden) region for the first quarter of 2004, relating to professionally-qualified builders and carpenters. Byggettan declared that it was prepared to take collective action forthwith in the event that Laval failed to agree to this.

31 According to the documents on the file, during the procedure before the Arbedstomstolen, Laval stated that it would pay its workers a monthly wage of SEK 13 600 (approximately EUR 1 500), which would be supplemented by benefits in kind in respect of meals, accommodation and travel amounting to SEK 6 000 (approximately EUR 660) per month.

32 If the collective agreement for the building sector had been signed, Laval would have been bound, in principle, by all its terms, including those relating to the pecuniary obligations to Byggettan and FORA set out in paragraph 20 of this judgment. A proposal to subscribe to insurance contracts with FORA was made to Laval by way of a declaration form sent to it in December 2004.

33 Since those negotiations were not successful, Byggettan requested Byggnads to take measures to initiate the collective action against Laval announced at the meeting of 15 September 2004. Notice was given in October 2004.

34 Blockading ('blockad') of the Vaxholm building site began on 2 November 2004. The blockading consisted, inter alia, of preventing the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. Laval asked the police for assistance but they explained that since the collective action was lawful under national law they were not allowed to intervene or to remove physical obstacles blocking access to the site.

35 At the end of November 2004, Laval spoke to the liaison office referred to in paragraph 9 above in order to obtain information on the terms and conditions of employment which it had to apply in Sweden, on whether or not there was a minimum wage and on the nature of any contributions which it had to pay. By letter of 2 December 2004, the liaison office's head of legal affairs informed Laval that it was required to apply the provisions to which the law on the posting of workers refers, that it was for management and labour to agree on wage issues, that the minimum requirements under the collective agreements also applied to foreign posted workers, and that, if a foreign employer was having to pay double contributions, the matter could be brought before the courts. In order to ascertain what provisions under the agreements were applicable, Laval had to speak to management and labour in the sector concerned.

36 At the mediation meeting arranged on 1 December 2005 and at the conciliation hearing held before the Arbetsdomstolen on 20 December 2005, Laval was requested by Byggettan to sign the collective agreement for the building sector before the issue of wages was dealt with. If Laval had accepted that proposal, the collective action would have ceased immediately, and the social truce, which would have allowed negotiations on wages to begin, would have come into effect. Laval, however, refused to sign the agreement, since it was not possible for it to know in advance what conditions would be imposed on it in relation to wages.

37 In December 2004, the collective action directed against Laval intensified. On 3 December 2004, Elektrikerna initiated sympathy action. That measure had the effect of preventing Swedish undertakings belonging to the organisation of electricians' employers from providing services to Laval. At Christmas, the workers posted by Laval went back to Latvia and did not return to the site in question.

38 In January 2005, other trade unions announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden, with the result that the undertaking was no longer able to carry out its activities in that Member State.

In February 2005, the town of Vaxholm requested that the contract between it and Baltic be terminated, and on 24 March 2005 the latter was declared bankrupt.

### **The questions referred**

39 On 7 December 2004, Laval commenced proceedings before the Arbetsdomstolen against Byggnads, Byggettan and Elektrikerna, seeking a declaration that both the blockading and the sympathy action affecting all its worksites were illegal and an order that such action should cease. It also sought an order that the trade unions pay compensation for the damage suffered. By decision of 22 December 2004, the national court dismissed Laval's application for an interim order that the collective action should be brought to an end.

40 Since it wished to ascertain whether Articles 12 EC and 49 EC and Directive 96/71 preclude trade unions from attempting, by means of collective action, to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement, the Arbetsdomstolen decided on 29 April 2005 to make a reference to the Court of Justice for a preliminary ruling. In its order for reference, of 15 September 2005, the national court refers the following questions for a preliminary ruling:

'(1) Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC ... for trade unions to attempt, by means of collective action in the form of a blockade ('blockad'), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

(2) The [MBL] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the "Lex Britannia", only where a trade union takes collective action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule – which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded – to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?'

41 By order of the President of the Court of Justice of 15 November 2005, the application for a ruling to be given in this case under the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure was dismissed.

### **Admissibility**

42 Byggnads, Byggettan and Elektrikerna challenge the admissibility of the reference for a preliminary ruling.

43 First of all, they claim that there is no link between the questions referred and the facts of the case in the main proceedings. The national court asks the Court of Justice to interpret provisions relating to freedom to provide services and Directive 96/71, although Laval is established in Sweden, in accordance with Article 43 EC, through its subsidiary, Baltic, in which it held 100% of the share capital until the end of 2003. Since the share capital of Laval and of Baltic were held by the same persons, and those companies had the same representatives and used the same trademark, they should be regarded as one and the same economic entity from the point of view of Community law, even though they constitute two separate legal persons. Therefore, Laval was under an obligation to pursue its activity in Sweden under the conditions laid down for its own nationals by the legislation of that Member State, for the purposes of the second paragraph of Article 43 EC.

44 Secondly, they submit that the purpose of the dispute in the main proceedings is to enable Laval to circumvent Swedish law and, for that reason, the dispute, at least in part, is artificial. Laval, whose activity consists of placing, on a temporary basis, staff of Latvian origin with companies which carry on their activities on the

Swedish market, is seeking to escape all the obligations under Swedish legislation and rules relating to collective agreements and, by relying on the provisions of the Treaty on services and on Directive 96/71, is making an improper attempt to take advantage of the possibilities offered by Community law.

45 In this regard, it must be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, *inter alia*, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33, and Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19).

46 Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19, and *Conseil général de la Vienne*, paragraph 20).

47 Furthermore, it must be borne in mind that the Court must take account, under the division of jurisdiction between the Community judicature and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set (see, *inter alia*, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-136/03 *Dörr and Ünal* [2005] ECR I-4759, paragraph 46, *Conseil général de la Vienne*, paragraph 24).

48 In this case, as the Advocate General pointed out in paragraph 97 of his Opinion, the national court seeks an interpretation of Articles 12 EC and 49 EC, and of the provisions of Directive 96/71 concerning the posting of workers in the framework of the provision of services. It is apparent from the order for reference that those questions have been submitted in the context of the dispute between Laval and Byggnads, Byggettan and Elektrikerna concerning collective action taken by the latter following Laval's refusal to sign the collective agreement for the building sector, that the dispute concerns the terms and conditions of employment applicable to Latvian workers posted by Laval to a building site in Sweden, the work being carried out by an undertaking belonging to the Laval group, and that, following collective action and suspension of the work, the posted workers returned to Latvia.

49 Accordingly, it is clear that the questions referred do have a bearing on the subject-matter of the case in the main proceedings, as described by the national court, and that the factual context in which the questions put to it are set does not support the view that the dispute in question is artificial.

50 It follows that the reference for a preliminary ruling is admissible.

### **The first question**

51 By its first question, the national court is asking whether it is compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC, for trade unions to attempt, by means of collective action in the form of a blockade, to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as the collective agreement for the building sector, if the situation in the host country is characterised by the fact that the legislation to implement that directive has no express provision concerning the application of terms and conditions of employment in collective agreements.

52 It is clear from the order of reference that the collective action initiated by Byggnads and Byggettan was motivated by Laval's refusal to guarantee its workers posted in Sweden the hourly wage demanded by those trade

unions, even though that Member State does not provide for minimum rates of pay, and Laval's refusal to sign the collective agreement for the building sector, some terms of which lay down, in relation to certain matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in that article.

53 Accordingly, the national court's first question must be understood as asking, in essence, whether Articles 12 EC and 49 EC, and Directive 96/71, are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment concerning the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive, save for minimum rates of pay, are contained in legislative provisions, from attempting, by means of collective action in the form of blockading sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

#### *The relevant provisions of Community law*

54 In order to ascertain the provisions of Community law applicable to a case such as that in the main proceedings, it must be noted that, according to the settled case-law of the Court, Article 12 EC, which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific prohibition of discrimination (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 25, and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 57).

55 So far as the freedom to provide services is concerned, that principle was given specific expression and effect by Article 49 EC (Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 32, and Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 17). It is for that reason unnecessary to rule on Article 12 EC.

56 As regards the temporary posting of workers to another Member State so that they can carry out construction work or public works in the context of services provided by their employer, it is clear from the settled case-law of the Court that Articles 49 EC and 50 EC preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and also preclude that Member State from making the movement of staff in question subject to more restrictive conditions. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service (Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12).

57 Conversely, Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by management and labour relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established (see, in particular, Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* [1982] ECR 223, paragraph 14, and Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 21). The application of such rules must, however, be appropriate for securing the attainment of the objective which they pursue, that is, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see, to that effect, *inter alia*, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35 and Case C-341/02 *Commission v Germany* [2005] ECR I-2733, paragraph 24).

58 In that context, the Community legislature adopted Directive 96/71, with a view, as is clear from recital 6 in the preamble to that directive, to laying down, in the interests of the employers and their personnel, the terms and conditions governing the employment relationship where an undertaking established in one Member State posts workers on a temporary basis to the territory of another Member State for the purposes of providing a service.

59 It follows from recital 13 to Directive 96/71 that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there.

60 Nevertheless, Directive 96/71 did not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law (Case C-490/04 *Commission v Germany* [2007] ECR I-0000, paragraph 19).

61 Consequently, since the facts at issue in the main proceedings, as described in the order of reference, occurred in 2004, that is to say, on a date subsequent to the expiry of the period allowed to the Member States for transposing Directive 96/71, that date being fixed for 16 December 1999, and since those facts fall within the scope of that directive, the first question must be examined with regard to the provisions of that directive interpreted in the light of Article 49 EC (Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraphs 25 to 27 and 45), and, where appropriate, with regard to the latter provision itself.

*The possibilities available to the Member States for determining the terms and conditions of employment applicable to posted workers, including minimum rates of pay*

62 In the context of the procedure established by Article 234 EC providing for cooperation between national courts and the Court of Justice, and in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it (C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22; C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18, and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 23), it is appropriate to examine the possibilities available to the Member States for determining the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g), including minimum rates of pay, which undertakings are to guarantee workers they post in the framework of the transnational provision of services.

63 It is clear from both the order for reference and the observations submitted in the course of the present proceedings that underlying the dispute is, first, as regards the determination of the terms and conditions of the employment of posted workers relating to those matters, the fact that minimum rates of pay constitute the only term of employment which, in Sweden, is not laid down in accordance with one of the means provided for in Directive 96/71 and, second, the requirement imposed on Laval to negotiate with trade unions in order to ascertain the wages to be paid to its workers and to sign the collective agreement for the building sector.

64 According to the first and second indents of the first subparagraph of Article 3(1) of Directive 96/71, the terms and conditions of employment covering the matters referred to in (a) to (g) thereof are established, in relation to the transnational provision of services in the construction sector, either by law, regulation or administrative provision, or by collective agreements or arbitration awards which have been declared universally applicable. Collective agreements and arbitration awards for the purposes of that provision are those which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

65 The second subparagraph of Article 3(8) of Directive 96/71 also gives Member States the possibility, in the absence of a system for declaring collective agreements or arbitration awards to be of universal application, to base themselves on those which are generally applicable to all similar undertakings in the industry concerned or those which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory.

66 It is clear from the wording of that provision that recourse to the latter possibility requires, first, that the Member State must so decide, and second, that the application of collective agreements to undertakings which post workers should guarantee equality of treatment in the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 between the latter undertakings and national undertakings in the profession or industry concerned which are in a similar position. Equality of treatment, within the meaning of Article 3(8) of the directive, is deemed to exist where national undertakings are subject to the same obligations, as regards those matters, as posting undertakings, and where each are required to fulfil such obligations with the same effects.

67 It is common ground that, in Sweden, the terms and conditions of employment covering the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, save for minimum rates of pay, have been laid down by law. It is also not disputed that the collective agreements have not been declared universally applicable, and that that Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive.

68 It must be noted, in this respect, that since the purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive, provided that it does not hinder the provision of services between the Member States.

69 It is clear from the file that the national authorities in Sweden have entrusted management and labour with the task of setting, by way of collective negotiations, the wage rates which national undertakings are to pay their workers and that, as regards undertakings in the construction sector, such a system requires negotiation on a case-by-case basis, at the place of work, having regard to the qualifications and tasks of the employees concerned.

70 As regards the requirements as to pay which can be imposed on foreign service providers, it should be recalled that the first subparagraph of Article 3(1) of Directive 96/71 relates only to minimum rates of pay. Therefore, that provision cannot be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions seek in this case to impose in the framework of the Swedish system, which do not constitute minimum wages and are not, moreover, laid down in accordance with the means set out in that regard in Article 3(1) and (8) of the directive.

71 It must therefore be concluded at this stage that a Member State in which the minimum rates of pay are not determined in accordance with one of the means provided for in Article 3(1) and (8) of Directive 96/71 is not entitled, pursuant to that directive, to impose on undertakings established in other Member States, in the framework of the transnational provision of services, negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees, so that the undertakings concerned may ascertain the wages which they are to pay their posted workers.

72 It is necessary to assess further, the obligations on undertakings established in another Member State which stem from such a system for determining wages with regard to Article 49 EC.

*Matters which may be covered by the terms and conditions of work applicable to posted workers*

73 In order to ensure that the nucleus of mandatory rules for minimum protection are observed, the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, in the framework of the transnational provision of services, undertakings guarantee workers posted to their territory the terms and conditions of employment covering the matters listed in that provision, namely: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and equality of treatment between men and women and other provisions on non-discrimination.

74 That provision seeks, first, to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally, in so far as it requires the latter to afford their workers, as regards a limited list of matters, the terms and conditions of employment laid down in the host Member State by law, regulation or administrative provision or by collective agreements or arbitration awards within the meaning of Article 3(8) of Directive 96/71, which constitute mandatory rules for minimum protection.

75 That provision thus prevents a situation arising in which, by applying to their workers the terms and conditions of employment in force in the Member State of origin as regards those matters, undertakings established in other Member States would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher.

76 Secondly, that provision seeks to ensure that posted workers will have the rules of the Member States for minimum protection as regards the terms and conditions of employment relating to those matters applied to them while they work on a temporary basis in the territory of that Member State.

77 The consequence of affording such minimum protection – if the level of protection resulting from the terms and conditions of employment granted to posted workers in the Member State of origin, as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, is lower than the level of minimum

protection afforded in the host Member State – is to enable those workers to enjoy better terms and conditions of employment in the host Member State.

78 However, in the case in the main proceedings, it is apparent from paragraph 19 of this judgment that, in respect of some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, in particular as regards working time and annual leave, certain terms of the collective agreement for the building sector depart from the provisions of Swedish law which lay down the terms and conditions of employment applicable to posted workers, by establishing more favourable terms.

79 It is true that Article 3(7) of Directive 96/71 provides that paragraphs 1 to 6 are not to prevent application of terms and conditions of employment which are more favourable to workers. In addition, according to recital 17, the mandatory rules for minimum protection in force in the host country must not prevent the application of such terms and conditions.

80 Nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.

81 Therefore – without prejudice to the right of undertakings established in other Member States to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable – the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, unless, pursuant to the law or collective agreements in the Member State of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.

82 Moreover, it must be pointed out that, pursuant to the first indent of Article 3(10) of Directive 96/71, Member States may apply terms and conditions of employment on matters other than those specifically referred to in Article 3(1), first subparagraph, (a) to (g), in compliance with the Treaty and, in the case of public policy provisions, on a basis of equality of treatment, to national undertakings and to the undertakings of other Member States.

83 In the main proceedings, certain terms of the collective agreement for the building sector relate to matters which are not specifically referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71. In that regard, it follows from paragraph 20 of this judgment that signing that collective agreement entails undertakings accepting pecuniary obligations such as those requiring them to pay to Byggettan a sum equal to 1.5% of total gross wages for the purposes of the pay review which that section trade union carries out, and to the insurance company, FORA, first, 0.8% of total gross wages for the purposes of a charge called the ‘special building supplement’, and, second, a further 5.9% for the purposes of a number of insurance premiums.

84 It is common ground, however, that those obligations were imposed without the national authorities’ having had recourse to Article 3(10) of Directive 96/71. The terms of the collective agreement for the building sector in question were in fact established through negotiation between management and labour; not being bodies governed by public law, they cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law.

85 It is also necessary to assess from the point of view of Article 49 EC the collective action taken by the trade unions in the case in the main proceedings, both in so far as it seeks to force a service provider established in another Member State to enter into negotiations on the wages to be paid to posted workers and in so far as it seeks to force that service provider to sign a collective agreement the terms of which lay down, as regards some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, more favourable conditions than those stemming from the relevant legislative provisions, while other terms cover matters not referred to in that provision.

*Assessment of the collective action at issue in the case in the main proceedings from the point of view of Article 49 EC*

86 As regards use of the means available to the trade unions to bring pressure to bear on the relevant parties to sign a collective agreement and to enter into negotiations on pay, the defendants in the main proceedings and the Danish and Swedish Governments submit that the right to take collective action in the context of negotiations with an employer falls outside the scope of Article 49 EC, since, pursuant to Article 137(5) EC, as amended by the Treaty of Nice, the Community has no power to regulate that right.

87 In this regard, it suffices to point out that, even though, in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, they must nevertheless exercise that competence consistently with Community law (see, by analogy, as regards social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; as regards direct taxation, Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

88 Therefore, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.

89 According to the observations of the Danish and Swedish Governments, the right to take collective action constitutes a fundamental right which, as such, falls outside the scope of Article 49 EC and Directive 96/71.

90 In that regard, it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

91 Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.

92 Although it is true, as the Swedish Government points out, that the right to take collective action enjoys constitutional protection in Sweden, as in other Member States, nevertheless as is clear from paragraph 10 of this judgment, under the Swedish constitution, that right – which, in that Member State, covers the blockading of worksites – may be exercised unless otherwise provided by law or agreement.

93 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

94 As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

95 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another Member State which posts workers in the framework of the transnational provision of services.

96 It must therefore be examined whether the fact that a Member State's trade unions may take collective action in the circumstances described above constitutes a restriction on the freedom to provide services, and, if so, whether it can be justified.

97 It should be noted that, in so far as it seeks to abolish restrictions on the freedom to provide services stemming from the fact that the service provider is established in a Member State other than that in which the service is to be provided, Article 49 EC became directly applicable in the legal orders of the Member States on expiry of the transitional period and confers on individuals rights which are enforceable by them and which the national courts must protect (see, inter alia, Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 26; Case 13/76 *Donà* [1976] ECR 1333, paragraph 20; Case 206/84 *Commission v Ireland* [1986] ECR 3817, paragraph 16; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 67).

98 Furthermore, compliance with Article 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, the provision of services. The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

99 In the case in the main proceedings, it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 and others relate to matters not referred to in that provision – is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

100 The same is all the more true of the fact that, in order to ascertain the minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided.

101 It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community (see, inter alia, Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 17, and Case 252/83 *Commission v Denmark* [1986] ECR 3713, paragraph 17), a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it (Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 21; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 37, and Case C-94/04 *Cipolla* [2006] ECR I-11421, paragraph 61).

102 The Swedish Government and the defendant trade unions in the main proceedings submit that the restrictions in question are justified, since they are necessary to ensure the protection of a fundamental right recognised by Community law and have as their objective the protection of workers, which constitutes an overriding reason of public interest.

103 In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-0000, paragraph 77).

104 It should be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an ‘internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital’, but also ‘a policy in the social sphere’. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of ‘a harmonious, balanced and sustainable development of economic activities’ and ‘a high level of employment and of social protection’.

105 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

106 In the case in the main proceedings, Byggnads and Byggettan contend that the objective of the blockade carried out against Laval was the protection of workers.

107 In that regard, it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers.

108 However, as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.

109 Finally, as regards the negotiations on pay which the trade unions seek to impose, by way of collective action such as that at issue in the main proceedings, on undertakings, established in another Member State which post workers temporarily to their territory, it must be emphasised that Community law certainly does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means (see *Seco and Desquenne & Giral*, paragraph 14; *Rush Portuguesa*, paragraph 18, and *Arblade and Others*, paragraph 41).

110 However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, paragraph 43).

111 In the light of the foregoing, the answer to the first question must be that Article 49 EC and Directive 96/71 are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade (‘blockad’) of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.

### **The second question**

112 By the second question, the national court is asking, in essence, whether, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject

to the condition that such action must relate to terms and conditions of employment to which the national law applies directly, thereby making it impossible for an undertaking which posts workers to that Member State in the framework of the provision of services and which is bound by a collective agreement subject to the law of another Member State to enforce such a prohibition vis-à-vis those trade unions.

113 That question concerns the application of the provisions of the MBL which introduced a system to combat social dumping, pursuant to which a service provider is not entitled, in the Member State in which it provides its services, to expect any account to be taken of the obligations under collective agreements to which it is already subject in the Member State in which it is established. It follows from such a system that collective action is authorised against undertakings bound by a collective agreement subject to the law of another Member State in the same way as such action is authorised against undertakings which are not bound by any collective agreement.

114 It is clear from settled case-law that the freedom to provide services implies, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a Member State other than the one in which the service is provided (see, inter alia, Case C-154/89 *Commission v France* [1991] ECR I-659, paragraph 12; Case C-180/89 *Commission v Italy* ECR I-709, paragraph 15; Case C-198/89 *Commission v Greece* ECR I-727, paragraph 16, and *Commission v Germany* [2007] paragraph 83).

115 It is also settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (See, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-383/05 *Talotta* [2007] ECR I-0000, paragraph 18, and Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-0000, paragraph 27).

116 In that regard, it must be pointed out that national rules, such as those at issue in the case in the main proceedings, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.

117 It follows from Article 46 EC, which must be interpreted strictly, that discriminatory rules may be justified only on grounds of public policy, public security or public health (see *Commission v Germany* [2007] paragraph 86).

118 It is clear from the order for reference that the application of those rules to foreign undertakings which are bound by collective agreements to which Swedish law does not directly apply is intended, first, to allow trade unions to take action to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and secondly, to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other Member States.

119 Since none of the considerations referred to in the previous paragraph constitute grounds of public policy, public security or public health within the meaning of Article 46 EC, applied in conjunction with Article 55 EC, it must be held that discrimination such as that in the case in the main proceedings cannot be justified.

120 In the light of the foregoing, the answer to the second question must be that, where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.

### **Costs**

121 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Article 49 EC and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union, in a Member State in which the terms and conditions of employment covering the matters referred to in Article 3(1), first subparagraph, (a) to (g) of that directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.**
  
2. **Where there is a prohibition in a Member State against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly.**

## **C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig***

In Case C-333/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sozialgericht Leipzig (Germany), made by decision of 3 June 2013, received at the Court on 19 June 2013, in the proceedings

**Elisabeta Dano,**

**Florin Dano**

v

**Jobcenter Leipzig,**

THE COURT (Grand Chamber),

[...]

gives the following

### **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 18 TFEU, of point (a) of the first subparagraph, and the second subparagraph, of Article 20(2) TFEU, of Articles 1, 20 and 51 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Articles 4 and 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004'), and of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2 The request has been made in proceedings brought by Ms Dano and her son Florin against Jobcenter Leipzig concerning the latter's refusal to grant them benefits by way of basic provision ('Grundsicherung') that are envisaged by German legislation, namely, for Ms Dano, subsistence benefit ('existenzsichernde Regelleistung') and, for her son, social allowance ('Sozialgeld'), as well as a contribution to accommodation and heating costs.

### **Legal context**

*EU law*

Regulation No 1247/92

3 The first to eighth recitals in the preamble to Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 L 136, p. 1) state as follows:

'... it is necessary to amend Regulation (EEC) No 1408/71 ..., as updated by Regulation (EEC) No 2001/83 ..., as last amended by Regulation (EEC) No 2195/91 ...;

... it is necessary to extend the definition of "member of the family" in Regulation (EEC) No 1408/71 to conform with the case-law of the Court of Justice concerning the interpretation of that expression;

... it is also necessary to take account of the case-law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance because of the class of persons to whom such laws apply, their objectives and their manner of application;

... the Court of Justice has stated that, in some of its features, legislation under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries;

... Regulation (EEC) No 1408/71 excludes from its scope, by virtue of Article 4(4) thereof, social assistance schemes;

... the conditions referred to and their methods of application are such that a system of coordination which differs from that currently provided for in Regulation (EEC) No 1408/71 and which takes account of the special characteristics of the benefits concerned should be included in that Regulation in order to protect the interests of migrant workers in accordance with the provisions of Article 51 of the Treaty;

... such benefits should be granted, in respect of persons falling within the scope of Regulation (EEC) No 1408/71, solely in accordance with the legislation of the country of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality;

... it is necessary nevertheless to ensure that the existing system of coordination in Regulation (EEC) No 1408/71 continues to apply to benefits which either do not fall within the special category of benefits referred to or are not expressly included in an Annex to that Regulation; ... a new Annex is needed for this purpose’.

Regulation (EC) No 883/2004

4 Regulation No 883/2004 replaced Regulation No 1408/71 from 1 May 2010.

5 Recitals 1, 16 and 37 in the preamble to Regulation No 883/2004 state:

‘(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

...

(16) Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.

...

(37) As the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions. It follows that Chapter 9 of Title III of this Regulation can apply only to benefits which are both special and non-contributory and listed in Annex X to this Regulation.’

6 Article 1 of Regulation No 883/2004, headed ‘Definitions’, provides:

‘For the purposes of this Regulation:

...

(l) “legislation” means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

...’

7 Article 2(1) of Regulation No 883/2004, relating to the persons covered by the regulation, provides:

‘This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.’

8 Article 3 of Regulation No 883/2004, headed ‘Matters covered’, states:

‘1. This Regulation shall apply to all legislation concerning the following branches of social security:

...

(b) maternity and equivalent paternity benefits;

...

(h) unemployment benefits;

...

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

...

5. This Regulation shall not apply to:

(a) social and medical assistance ...’

9 Article 4 of Regulation No 883/2004, headed ‘Equality of treatment’, provides:

‘Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.’

10 Chapter 9 of Title III of Regulation No 883/2004, relating to ‘Special non-contributory cash benefits’, contains Article 70, which is headed ‘General provision’ and provides:

‘1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, “special non-contributory cash benefits” means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

11 Annex X to Regulation No 883/2004, which is entitled 'Special non-contributory cash benefits', specifies the following benefits as regards the Federal Republic of Germany:

'...

(b) Benefits to cover subsistence costs under the basic provision for jobseekers unless, with respect to these benefits, the eligibility requirements for a temporary supplement following receipt of unemployment benefit ([Paragraph] 24(1) of Book II of the Social Code) are fulfilled.'

Directive 2004/38

12 Recitals 10, 16 and 21 in the preamble to Directive 2004/38 state:

'(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

...

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or jobseekers as defined by the Court of Justice save on grounds of public policy or public security.

...

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

13 Article 6 of Directive 2004/38, headed 'Right of residence for up to three months', provides in paragraph 1:

'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.'

14 Article 7(1) of Directive 2004/38 provides:

'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; ...'

15 Article 8 of Directive 2004/38, headed 'Administrative formalities for Union citizens', provides in paragraph 4:

'Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.'

16 Article 14 of Directive 2004/38, headed 'Retention of the right of residence', provides:

- 1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.
- 2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

- 3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.
- 4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:
  - (a) the Union citizens are workers or self-employed persons, or
  - (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

17 Article 24 of Directive 2004/38, headed 'Equal treatment', provides:

'1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.'

#### *German law*

#### Social Code

18 Paragraph 19a(1) of Book I of the Social Code (Sozialgesetzbuch Erstes Buch; 'SGB I') sets out the two main types of benefit granted by way of basic provision for jobseekers:

'(1) Under the entitlement to basic provision for jobseekers, the following may be claimed:

1. benefits for integration into the labour market,
2. benefits to cover subsistence costs.'

19 In Book II of the Social Code (Sozialgesetzbuch Zweites Buch; 'SGB II'), Paragraph 1, headed 'Function and objective of basic provision for jobseekers', provides in subparagraphs 1 to 3:

'(1) Basic provision for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity.

...

(3) Basic provision for jobseekers encompasses benefits:

1. intended to bring to an end or reduce need, in particular by integration into the labour market, and
2. intended to cover subsistence costs.'

20 Paragraph 7 of SGB II, headed 'Beneficiaries', provides:

'(1) Benefits under this Book shall be received by persons who:

1. have attained the age of 15 and have not yet reached the age limit referred to in Paragraph 7a,
2. are fit for work,
3. are in need of assistance and
4. whose ordinary place of residence is in the Federal Republic of Germany (beneficiaries fit for work). The following are excluded:
  1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union

citizens [Freizügigkeitsgesetz/EU; “the FreizügG/EU”], and their family members, for the first three months of their residence,

2. foreign nationals whose right of residence arises solely out of the search for employment and their family members,

...

Point 1 of the second sentence shall not apply to foreign nationals residing in the Federal Republic of Germany who have been granted a residence permit under Chapter 2, Section 5, of the Law on residence. Provisions of law governing residence shall be unaffected.

...’

21 Paragraph 8 of SGB II, headed ‘Fitness for work’, states in subparagraph 1:

‘All persons who are not incapable for the foreseeable future, because of an illness or handicap, of working for at least three hours per day under normal labour market conditions are fit for work.

...’

22 Paragraph 9(1) of SGB II provides:

‘All persons who cannot, or cannot sufficiently, cover their subsistence costs on the basis of the income or assets to be taken into consideration and who do not receive the necessary assistance from other persons, in particular from family members or providers of other social security benefits, are in need of assistance.’

23 Paragraph 20 of SGB II sets out additional provisions on basic subsistence needs. Paragraph 21 of SGB II lays down rules on additional needs and Paragraph 22 lays down rules on accommodation and heating needs. Finally, Paragraphs 28 to 30 deal with education and participation benefits.

24 In Book XII of the Social Code (Sozialgesetzbuch Zwölftes Buch; ‘SGB XII’), Paragraph 1, which relates to social assistance, provides:

‘The function of social assistance is to enable the beneficiaries to lead a life in keeping with human dignity. ...’

25 Paragraph 21 of SGB XII provides:

‘Subsistence benefits shall not be paid to persons who are in principle entitled to benefits under Book II because they are fit for work or because of their family ties. ...’

26 Paragraph 23 of SGB XII, headed ‘Social assistance for foreign nationals’, reads as follows:

‘(1) Subsistence assistance, assistance for sick persons, assistance for pregnant women, maternity assistance and care assistance under this Book must be given to foreign nationals who are actually resident in national territory. The provisions of the fourth Chapter shall not be affected. Otherwise, social assistance may be granted in so far as it is justified in a particular case. The restrictions of the first sentence shall not apply to foreign nationals holding a permanent residence permit (“Niederlassungserlaubnis”) or a residence permit of limited duration (“befristeter Aufenthaltstitel”) who anticipate taking up permanent residence in federal territory. Legal provisions under which social assistance other than the benefits referred to in the first sentence must or should be granted shall not be affected.

...

(3) Foreign nationals who have entered national territory in order to obtain social assistance or whose right of residence arises solely out of the search for employment, and their family members, have no right to social

assistance. If they have entered national territory for the purpose of treatment or alleviation of illness, assistance for sick persons may be granted only to remedy a critical, life-threatening condition or for urgent and essential treatment of a serious or contagious disease.

(4) Foreign nationals in receipt of social assistance must be informed of the return and resettlement programmes applicable to them; in appropriate cases recourse to such programmes is to be promoted.'

Law on freedom of movement of Union citizens

27 The scope of the FreizügG/EU is specified in Paragraph 1 of that law:

'This Law shall govern the entry and residence of nationals of other Member States of the European Union (Union citizens) and their family members.'

28 Paragraph 2 of the FreizügG/EU provides, on the right of entry and residence:

'(1) Union citizens who are entitled to freedom of movement and their family members shall have the right to enter and reside in federal territory, subject to the provisions of this Law.

(2) The following are entitled to freedom of movement under Community law:

1. Union citizens who wish to reside in federal territory as workers or for the purpose of seeking employment or pursuing vocational training,

...

5. Union citizens who are not working, subject to the conditions laid down in Paragraph 4,

6. family members, subject to the conditions laid down in Paragraphs 3 and 4,

...

(4) Union citizens shall not require a visa in order to enter federal territory or a residence permit in order to reside there. ...

(5) In order for Union citizens to reside in federal territory for a period of up to three months, it is sufficient that they hold a valid identity card or passport. Family members who are not Union citizens have the same right if they hold an approved or otherwise accepted passport (or document in lieu of a passport) and they are accompanying or joining the Union citizen.

...

(7) The right under subparagraph 1 may be found not to exist if it is established that the person concerned has pretended that a condition for that right is fulfilled by using counterfeit or falsified documents or by misrepresentation of the facts. In the case of a family member who is not a Union citizen, the right under subparagraph 1 may also be found not to exist if it is established that he is not joining the Union citizen in order to establish or preserve family life or is not accompanying the Union citizen for that purpose. In these cases a family member who is not a Union citizen may be refused issue of the residence card or visa or his residence card may be withdrawn. Decisions under sentences 1 to 3 shall be in writing.'

29 Paragraph 3 of the FreizügG/EU, relating to family members, states:

'(1) Family members of the Union citizens specified in Paragraph 2(2), points 1 to 5, shall enjoy the right under Paragraph 2(1) if they are accompanying or joining the Union citizen. For family members of the Union citizens specified in Paragraph 2(2), point 5, this shall apply subject to Paragraph 4.

(2) The following are family members:

1. the spouse, the partner and the descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, who are not yet 21 years old,
2. the relatives in the ascending line and descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, whom those persons or their spouses or partners maintain.

...'

30 Paragraph 4 of the FreizügG/EU provides, in relation to persons who are entitled to freedom of movement and are not working:

'Union citizens who are not working and the family members accompanying or joining them shall enjoy the right provided for in Paragraph 2(1) if they have sufficient sickness insurance cover and sufficient means of subsistence. If the Union citizen is resident in federal territory as a student, this right shall extend only to his spouse, partner and children who are maintained.'

31 Paragraph 5 of the FreizügG/EU, headed 'Residence cards and certificate concerning the right of permanent residence', provides:

'...

(2) The competent aliens office may require that the conditions for the right under Paragraph 2(1) be substantiated within three months following entry into federal territory. Information and evidence necessary for substantiation may be received by the competent registration authority at the time of registration with it. That authority shall forward the information and evidence to the competent aliens office. The registration authority shall not use or process that data for any other purpose.

(3) A check to establish whether the conditions for the right under Paragraph 2(1) are fulfilled or continue to be fulfilled may be carried out where this is justified by a particular reason.

...'

32 Paragraph 5a of the FreizügG/EU states:

'(1) The competent authority may request a Union citizen to produce to it a valid identity card or passport in the circumstances referred to in Paragraph 5(2) and, in the circumstances referred to in

...

3. Paragraph 2(2), point 5, proof of sufficient sickness insurance cover and sufficient means of subsistence.'

33 Paragraph 6 of the FreizügG/EU, relating to loss of the right of entry and residence, states:

'(1) Without prejudice to Paragraph 2(7) and Paragraph 5(4), loss of the right under Paragraph 2(1) may be determined, and the certificate concerning the right of permanent residence, the residence card or the permanent residence card may be withdrawn, only on grounds of public policy, public security or public health (Articles 45(3) and 52(1) of the Treaty on the Functioning of the European Union). Entry may also be refused on the grounds referred to in the first sentence. ...

(2) The existence of a criminal conviction shall not in itself constitute a sufficient ground for the adoption of the decisions or measures referred to in subparagraph 1. Only criminal convictions which have not yet been deleted from the federal central register may be taken into account, and only in so far as the circumstances on which they are based disclose personal conduct that constitutes a present threat to the requirements of public policy. There must be a genuine and sufficiently serious threat affecting a fundamental interest of society.

(3) When a decision under subparagraph 1 is made, account must be taken in particular of how long the person concerned has resided in Germany, his age, his state of health, his family and economic situation, his social and cultural integration in Germany and the extent of his ties to his State of origin.

...

(6) Decisions or measures relating to loss of the right of residence or the right of permanent residence may not be adopted on economic grounds.

...'

34 As regards the obligation to leave the territory, Paragraph 7 of the FreizügG/EU states:

'(1) Union citizens and their family members shall be obliged to leave federal territory if the aliens office has established that there is no right of entry and residence. The decision shall contain a warning of removal from federal territory and set a time-limit for leaving it. Except in urgent cases the period set must be at least a month.

...

Union citizens and their family members who have lost their right to freedom of movement pursuant to Paragraph 6(1) may not re-enter federal territory and reside there. The prohibition under the first sentence shall, upon application, be for a fixed term. That term shall begin to run when federal territory is left. An application to have the prohibition lifted that is made after a reasonable period or after three years shall be determined within six months.'

#### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

35 Ms Dano, who was born in 1989, and her son Florin, who was born on 2 July 2009 in Saarbrücken (Germany), are both Romanian nationals. According to the findings of the referring court, Ms Dano last entered Germany on 10 November 2010.

36 On 19 July 2011, the city of Leipzig issued Ms Dano with a residence certificate of unlimited duration ('unbefristete Freizügigkeitsbescheinigung') for EU nationals, establishing 27 June 2011 as the date of entry into German territory. On 28 January 2013 it also issued her with a duplicate certificate.

37 Since their arrival in Leipzig, Ms Dano and her son have been living in the apartment of Ms Dano's sister, who provides for them materially.

38 Ms Dano receives child benefit ('Kindergeld') for her son Florin, which is paid by the Leipzig family benefits office on behalf of the Federal Employment Agency and amounts to EUR 184 per month. The Leipzig social assistance service for children and young people also pays an advance on maintenance payments of EUR 133 per month for that child, whose father's identity is not known.

39 Ms Dano attended school for three years in Romania, but did not obtain any leaving certificate. She understands German orally and can express herself simply in German. On the other hand, she cannot write in German and her ability to read texts in that language is only limited. She has not been trained in a profession and, to date, has not worked in Germany or Romania. Although her ability to work is not in dispute, there is nothing to indicate that she has looked for a job.

40 The first application that Ms Dano and her son submitted for the grant of benefits by way of basic provision under SGB II was refused by Jobcenter Leipzig by decision of 28 September 2011, on the basis of point 2 of the second sentence of Paragraph 7(1) of SGB II. Since that decision was not contested, it became final.

41 A fresh application for the same benefits, submitted on 25 January 2012, was also refused, by decision of Jobcenter Leipzig of 23 February 2012. Ms Dano and her son lodged an administrative objection against that refusal, relying on Articles 18 TFEU and 45 TFEU and on the judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344). That objection was dismissed by decision of 1 June 2012.

42 On 1 July 2012, Ms Dano and her son brought an action challenging that decision before the Sozialgericht Leipzig (Social Court, Leipzig), by which they again sought the grant of benefits by way of basic provision for jobseekers under SGB II in respect of the period commencing on 25 January 2012.

43 The Sozialgericht Leipzig considers that, by virtue of point 2 of the second sentence of Paragraph 7(1) of SGB II and Paragraph 23(3) of SGB XII, Ms Dano and her son are not entitled to benefits granted by way of basic provision. However, it expresses doubts as to whether provisions of EU law, in particular Article 4 of Regulation No 883/2004, the general principle of non-discrimination resulting from Article 18 TFEU and the general right of residence resulting from Article 20 TFEU, preclude those provisions of German law.

44 According to the findings of the referring court, the main proceedings concern persons who cannot claim a right of residence in the host State by virtue of Directive 2004/38.

45 In those circumstances, the Sozialgericht Leipzig decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Do persons who do not wish to claim payment of any benefits of social security law or family benefits under Article 3(1) of Regulation No 883/2004 but rather special non-contributory benefits under Article 3(3) and Article 70 of the regulation fall within the scope *ratione personae* of Article 4 of the regulation?’

(2) If Question 1 is answered in the affirmative: are the Member States precluded by Article 4 of Regulation No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the regulation which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?’

(3) If Question 1 or Question 2 is answered in the negative: are the Member States precluded by (a) Article 18 TFEU and/or (b) [point (a) of the first subparagraph of Article 20(2)] TFEU in conjunction with the [second subparagraph] of Article 20(2) TFEU and Article 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?’

(4) If, according to the answers to the abovementioned questions, the partial exclusion of benefits which guarantee a level of subsistence complies with EU law: may the provision of non-contributory benefits which guarantee a level of subsistence for Union citizens, outside acute emergencies, be limited to the provision of the necessary funds for return to the home State or do Articles 1, 20 and 51 of the Charter ... require more extensive payments which enable permanent residence?’

### **Consideration of the questions referred**

#### *Question 1*

46 By its first question, the referring court asks, in essence, whether Article 4 of Regulation No 883/2004 must be interpreted as meaning that ‘special non-contributory benefits’ for the purposes of Articles 3(3) and 70 of the regulation fall within its scope.

47 A preliminary point to note is that the referring court has classified the benefits at issue in the main proceedings as ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004.

48 It must be pointed out, first, that Article 3 of Regulation No 883/2004 defines the matters covered by the regulation, expressly stating in Article 3(3) that the regulation ‘shall also apply to the special non-contributory cash benefits covered by Article 70 [of the regulation]’.

49 Accordingly, it is clear from the wording of Article 3 of Regulation No 883/2004 that the regulation applies to special non-contributory cash benefits.

50 Second, Article 70(3) of Regulation No 883/2004 provides that Article 7 of the regulation, which governs the waiving of residence rules, and the other chapters of Title III thereof, which is devoted to the various categories of benefits, are not to apply to special non-contributory cash benefits.

51 Whilst Article 70(3) of Regulation No 883/2004 therefore, by way of exception, renders certain of the regulation's provisions inapplicable to special non-contributory cash benefits, Article 4 is not among those provisions.

52 Finally, the interpretation that Article 4 of Regulation No 883/2004 applies to special non-contributory cash benefits corresponds to the intention of the EU legislature, as is apparent from the third recital in the preamble to Regulation No 1247/92 which amended Regulation No 1408/71, inserting provisions relating to benefits of this type in order to take account of the case-law in that regard.

53 In accordance with the seventh recital, such benefits should be granted solely in accordance with the legislation of the Member State of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality.

54 The specific provision which the EU legislature thus inserted into Regulation No 1408/71 by means of Regulation No 1247/92 is thus characterised by non-exportability of special non-contributory cash benefits as the counterpart of equal treatment in the State of residence.

55 In the light of all the foregoing considerations, the answer to the first question is that Regulation No 883/2004 must be interpreted as meaning that 'special non-contributory cash benefits' as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.

#### *Questions 2 and 3*

56 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded, in full or in part, from entitlement to certain 'special non-contributory cash benefits' within the meaning of Regulation No 883/2004 although those benefits are granted to nationals of the Member State concerned who are in the same situation.

57 It should be observed first of all that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union (judgment in *N.*, C-46/12, EU:C:2013:9725, paragraph 25).

58 As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 28; and *N.*, EU:C:2013:9725, paragraph 27).

59 Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU (see judgment in *N.*, EU:C:2013:97, paragraph 28 and the case-law cited).

60 In this connection, it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein'. The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the

'limitations and conditions laid down in the Treaties and by the measures adopted to give them effect' (see judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 46 and the case-law cited).

61 Thus, the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation.

62 Accordingly, the Court should interpret Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004.

63 It must be stated first of all that 'special non-contributory cash benefits' as referred to in Article 70(2) of Regulation No 883/2004 do fall within the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State (judgment in *Brey*, EU:C:2013:565, paragraph 61).

64 That having been said, it must be pointed out that, whilst Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, Article 24(2) of that directive contains a derogation from the principle of non-discrimination.

65 Under Article 24(2) of Directive 2004/38, the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the period of seeking employment, referred to in Article 14(4)(b) of the directive, that extends beyond that first period, nor is it obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families.

66 It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope *ratione personae* of Article 24(2) of Directive 2004/38.

67 In those circumstances, it must be established whether Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings.

68 Article 24(1) of Directive 2004/38 provides that all Union citizens residing on the basis of the directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.

69 It follows that, so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38.

70 First, in the case of periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities for the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(1) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 39). In accordance with Article 24(2) of Directive 2004/38, the host Member State is thus not obliged to confer entitlement to social benefits on a national of another Member State or his family members during that period.

71 Second, for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen

and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 40).

72 Third, it is apparent from Article 16(1) of Directive 2004/38 that Union citizens acquire the right of permanent residence after residing legally for a continuous period of five years in the host Member State and that that right is not subject to the conditions referred to in the preceding paragraph. As stated in recital 18 in the preamble to the directive, once obtained, the right of permanent residence is not to be subject to any conditions, with the aim of it being a genuine vehicle for integration into the society of that State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 41).

73 In order to determine whether economically inactive Union citizens, in the situation of the applicants in the main proceedings, whose period of residence in the host Member State has been longer than three months but shorter than five years, can claim equal treatment with nationals of that Member State so far as concerns entitlement to social benefits, it must therefore be examined whether the residence of those citizens complies with the conditions in Article 7(1)(b) of Directive 2004/38. Those conditions include the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members.

74 To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.

75 It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil any other condition. On the other hand, persons who are economically inactive are required by Article 7(1)(b) of the directive to meet the condition that they have sufficient resources of their own.

76 Therefore, Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.

77 As the Advocate General has observed in points 93 and 96 of his Opinion, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.

78 A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.

79 To deny the Member State concerned that possibility would, as the Advocate General has stated in point 106 of his Opinion, thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.

80 Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.

81 In the main proceedings, according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State under Directive 2004/38. Therefore,

as has been stated in paragraph 69 of the present judgment, they cannot invoke the principle of non-discrimination in Article 24(1) of the directive.

82 Accordingly, Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, does not preclude national legislation such as that at issue in the main proceedings in so far as it excludes nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004.

83 The same conclusion must be reached in respect of the interpretation of Article 4 of Regulation No 883/2004. The benefits at issue in the main proceedings, which constitute ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 in the host Member State (see, to this effect, judgment in *Brey*, EU:C:2013:965, paragraph 44).

84 In the light of the foregoing, the answer to the second and third questions is that Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.

#### *Question 4*

85 By its fourth question, the referring court asks, in essence, whether Articles 1, 20 and 51 of the Charter must be interpreted as requiring the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State.

86 It should be recalled that, in the context of a reference for a preliminary ruling under Article 267 TFEU, the Court is called upon to interpret EU law only within the limits of the powers conferred on the European Union (see, inter alia, judgment in *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 68 and the case-law cited).

87 Article 51(1) of the Charter states that the provisions of the Charter are addressed ‘to the Member States only when they are implementing Union law’.

88 According to Article 6(1) TEU, the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 and 23, and order in *Nagy and Others*, C-488/12 to C-491/12 and C-526/12, EU:C:2013:703, paragraph 15).

89 In paragraph 41 of the judgment in *Brey* (EU:C:2013:565), the Court confirmed that Article 70 of Regulation No 883/2004, which defines the term ‘special non-contributory cash benefits’, is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions.

90 Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence, as the Advocate General has observed in point 146 of his Opinion, to define the extent of the social cover provided by that type of benefit.

91 Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.

92 It follows that the Court does not have jurisdiction to answer the fourth question.

### **Costs**

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as meaning that ‘special non-contributory cash benefits’ as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.**
2. **Article 24(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004, as amended by Regulation No 1244/2010, must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.**
3. **The Court of Justice of the European Union does not have jurisdiction to answer the fourth question.**

## LECTURE 5: EU CITIZENSHIP UNLIMITED?

The EU's free movement rights are essentially directed towards economically active persons: workers and independent professionals engaged in an economic activity. Over time, however, former or future workers also began to ask for supplementary residence rights for prolonged periods of time in the territory of another EU Member State. To accommodate those requests, the Maastricht Treaty introduced the concept of EU citizenship. According to Article 20 TFEU, every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. Attached to EU citizenship are (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

Of those rights, the right to move and reside has proven most controversial; questions have indeed been asked in what circumstances a citizen – non-economically or professionally active – may benefit from residence rights. Such residence rights are important, as a legal resident in another Member State benefits fully from the prohibition of discrimination on grounds of nationality in accordance with Article 18 TFEU. As such, citizenship residence implies entitlements for individuals and potential financial burdens for host States. It will not surprise you, therefore, that the Court of Justice has had to intervene on multiple occasions to balance both interests at stake. In this lecture, we will analyse the EU citizenship case law from the vantage point of balancing both interests, yet also from the point made in legal scholarship that EU citizenship presents an independent status which could be imagined as the building block for more social integration between Member States. In the lecture, we will critically assess that hypothesis, demonstrating that the current EU citizenship setup does not necessarily reflect that 'independent building block' status.

### Materials to read:

- Court of Justice, 20 September 2001, C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458.
- Court of Justice, 8 March 2011, C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, ECLI:EU:C:2011:124.
- Court of Justice, 25 February 2016, Case C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna Garcia-Nieto and Others*, ECLI:EU:C:2016:114.
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, [2004] O.J. L158/77 (via eCampus).

- M. Blauburger and S.K. Schmidt, “Welfare migration? Free movement of EU citizens and access to social benefits”, 1(3) *Research and Politics* (2014), 1-7 (via eCampus).
- P. Van Cleynenbreugel, “Citizens beyond the market? EU citizenship in the context of European economic and social integration” in S. Pais Oliveira (ed.), *EU citizenship: challenges and opportunities*, Porto, Universidade Católica Porto Editora, 2015, 97-128 (via eCampus).

Lecture 5 outline:

- a. The gradual recognition of EU citizenship entitlements
  1. Humble worker beginnings: Martinez Sala and Gravier
  2. The Maastricht Treaty
  3. Towards independent entitlements? Baumbast and Bidar
- b. Residence rights in Directive 2004/38
  1. Workers
  2. Employment seekers
  3. Students
  4. Others
  5. Family members
- c. Linking primary and secondary law
  1. Lex specialis as principle
  2. Exceptions to the principle: administrative rigidity and removal from the European Union
  3. Zambrano v. Garcia Nieto: where to draw a line?
- d. The place of citizenship in EU internal market law
  1. Fundamental status or supplementary rights?
  2. Balancing Member States v. individual interests
  3. The role of the Court of Justice in maintaining the balance
  4. Limits to EU citizenship entitlements?

Questions for discussion:

- What criteria does the Court rely on to balance individual and Member State interests in awarding citizenship rights? Are those criteria made explicit?
- How does the Court envisage the relationship between primary and secondary Union law in this field? Is this approach similar to or different from the general approach outlined in lecture 3?

**C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve**

In Case C-184/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal du travail de Nivelles (Belgium) for a preliminary ruling in the proceedings pending before that court between

**Rudy Grzelczyk**

and

**Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve,**

on the interpretation of Articles 6, 8 and 8a of the EC Treaty (now, after amendment, Articles 12 EC, 17 EC and 18 EC) and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward (Rapporteur), P. Jann, L. Sevón, R. Schintgen and F. Macken, Judges,

Advocate General: S. Alber,

Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

- the Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, by B. Liétar, avocat,
- the Belgian Government, by A. Snoecx, acting as Agent, C. Doutrelepont and M. Uyttendaele, avocat,
- the Danish Government, by J. Molde, acting as Agent,
- the French Government, by K. Rispal-Bellanger and C. Bergeot, acting as Agents,
- the Portuguese Government, by L. Fernandes and A.C. Pedroso, acting as Agents,
- the United Kingdom Government, by R. Magrill, acting as Agent, P. Sales and J. Coppel, Barristers,
- the Council of the European Union, by E. Karlsson and F. Anton, acting as Agents,
- the Commission of the European Communities, by P. van Nuffel, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Belgian Government, represented by C. Doutrelepont, of the French Government, represented by C. Bergeot, of the United Kingdom Government, represented by K. Parker QC, of the Council, represented by E. Karlsson, and of the Commission, represented by M. Wolfcarius and D. Martin, acting as Agents, at the hearing on 20 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2000,

gives the following

## Judgment

1.

By judgment of 7 May 1999, received at the Court on 19 May 1999, the Tribunal du travail de Nivelles (Industrial Tribunal, Nivelles) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 6, 8 and 8a of the EC Treaty (now, after amendment, Articles 12 EC, 17 EC and 18 EC) and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

2.

Those questions were raised in proceedings between Mr Rudy Grzelczyk and the Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve (Public Social Assistance Centre for Ottignies-Louvain-la-Neuve, hereinafter 'the CPAS') concerning the CPAS's decision to stop payment of the 'minimex', the minimum subsistence allowance (hereinafter referred to as 'the minimex').

### Relevant Community legislation

3.

The first paragraph of Article 6 of the Treaty provides:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

4.

Article 8 of the Treaty provides:

'1. Citizenship of the Union is hereby established.

Every person holding the nationality of a Member State shall be a citizen of the Union.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.'

5.

Article 8a of the Treaty is worded as follows:

'1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.'

6.

The fourth recital in the preamble to both Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28) and the sixth recital in the preamble to Directive 93/96 - which essentially replaced Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30) after it was annulled by the Court of Justice (Case C-295/90 *Parliament v Council* [1992] ECR I-

4193) - state that beneficiaries of those directives must not become an unreasonable burden on the public finances of the host Member State.

7.

According to Article 1 of Directive 93/96,

‘In order to lay down conditions to facilitate the exercise of the right of residence and with a view to guaranteeing access to vocational training in a non-discriminatory manner for a national of a Member State who has been accepted to attend a vocational training course in another Member State, the Member States shall recognise the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law, and for the student's spouse and their dependent children, where the student assures the relevant national authority, by means of a declaration or by such alternative means as the student may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, provided that the student is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and that he is covered by sickness insurance in respect of all risks in the host Member State.’

#### **Relevant national legislation**

8.

Article 1 of the Law of 7 August 1974 establishing the right to a minimum subsistence allowance (*Moniteur belge* of 18 September 1974, p. 11363) provides:

‘1. Any Belgian having reached the age of majority, who is actually resident in Belgium and who does not have adequate resources and is not able to obtain them either by his own efforts or from other sources, shall be entitled to a minimum subsistence allowance.

The King shall determine the meaning of the words “actually resident”.

The same entitlement is granted to minors treated as being of full age on account of marriage, and also to single persons who are responsible for one or more children.

2. The King may, by decree deliberated by the Council of Ministers, extend the application of this law, subject to such conditions as he shall set, to other categories of minors, and also to persons not possessing Belgian nationality.’

9.

According to Article 1 of the Royal Decree of 27 March 1987 (*Moniteur belge* of 7 April 1987, p. 5068), which extends application of the Law of 7 August 1974 to persons not possessing Belgian nationality:

‘The scope of the Law of 7 August 1974 establishing a right to a minimum subsistence allowance shall be extended to the following persons:

(i) those to whom Regulation (EEC) No 1612/68 of the Council of the European Communities of 15 October 1968 on the freedom of movement for workers within the Community applies;

(ii) stateless persons to whom the Convention on the Status of Stateless Persons, signed in New York on 28 September 1954 and approved by the Law of 12 May 1960 applies;

(iii) refugees within the meaning of Article 49 of the Law of 15 December 1980 on entry to Belgian territory, residence, establishment and the expulsion of foreigners.’

#### **The main proceedings and the questions referred for a preliminary ruling**

10.

In 1995 Mr Grzelczyk, a French national, began a course of university studies in physical education at the Catholic University of Louvain-la-Neuve and for that purpose took up residence in Belgium. During the first three years of his studies, he defrayed his own costs of maintenance, accommodation and studies by taking on various minor jobs and by obtaining credit facilities.

11.

At the beginning of his fourth and final year of study, he applied to the CPAS for payment of the minimex. In its report, the CPAS observed that Mr Grzelczyk had worked hard to finance his studies, but that his final academic year, involving the writing of a dissertation and the completion of a qualifying period of practical training, would be more demanding than the previous years. For those reasons, by decision of 16 October 1998, the CPAS granted Mr Grzelczyk the minimex, calculated at the 'single' rate, for the period from 5 October 1998 to 30 June 1999.

12.

The CPAS applied to the Belgian State authorities for reimbursement of the minimex paid to Mr Grzelczyk. The competent federal minister, however, refused to reimburse the CPAS on the ground that the legal requirements for the grant of the minimex, and in particular the nationality requirement, had not been satisfied, whereupon the CPAS withdrew the minimex from Mr Grzelczyk with effect from 1 January 1999, for the stated reason that 'the person concerned is an EEC national enrolled as a student'.

13.

Mr Grzelczyk challenged that decision before the Labour Tribunal, Nivelles. The tribunal observed that, according to the case-law of the Court of Justice, the minimex is a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, 1968 (II), p. 47) and that, under Belgian law, entitlement to the minimex had been extended to persons to whom Regulation No 1612/68 applies. It pointed out, however, that Mr Grzelczyk did not, in the CPAS's view, satisfy all the requirements for claiming the minimex under its extended scope since his student status prevented him from being regarded as a worker and his residence in Belgium was not attributable to operation of the principle of free movement of workers. The Labour Tribunal also referred to the judgment of the Court of Justice in Case C-85/96 *Martinez Sala* [1998] ECR I-2691 and queried whether the principles of European citizenship and non-discrimination precluded application of the national legislation at issue in the main proceedings.

14.

In those circumstances, the Labour Tribunal, Nivelles, recognising the urgency of Mr Grzelczyk's situation, granted him a flat-rate allowance of BEF 20 000 per month for the period from 1 January 1999 to 30 June 1999 and stayed the proceedings in order to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it contrary to Community law - more particularly the principles of European citizenship and of non-discrimination enshrined in Article 6 and 8 of the Treaty establishing the European Community - for entitlement to a non-contributory social benefit, such as that introduced by the Belgian Law of 7 August 1974 on the minimum subsistence allowance, to be granted only to nationals of the Member States to whom Regulation (EEC) No 1612/68 of 15 October 1968 applies and not to all citizens of the Union?'

2. In the alternative, are Articles 6 and 8a of the Treaty and Directive 93/96 of 29 October 1993 on the right of residence for students to be interpreted to the effect that, after a student's right of residence has been acknowledged, he may subsequently be barred from entitlement to non-contributory social benefits, such as the minimum subsistence allowance, payable by the host country, and, if so, is that exclusion general and definitive in nature?'

#### **Preliminary remarks**

15.

The parties to the main proceedings, the Member States which have submitted observations and the Commission have all devoted a substantial part of their observations, both written and oral, to the question whether the fact that during the first three years of his studies Mr Grzelczyk took various paid jobs brings him within the scope of the Royal Decree of 27 March 1987 as a worker within the meaning of Community law.

16.

However, it is clear from the national court's order for reference that it adopted the analysis of the CPAS that Mr Grzelczyk did not fulfil the criteria for treatment as a worker within the meaning of Community law. Against that factual and legal background the national court raises the question of the compatibility of the relevant Belgian legislation with Community law, and in particular with Articles 6, 8 and 8a of the Treaty.

17.

That being so, the Court must answer its questions as they have been framed and within the limits set by the national court.

18.

It is for the national court to determine, in the light, in particular, of the Opinion of the Advocate General, whether or not the facts and circumstances of the case are such as to permit Mr Grzelczyk to be regarded as a worker for the purposes of Community law.

#### **The first question referred for a preliminary ruling**

19.

By its first question, the Belgian court asks essentially whether Articles 6 and 8 of the Treaty preclude entitlement to a non-contributory social benefit, such as the *minimex*, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State.

#### *Observations submitted to the Court*

20.

The CPAS argues that, as Community law stands at present, it would be wrong to regard all citizens of the European Union as being entitled to claim non-contributory social benefits, such as the *minimex*. It is clear from the wording of the provision itself that Article 8a(1) of the Treaty does not have direct effect and that its implementation must always have due regard for the limits laid down in the Treaty and defined in secondary legislation. This includes, in particular, Directives 90/364, 90/365 and 93/96, which subject exercise of the freedom of movement to a requirement to demonstrate that the person concerned possesses sufficient resources and social security cover.

21.

The Belgian and Danish Governments submit that the entry into force of the Treaty on European Union and the Treaty of Amsterdam does not affect that interpretation. Citizenship of the Union does not mean that Union citizens obtain rights that are new and more extensive than those already deriving from the EC Treaty and secondary legislation. The principle of citizenship of the Union has no autonomous content, but is merely linked to the other provisions of the Treaty.

22.

The French Government submits that the idea that the principle of equal treatment in the matter of social advantages should be extended to all citizens of the Union when at present it applies only to workers and members of their families would amount to establishing total equality between citizens of the Union established in a Member State and nationals of that State, which would be difficult to reconcile with rights attaching to nationality.

23.

The Portuguese Government points out that, since the entry into force of the Treaty on European Union, nationals of the Member States are no longer regarded in Community law as being primarily economic factors in an essentially economic community. One consequence of the introduction of Union citizenship is that the limits and conditions which Community law imposes on the exercise of the right to freedom of movement and residence within the territory of the Member States should no longer be construed as envisaging a purely economic right arising from the EC Treaty but as being concerned only with those exceptions that are based on reasons of public policy, public security or public health. Furthermore, if from the time when the Treaty on European Union entered into force, nationals of the Member States acquired the status of citizen of the Union and ceased to be regarded as purely economic agents, it follows that the application of Regulation No 1612/68 ought also to be extended to all citizens of the Union, whether or not they are workers within the meaning of that regulation.

24.

The United Kingdom Government, referring to the judgment in *Martínez Sala*, cited above, argues that, whilst Mr Grzelczyk is suffering discrimination on the grounds of his nationality, Article 6 of the EC Treaty does not apply to his situation because any discrimination against him falls outside the scope of the Treaty. Article 6 cannot have the effect of striking down limitations upon the scope of Regulation No 1612/68, whether read alone or together with Article 8 of the Treaty.

25.

The Belgian Government adds that the applicant in the main proceedings is claiming the minimex whereas this type of funding falls outside the scope of Article 6 of the Treaty, of Article 126 of the EC Treaty (now Article 149 EC) and of Article 127 of the EC Treaty (now, after amendment, Article 150 EC). Funding such as the minimex is an instrument of social policy with no particular link with vocational training. As Community law stands at present, it is not within Community competence.

26.

The Commission takes the view that Articles 6 and 8 of the Treaty must be interpreted as granting to every citizen of the Union the right not to suffer discrimination by a Member State on grounds of nationality, within the scope of application *ratione materiae* of the Treaty, provided that the Union citizen's situation has some relevant connection with the Member State concerned.

#### *Findings of the Court*

27.

In order to place the legal problem raised by this case in its context, it should be recalled that, in Case 249/83 *Hoeckx* [1985] ECR 973, concerning an unemployed Dutch national returning to Belgium where she made a fresh application for the minimex, the Court held that a social benefit providing a general guarantee of a minimum subsistence allowance, such as that provided for by the Belgian Law of 7 August 1974, constitutes a social advantage within the meaning of Regulation No 1612/68.

28.

At the time of the facts giving rise to *Hoeckx*, all Community nationals were entitled to the minimex, although nationals of Member States other than Belgium had to satisfy the additional requirement of having actually resided in Belgium for at least five years immediately preceding the date on which the minimex was granted (see Article 1 of the Royal Decree of 8 January 1976, *Moniteur belge* of 13 January 1976, p. 311). It was the Royal Decree of 27 March 1987, which repealed the Royal Decree of 8 January

1976, which restricted entitlement to the *minimex*, in the case of nationals of other Member States, to persons to whom Regulation No 1612/68 applied. The residence condition, which had been amended in the meantime, was finally removed after infringement proceedings were brought by the Commission against the Kingdom of Belgium (Case C-326/90 *Commission v Belgium* [1992] ECR I-5517).

29.

It is clear from the documents before the Court that a student of Belgian nationality, though not a worker within the meaning of Regulation No 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the *minimex*. The fact that Mr Grzelczyk is not of Belgian nationality is the only bar to its being granted to him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality.

30.

Within the sphere of application of the Treaty, such discrimination is, in principle, prohibited by Article 6. In the present case, Article 6 must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application.

31.

Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.

32.

As the Court held in paragraph 63 of its judgment in *Martinez Sala*, cited above, a citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law.

33.

Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a of the Treaty (see Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraphs 15 and 16).

34.

It is true that, in paragraph 18 of its judgment in Case 197/86 *Brown* [1988] ECR 3205, the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof (later Article 6 of the EC Treaty).

35.

However, since *Brown*, the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty and added to Title VIII of Part Three a new chapter 3 devoted to education and vocational training. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. Furthermore, since *Brown*, the Council has also adopted Directive 93/96, which provides that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements.

36.

The fact that a Union citizen pursues university studies in a Member State other than the State of which he is a national cannot, of itself, deprive him of the possibility of relying on the prohibition of all discrimination on grounds of nationality laid down in Article 6 of the Treaty.

37.

As pointed out in paragraph 30 above, in the present case that prohibition must be read in conjunction with Article 8a(1) of the Treaty, which proclaims ‘the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect’.

38.

As regards those limitations and conditions, it is clear from Article 1 of Directive 93/96 that Member States may require of students who are nationals of a different Member State and who wish to exercise the right of residence on their territory, first, that they satisfy the relevant national authority that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence, next, that they be enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and, lastly, that they be covered by sickness insurance in respect of all risks in the host Member State.

39.

Article 3 of Directive 93/96 makes clear that the directive does not establish any right to payment of maintenance grants by the host Member State for students who benefit from the right of residence. On the other hand, there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits.

40.

As regards more specifically the question of resources, Article 1 of Directive 93/96 does not require resources of any specific amount, nor that they be evidenced by specific documents. The article refers merely to a declaration, or such alternative means as are at least equivalent, which enables the student to satisfy the national authority concerned that he has, for himself and, in relevant cases, for his spouse and dependent children, sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their stay (see paragraph 44 of the judgment in Case C-424/98 *Commission v Italy* [2000] ECR I-4001).

41.

In merely requiring such a declaration, Directive 93/96 differs from Directives 90/364 and 90/365, which do indicate the minimum level of income that persons wishing to avail themselves of those directives must have. That difference is explained by the special characteristics of student residence in comparison with that of persons to whom Directives 90/364 and 90/365 apply (see paragraph 45 of the judgment in *Commission v Italy*, cited above).

42.

That interpretation does not, however, prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence or from taking measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it.

43.

Nevertheless, in no case may such measures become the automatic consequence of a student who is a national of another Member State having recourse to the host Member State's social assistance system.

44.

Whilst Article 4 of Directive 93/96 does indeed provide that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive's preamble envisages that beneficiaries of the right of residence must not become an ‘unreasonable’ burden on the public finances of the host Member State. Directive 93/96, like Directives 90/364 and 90/365, thus accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary.

45.

Furthermore, a student's financial position may change with the passage of time for reasons beyond his control. The truthfulness of a student's declaration is therefore to be assessed only as at the time when it is made.

46.

It follows from the foregoing that Articles 6 and 8 of the Treaty preclude entitlement to a non-contributory social benefit, such as the *minimex*, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State.

**The second question referred for a preliminary ruling**

47.

In view of the answer given to the first question, and since the second question was put in the alternative, it is not necessary to reply to that question.

**The temporal effects of the present judgment**

48.

In its written observations the Belgian Government asks the Court, in the event that it finds that a person such as the applicant in the main proceedings may receive the *minimex*, to limit in time the effects of the present judgment.

49.

In support of that request, the Belgian Government states that the Court's judgment would have retroactive effects which would throw into doubt legal relations established in good faith and in accordance with secondary legislation. More specifically, it fears that systems of social allowances for students will be upset if secondary legislation is changed as a result of a new interpretation of Community law allowing students to rely on Articles 6 and 8 of the Treaty in circumstances such as those in the main proceedings. The principle of legal certainty therefore requires that the effects of the judgment be limited in time.

50.

The Court has repeatedly held that an interpretation it gives to a provision of Community law clarifies and defines its meaning and scope only as it should have been understood and applied from the time of its entry into force (see Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 42, and Case C-35/97 *Commission v France* [1998] ECR I-5325, paragraph 46).

51.

It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the possibility for any person concerned to rely upon a provision which it has interpreted with a view to calling into question legal relationships established in good faith (see, *inter alia*, Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 39).

52.

It is also settled in case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling (see, in particular, *Buchner and Others*, paragraph 41).

53.

The Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with Community law by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed (see, in particular, *Roders and Others*, cited above, paragraph 43).

54.

In the present case, in support of its request for limitation of the temporal effects of the present judgment, the Belgian Government has produced no evidence to show that any objective and significant uncertainty regarding the implications of the Treaty provisions concerning citizenship of the Union which entered into force on 1 November 1993 had led its national authorities to adopt practices which did not comply with those provisions.

55.

Consequently, there are no grounds for limiting the effects of the present judgment in time.

#### **Costs**

56.

The costs incurred by the Belgian, Danish, French, Portuguese and United Kingdom Governments and by the Council and Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal du travail de Nivelles by judgment of 7 May 1999, hereby rules:

**Articles 6 and 8 of the EC Treaty (now, after amendment, Articles 12 EC and 17 EC) preclude entitlement to a non-contributory social benefit, such as the *minimex*, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 of the Council of 15 October 1968 on the freedom of movement for workers within the Community when no such condition applies to nationals of the host Member State.**

**C-34/09, Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)**

In Case C-34/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal du travail de Bruxelles (Belgium), made by decision of 19 December 2008, received at the Court on 26 January 2009, in the proceedings

**Gerardo Ruiz Zambrano,**

v

**Office national de l'emploi (ONEm),**

THE COURT (Grand Chamber),

[...]

gives the following

**Judgment**

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 17 EC and 18 EC, and also Articles 21, 24 and 34 of the Charter of Fundamental Rights of the European Union ('the Charter of Fundamental Rights').

2 That reference was made in the context of proceedings between Mr Ruiz Zambrano, a Columbian national, and the Office national de l'emploi (National Employment Office) ('ONEm') concerning the refusal by the latter to grant him unemployment benefits under Belgian legislation.

**Legal context**

*European Union law*

3 Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), provides:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

*National law*

The Belgian Nationality Code

4 Under Article 10(1) of the Belgian Nationality Code (*Moniteur belge*, 12 July 1984, p. 10095), in the version applicable at the time of the facts in the main proceedings ('the Belgian Nationality Code'):

'Any child born in Belgium who, at any time before reaching the age of 18 or being declared of full age, would be stateless if he or she did not have Belgian nationality, shall be Belgian.'

The Royal Decree of 25 November 1991

5 Article 30 of the Royal Decree of 25 November 1991 (*Moniteur belge* of 31 December 1991, p. 29888) concerning rules on unemployment provides as follows:

‘In order to be eligible for unemployment benefit, a full-time worker must have completed a qualifying period comprising the following number of working days:

...

2. 468 during the 27 months preceding the claim [for unemployment benefit], if the worker is more than 36 and less than 50 years of age,

...’

6 Article 43(1) of the Royal Decree states:

‘Without prejudice to the previous provisions, a foreign or stateless worker is entitled to unemployment benefit if he or she complies with the legislation relating to aliens and to the employment of foreign workers.

Work undertaken in Belgium is not taken into account unless it complies with the legislation relating to the employment of foreign workers.

...’

7 Under Article 69(1) of the Royal Decree:

‘In order to receive benefits, foreign and stateless unemployed persons must satisfy the legislation concerning aliens and that relating to the employment of foreign labour.’

The Decree-Law of 28 December 1944

8 Article 7(14) of the Decree-Law of 28 December 1944 on social security for workers (*Moniteur belge* of 30 December 1944), inserted by the Framework Law of 2 August 2002 (*Moniteur belge* of 29 August 2002, p. 38408), is worded as follows:

‘Foreign and stateless workers shall be eligible to receive benefits only if, at the time of applying for benefits, they satisfy the legislation concerning residency and that relating to the employment of foreign labour.

Work done in Belgium by a foreign or stateless worker shall be taken into account for the purpose of the qualifying period only if it was carried out in accordance with the legislation on the employment of foreign labour.

...’

The Law of 30 April 1999

[...]

The Royal Decree of 9 June 1999

11 Article 2(2) of the Royal Decree of 9 June 1999 implementing the Law of 30 April 1999 on the employment of foreign workers (*Moniteur belge* of 26 June 1999, p. 24162) provides:

‘The following shall not be required to obtain a work permit:

...

2. the spouse of a Belgian national, provided that s/he comes in order to settle, or does settle, with that national;
    - (a) descendants under 21 years of age or dependants of the Belgian national or his spouse;
    - (b) dependent ascendants of the Belgian national or his/her spouse;
    - (c) the spouse of the persons referred to in (a) or (b);
- ...’

The Law of 15 December 1980

12 Article 9 of the Law of 15 December 1980 on access to Belgian territory, residence, establishment and expulsion of foreign nationals (*Moniteur belge* du 31 December 1980, p. 14584), in the version thereof applicable to the main proceedings (‘the Law of 15 December 1980’), provides:

‘In order to be able to reside in the Kingdom beyond the term fixed in Article 6, a foreigner who is not covered by one of the cases provided for in Article 10 must be authorised by the Minister or his representative.

Save for exceptions provided for by international treaty, a law or royal decree, the foreigner must request that authorisation from the competent diplomatic mission or Belgian consul in his place of residence or stay abroad.

In exceptional circumstances, the foreigner may request that authorisation from the mayor of the municipality where he is residing, who will forward to the Minister or his representative. It will, in that case, be issued in Belgium.’

13 Article 40 of the same law provides:

‘1. Without prejudice to the provisions in the regulations of the Council [of the European Union] and the Commission of the European Communities and more favourable ones on which an EC foreign national might rely, the following provisions shall apply to him.

2. For the purposes of this Law, “EC foreign national” shall mean any national of a Member State of the European Communities who resides in or travels to the Kingdom and who:

- (i) pursues or intends to pursue there an activity as an employed or self-employed person;
- (ii) receives or intends to receive services there;
- (iii) enjoys or intends to enjoy there a right to remain;
- (iv) enjoys or intends to enjoy there a right of residence after ceasing a professional activity or occupation pursued in the Community;
- (v) undergoes or intends to undergo there, as a principal pursuit, vocational training in an approved educational establishment; or
- (vi) belongs to none of the categories under (i) to (v) above.

3. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(i), (ii) and (iii) above, provided that they come in order to settle, or do settle, with him:

- (i) the spouse of that national;
- (ii) the national’s descendants or those of his spouse who are under 21 years of age and dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

4. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(iv) and (vi) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

(ii) the national's descendants or those of his spouse who are dependent on them;

(iii) the national's ascendants or those of his spouse who are dependent on them;

(iv) the spouse of the persons referred to in (ii) or (iii).

5. Subject to any contrary provisions of this Law, the spouse of an EC foreign national covered by paragraph 2(v) above and his children or those of his spouse who are dependent on them shall, whatever their nationality, be treated in the same way as the EC foreign national provided that they come in order to settle, or do settle, with him.

6. The spouse of a Belgian who comes in order to settle, or does settle, with him, and also their descendants who are under 21 years of age or dependent on them, their ascendants who are dependent on them and any spouse of those descendants or ascendants, who come to settle, or do settle, with them, shall also be treated in the same way as an EC foreign national.'

#### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

14 On 14 April 1999, Mr Ruiz Zambrano, who was in possession of a visa issued by the Belgian embassy in Bogotá (Colombia), applied for asylum in Belgium. In February 2000, his wife, also a Columbian national, likewise applied for refugee status in Belgium.

15 By decision of 11 September 2000, the Belgian authorities refused their applications and ordered them to leave Belgium. However, the order notified to them included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country.

16 On 20 October 2000, Mr Ruiz Zambrano applied to have his situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980. In his application, he referred to the absolute impossibility of returning to Colombia and the severe deterioration of the situation there, whilst emphasising his efforts to integrate into Belgian society, his learning of French and his child's attendance at pre-school, in addition to the risk, in the event of a return to Columbia, of a worsening of the significant post-traumatic syndrome he had suffered in 1999 as a result of his son, then aged 3, being abducted for a week.

17 By decision of 8 August 2001, that application was rejected. An action was brought for annulment and suspension of that decision before the Conseil d'État, which rejected the action for suspension by a judgment of 22 May 2003.

18 Since 18 April 2001, Mr Ruiz Zambrano and his wife have been registered in the municipality of Schaerbeek (Belgium). On 2 October 2001, although he did not hold a work permit, Mr Ruiz Zambrano signed an employment contract for an unlimited period to work full-time with the Plastoria company, with effect from 1 October 2001.

19 On 1 September 2003, Mr Ruiz Zambrano's wife gave birth to a second child, Diego, who acquired Belgian nationality pursuant to Article 10(1) of the Belgian Nationality Code, since Columbian law does not recognise Columbian nationality for children born outside the territory of Colombia where the parents do not take specific steps to have them so recognised.

20 The order for reference further indicates that, at the time of his second child's birth, Mr Ruiz Zambrano had sufficient resources from his working activities to provide for his family. His work was paid according to the various applicable scales, with statutory deductions made for social security and the payment of employer contributions.

21 On 9 April 2004, Mr and Mrs Ruiz Zambrano again applied to have their situation regularised pursuant to the third paragraph of Article 9 of the Law of 15 December 1980, putting forward as a new factor the birth of their second child and relying on Article 3 of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('ECHR'), which prevents that child from being required to leave the territory of the State of which he is a national.

22 Following the birth of their third child, Jessica, on 26 August 2005, who, like her brother Diego, acquired Belgian nationality, on 2 September 2005 Mr and Mrs Ruiz Zambrano lodged an application to take up residence pursuant to Article 40 of the Law of 15 December 1980, in their capacity as ascendants of a Belgian national. On 13 September 2005, a registration certificate was issued to them provisionally covering their residence until 13 February 2006.

23 Mr Ruiz Zambrano's application to take up residence was rejected on 8 November 2005, on the ground that he '[could] not rely on Article 40 of the Law of 15 December 1980 because he had disregarded the laws of his country by not registering his child with the diplomatic or consular authorities, but had correctly followed the procedures available to him for acquiring Belgian nationality [for his child] and then trying on that basis to legalise his own residence'. On 26 January 2006, his wife's application to take up residence was rejected on the same ground.

24 Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, Mr Ruiz Zambrano has held a special residence permit valid for the entire duration of that action.

25 In the meantime, on 10 October 2005, Mr Ruiz Zambrano's employment contract was temporarily suspended on economic grounds, which led him to lodge a first application for unemployment benefit, which was rejected by a decision notified to him on 20 February 2006. That decision was challenged before the referring court by application of 12 April 2006.

26 In the course of the inquiries in the action brought against that decision, the Office des Étrangers (Aliens' Office) confirmed that 'the applicant and his wife cannot pursue any employment, but no expulsion measure can be taken against them because their application for legalising their situation is still under consideration'.

27 In the course of an inspection carried out on 11 October 2006 by the Direction générale du contrôle des lois sociales (Directorate General, Supervision of Social Legislation) at the registered office of Mr Ruiz Zambrano's employer, he was found to be at work. He had to stop working immediately. The next day, Mr Ruiz Zambrano's employer terminated his contract of employment with immediate effect and without compensation.

28 The application lodged by Mr Ruiz Zambrano for full-time unemployment benefits as from 12 October 2006 was rejected by a decision of the ONEm (National Employment Office), which was notified on 20 November 2006. On 20 December 2006 an action was also brought against that decision before the referring court.

29 On 23 July 2007, Mr Ruiz Zambrano was notified of the decision of the Office des Étrangers rejecting his application of 9 April 2004 to regularise his situation. The action brought against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) was declared to be devoid of purpose by a judgment of 8 January 2008, as the Office des Étrangers had withdrawn that decision.

30 By letter of 25 October 2007, the Office des Étrangers informed Mr Ruiz Zambrano that the action for review he had brought in March 2006 against the decision rejecting his application to take up residence of 2 September 2005 had to be reintroduced within 30 days of the notification of that letter, in the form of an action for annulment before the Conseil du contentieux des étrangers.

31 On 19 November 2007, Mr Ruiz Zambrano brought such an action for annulment, based, first, on the inexistence of the 'legal engineering' of which he had been charged in that decision, since the acquisition of Belgian nationality by his minor children was not the result of any steps taken by him, but rather of the application

of the relevant Belgian legislation. Mr Ruiz Zambrano also alleges infringement of Articles 2 and 7 of Directive 2004/38, as well as infringement of Article 8 of the ECHR, and of Article 3(1) of Protocol No 4 thereto.

32 In its written observations lodged before the Court, the Belgian Government states that, since 30 April 2009, Mr Ruiz Zambrano has had a provisional and renewable residence permit, and should have a type C work permit, pursuant to the instructions of 26 March 2009 of the Minister for immigration and asylum policy relating to the application of the former third paragraph of Article 9 and Article 9a of the Law of 15 December 1980.

33 It is apparent from the order for reference that the two decisions which are the subject-matter of the main proceedings, by which the ONEm refused to recognise Mr Ruiz Zambrano's entitlement to unemployment benefit, first, during the periods of temporary unemployment from 10 October 2005 and then 12 October 2006, following the loss of his job, are based solely on the finding that the working days on which he relies for the purpose of completing the qualifying period for his age category, that is, 468 working days during the 27 months preceding his claim for unemployment benefit, were not completed as required by the legislation governing foreigners' residence and employment of foreign workers.

34 Mr Ruiz Zambrano challenges that argument before the referring court, stating inter alia that he enjoys a right of residence directly by virtue of the EC Treaty or, at the very least, that he enjoys the derived right of residence, recognised in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 for the ascendants of a minor child who is a national of a Member State and that, therefore, he is exempt from the obligation to hold a work permit.

35 In those circumstances, the Tribunal du travail de Bruxelles (Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Do Articles 12 [EC], 17 [EC] and 18 [EC], or one or more of them when read separately or in conjunction, confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?

2. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right which they recognise, without discrimination on the grounds of nationality, in favour of any citizen of the Union to move and reside freely in the territory of the Member States means that, where that citizen is an infant dependent on a relative in the ascending line who is a national of a non-member State, the infant's enjoyment of the right of residence in the Member State in which he resides and of which he is a national must be safeguarded, irrespective of whether the right to move freely has been previously exercised by the child or through his legal representative, by coupling that right of residence with the useful effect whose necessity is recognised by Community case-law [*Zhu and Chen*], and granting the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who has sufficient resources and sickness insurance, the secondary right of residence which that same national of a non-member State would have if the child who is dependent upon him were a Union citizen who is not a national of the Member State in which he resides?

3. Must Articles 12 [EC], 17 [EC] and 18 [EC], in conjunction with the provisions of Articles 21, 24 and 34 of the Charter of Fundamental Rights, be interpreted as meaning that the right of a minor child who is a national of a Member State to reside in the territory of the State in which he resides must entail the grant of an exemption from the requirement to hold a work permit to the relative in the ascending line who is a national of a non-member State, upon whom the child is dependent and who, were it not for the requirement to hold a work permit under the national law of the Member State in which he resides, fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State, so that the child's right of residence is coupled with the useful effect recognised by Community case-law [*Zhu and Chen*] in favour of a minor child who is a European citizen with a nationality other than that of the Member State in which he resides and is dependent upon a relative in the ascending line who is a national of a non-member State?’

#### **The questions referred for a preliminary ruling**

36 By its questions, which it is appropriate to consider together, the referring court asks, essentially, whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a

relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.

37 All governments which submitted observations to the Court and the European Commission argue that a situation such as that of Mr Ruiz Zambrano's second and third children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedoms of movement and residence guaranteed under European Union law. Therefore, the provisions of European Union law referred to by the national court are not applicable to the dispute in the main proceedings.

38 Mr Ruiz Zambrano argues in response that the reliance by his children Diego and Jessica on the provisions relating to European Union citizenship does not presuppose that they must move outside the Member State in question and that he, in his capacity as a family member, is entitled to a right of residence and is exempt from having to obtain a work permit in that Member State.

39 It should be observed at the outset that, under Article 3(1) of Directive 2004/38, entitled '[b]eneficiaries', that directive applies to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members ...'. Therefore, that directive does not apply to a situation such as that at issue in the main proceedings.

40 Article 20 TFEU confers the status of citizen of the Union on every person holding the nationality of a Member State (see, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 27, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 21). Since Mr Ruiz Zambrano's second and third children possess Belgian nationality, the conditions for the acquisition of which it is for the Member State in question to lay down (see, to that effect, inter alia, Case C-135/08 *Rottmann* [2010] ECR I-0000, paragraph 39), they undeniably enjoy that status (see, to that effect, *Garcia Avello*, paragraph 21, and *Zhu and Chen*, paragraph 20).

41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, inter alia, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 82; *Garcia Avello*, paragraph 22; *Zhu and Chen*, paragraph 25; and *Rottmann*, paragraph 43).

42 In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).

43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.

44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

45 Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

#### **Costs**

[...]



**Case C-399/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others***

In Case C-299/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landessozialgericht Nordrhein-Westfalen (Higher Social Court, North Rhine-Westphalia, Germany), made by decision of 22 May 2014, received at the Court on 17 June 2014, in the proceedings

**Vestische Arbeit Jobcenter Kreis Recklinghausen**

v

**Jovanna García-Nieto,**

**Joel Peña Cuevas,**

**Jovanlis Peña García,**

**Joel Luis Peña Cruz,**

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, E. Levits, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 22 April 2015,

after considering the observations submitted on behalf of:

- Ms García-Nieto, Mr Peña Cuevas, Jovanlis Peña García and Joel Luis Peña Cruz, by M. Schmitz, Rechtsanwalt,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the French Government, by R. Coesme, acting as Agent,
- the Polish Government, by B. Majczyna, acting as Agent,
- the United Kingdom Government, by M. Holt, acting as Agent, and B. Kennelly, Barrister,
- the European Commission, by D. Martin, M. Kellerbauer and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 June 2015,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 18 TFEU and Article 45(2) TFEU, of Articles 4 and 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1 and corrigendum at OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004'), and of Article 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34).

2 The request has been made in proceedings between the Vestische Arbeit Jobcenter Kreis Recklinghausen (Employment Centre for the district of Recklinghausen, 'the Employment Centre') and Mr Peña Cuevas and Ms García-Nieto and their daughter, Jovanlis Peña García, and Mr Peña Cuevas's son, Joel Luis Peña Cruz (together 'the Peña-García family'), concerning the refusal by that centre to grant benefits by way of basic provision ('Grundsicherung') provided for under German law.

### **Legal context**

#### *International law*

3 Article 1 of the European Convention on Social and Medical Assistance, signed in Paris on 11 December 1953 by the members of the Council of Europe and in force since 1956 in Germany ('the Assistance Convention'), lays down a principle of non-discrimination in the following terms:

'Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance ... provided by the legislation in force from time to time in that part of its territory.'

4 Under Article 16(b) of the Assistance Convention, '[e]ach Contracting Party shall notify to the Secretary General of the Council of Europe any new law or regulation not already included in Annex I. At the time of making such notification a Contracting Party may make a reservation in respect of the application of this new law or regulation to the nationals of other Contracting Parties.' The reservation issued by the German Government on 19 December 2011 pursuant to that provision is worded as follows:

'The Government of the Federal Republic of Germany does not undertake to grant to the nationals of the other Contracting Parties, equally and under the same conditions as to its own nationals, the benefits provided for in Book II of the Social Code — Basic Income Support for Jobseekers [(Sozialgesetzbuch Zweites Buch — Grundsicherung für Arbeitsuchende)], in the latest applicable version [(“Book II of the Social Code”).']

5 That reservation was notified to the other parties to the Assistance Convention in accordance with Article 16(c) of that convention.

#### *EU law*

##### Regulation No 883/2004

6 Article 4 of Regulation No 883/2004, entitled 'Equality of treatment', provides:

'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

7 Article 70 of that regulation, entitled 'General provision', is included under Title III, Chapter 9 thereof, on '[s]pecial non-contributory cash benefits'. That article provides:

‘1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, “special non-contributory cash benefits” means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned; or

(ii) solely specific protection for the disabled, closely linked to the said person’s social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.’

8 Annex X to Regulation No 883/2004, entitled ‘Special non-contributory cash benefits’, specifies the following benefits as regards the Federal Republic of Germany:

‘...

(b) Benefits to cover subsistence costs under the basic provision for jobseekers unless, with respect to these benefits, the eligibility requirements for a temporary supplement following receipt of unemployment benefit (Paragraph 24(1) of Book II of the Social Code) are fulfilled.’

Directive 2004/38

9 Recitals 10, 16 and 21 in the preamble to Directive 2004/38 state:

‘(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. ...

...

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance scheme of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an

unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or jobseekers as defined by the Court of Justice save on grounds of public policy or public security.

...

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of jobseekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

10 Article 6 of that directive, entitled 'Right of residence for up to three months', provides:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

11 Under the heading 'Right of residence for more than three months', Article 7(1) of that directive provides:

'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; ...

...'

12 Under Article 14 of that directive, entitled 'Retention of the right of residence':

'1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.’

13 Article 24 of Directive 2004/38, entitled ‘Equal treatment’, provides:

‘1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

#### *German law*

#### The Social Code

14 Paragraph 19a(1) of Book I of the Social Code (Sozialgesetzbuch Erstes Buch) sets out the two main types of benefit granted by way of basic provision for jobseekers as follows:

‘Under the entitlement to basic provision for jobseekers, the following may be claimed:

1. benefits for integration into the labour market,
2. benefits to cover subsistence costs.’

15 Paragraph 1 of Book II of the Social Code, entitled ‘Function and objective of basic provision for jobseekers’, provides as follows, in subparagraphs 1 and 3:

‘(1) Basic provision for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity.

...

(3) Basic provision for jobseekers encompasses benefits:

1. intended to bring to an end to or reduce the need for assistance, in particular by integration into the labour market, and
2. intended to cover subsistence costs.’

16 Paragraph 7 of Book II of the Social Code, entitled ‘Beneficiaries’, provides as follows in subparagraph 1:

‘Benefits under this Book shall be received by persons:

1. who have attained the age of 15 years and have not yet reached the age limit referred to in Paragraph 7a,
2. who are fit for work,
3. who are in need of assistance, and

4. whose ordinary place of residence is in the Federal Republic of Germany (beneficiaries fit for work).

The following are excluded:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Law on freedom of movement of Union citizens [(Freizügigkeitsgesetz/EU, “the Law on freedom of movement”)], and their family members, for the first three months of their residence,

2. foreign nationals whose right of residence arises solely out of the search for employment, and their family members,

...

Point 1 of the second sentence shall not apply to foreign nationals residing in the Federal Republic of Germany who have been granted a residence permit under Chapter 2, Section 5, of the Law on residence [(Aufenthaltsgesetz)]. Provisions of the law governing residence shall be unaffected.’

17 It follows from subparagraphs 2 and 3 of Paragraph 7 that minors unfit for work, living with beneficiaries fit for work and thus forming a ‘community of need’ with the latter, have a derivative right to the benefits provided for by Book II of the Social Code.

18 Paragraph 8(1) of Book II of the Social Code, entitled ‘Fitness for work’, is worded as follows:

‘All persons who are not incapable for the foreseeable future, because of an illness or disability, of working for at least three hours per day under normal labour market conditions are fit for work.’

19 Paragraph 9(1) of Book II of the Social Code provides:

‘All persons who cannot, or cannot sufficiently, cover their subsistence costs on the basis of the income or assets to be taken into consideration and who do not receive the necessary assistance from other persons, in particular from family members or providers of other social security benefits, are in need of assistance.’

20 Paragraph 20 of Book II of the Social Code contains additional provisions relating to basic subsistence needs. Paragraph 21 of Book II of the Social Code lays down rules on additional needs and Paragraph 22 of that code concerns accommodation and heating needs. Lastly, Paragraphs 28 to 30 of Book II of the Social Code deal with education and participation benefits.

21 Paragraph 1 of Book XII of the Social Code, which relates to social assistance, is worded as follows:

‘The function of social assistance is to enable its beneficiaries to lead a life in keeping with human dignity. ...’

22 Paragraph 21 of Book XII of the Social Code provides:

‘Subsistence benefits shall not be paid to persons who are in principle entitled to benefits under Book II of the Social Code because they are fit for work or because of their family ties. ...’

The Law on freedom of movement

23 The scope of the Law on freedom of movement, as applicable to the facts of the main proceedings, is laid down in Paragraph 1 of that law:

‘This Law shall govern the entry and residence of nationals of other Member States of the European Union (Union citizens) and their family members.’

24 Paragraph 2 of that law provides, on the right of entry and residence:

‘(1) Union citizens who are entitled to freedom of movement and their family members shall have the right to enter and reside in federal territory, subject to the provisions of this Law.

(2) The following are entitled to freedom of movement under EU law:

1. Union citizens who wish to reside in federal territory as workers or for the purpose of seeking employment or pursuing vocational training,

...

5. Union citizens who are not working, subject to the conditions laid down in Paragraph 4,

6. family members, subject to the conditions laid down in Paragraphs 3 and 4,

...

(3) For workers and self-employed persons, the right provided for in subparagraph 1 is without prejudice:

1. to temporary incapacity for work as the result of an illness or accident,

2. to involuntary unemployment confirmed by the relevant employment office or termination of self-employment owing to circumstances beyond the control of the self-employed person, after more than one year of work,

3. to vocational training where that training is linked to the previous employment; the two need not be linked where the Union citizen is involuntarily unemployed.

The right derived from subparagraph 1 shall be retained for a period of six months in the event of involuntary unemployment confirmed by the relevant employment office after a period of employment of less than one year.

...’

25 Paragraph 3 of the Law on freedom of movement, relating to family members, provides:

‘(1) Family members of the Union citizens specified in Paragraph 2(2), points 1 to 5, shall enjoy the right under Paragraph 2(1) if they are accompanying or joining the Union citizen. For family members of the Union citizens specified in Paragraph 2(2), point 5, this shall apply subject to Paragraph 4.

(2) The following are family members:

1. the spouse and the descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses, who are not yet 21 years old,

2. the relatives in the ascending line and descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses, whom those persons or their spouses maintain.

...’

26 Paragraph 5 of the Law on freedom of movement, entitled ‘Residence permits and certificate concerning the right of permanent residence’, provides:

‘(1) A certificate attesting the right of residence shall be issued automatically and immediately to Union citizens and to their family members holding the nationality of a Member State of the European Union and authorised to move freely within the territory of the Member States.

...

(3) The competent aliens office may require that the conditions for the right under Paragraph 2(1) be substantiated within three months following entry into federal territory. Information and evidence necessary for substantiation may be received by the competent registration authority at the time of registration with it. That authority shall forward the information and evidence to the competent aliens office. ...

...'

#### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

27 All of the members of the Peña-García family are Spanish nationals. Ms García-Nieto and Mr Peña Cuevas lived together for a number of years as a couple in the same household in Spain and formed an economic unit, without being married and without having entered into a civil partnership, with their daughter, Jovanlis Peña García, and Mr Peña Cuevas's son, Joel Luis Peña Cruz, who is still a minor.

28 In April 2012, Ms García-Nieto entered Germany with her daughter Jovanlis and registered as a jobseeker on 1 June 2012. From 12 June 2012, she worked as a kitchen assistant, for which — from 1 July 2012 — she was compulsorily affiliated to German social security, and received a monthly net salary of EUR 600.

29 On 23 June 2012, Mr Peña Cuevas and his son joined Ms García-Nieto and Jovanlis. Until 1 November 2012, the Peña-García family resided with Ms García-Nieto's mother and the family's living expenses were met from Ms García-Nieto's income. In addition, from July 2012, Mr Peña Cuevas and Ms García-Nieto received child benefits for their children, Jovanlis and Joel Luis, who began attending school on 22 August 2012.

30 On 30 July 2012, the Peña-García family applied to the Employment Centre for subsistence benefits under Book II of the Social Code ('the benefits at issue'). The Employment Centre however refused to grant those benefits to Mr Peña Cuevas and his son for August and September 2012, although those benefits were granted with effect from October 2012.

31 The decision refusing the benefits given by the Employment Centre was based on point 1 of the second sentence of Paragraph 7(1) of Book II of the Social Code, on account of the fact that, at the time of the application, Mr Peña Cuevas and his son had resided in Germany for less than three months and that, moreover, Mr Peña Cuevas did not have the status of a worker or self-employed person. According to the Employment Centre, the exclusion from entitlement to the benefits at issue applied equally to Mr Peña Cuevas's son. Following the reservation issued by the German Government on 19 December 2011 with regard to the Assistance Convention, no rights could arise under the Assistance Convention.

32 The action brought by the Peña-García family against the Employment Centre's decision was upheld by the Sozialgericht Gelsenkirchen (Social Court, Gelsenkirchen), which rejected the grounds for exclusion relating to point 1 of the second sentence of Paragraph 7(1) of Book II of the Social Code for reasons relating to the scheme of the national legislation. The Employment Centre brought an appeal against that judgment before the Landessozialgericht Nordrhein-Westfalen (Higher Social Court, North Rhine-Westphalia).

33 The referring court expresses doubts as to the compatibility with EU law of the complete exclusion from entitlement to the benefits at issue in the situations referred to in point 1 of the second sentence of Paragraph 7(1) of Book II of the Social Code.

34 In those circumstances, the Landessozialgericht Nordrhein-Westfalen (Higher Social Court, North Rhine-Westphalia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the principle of equal treatment under Article 4 of Regulation No 883/2004 — with the exception of the clause in Article 70(4) thereof excluding the provision of benefits outside the Member State of residence — apply also to the special non-contributory cash benefits referred to in Article 70(1) and (2) of that regulation?

(2) If the first question is answered in the affirmative: may the principle of equal treatment laid down in Article 4 of Regulation No 883/2004 be limited by provisions of national legislation implementing Article 24(2) of Directive 2004/38 that do not in any circumstances allow access to those benefits for the first three months of their residence to Union citizens who are neither workers or self-employed persons in the Federal Republic of

Germany nor entitled to exercise freedom of movement under Paragraph 2(3) of the Law on Freedom of Movement and, if so, to what extent may that principle be so limited?

(3) If the first question is answered in the negative: do the principles of non-discrimination enshrined in primary law — in particular by the combined provisions of Article 45(2) TFEU and Article 18 TFEU — preclude a provision of national legislation that does not in any circumstances allow the grant of a social benefit, intended to provide means of subsistence and to facilitate access to the labour market, in their first three months of residence to Union citizens who are neither workers or self-employed persons in the Federal Republic of Germany nor entitled to exercise freedom of movement under Paragraph 2(3) of the Law on Freedom of Movement, but who can demonstrate a genuine link to the host Member State and, in particular, to the labour market of that host Member State?

35 By decision of 19 March 2015, the referring court decided that there was no need for the first question to be answered, since a substantially similar question had been referred in the case that gave rise to the judgment in *Dano* (C-333/13, EU:C:2014:2358) and the Court had answered in the affirmative, holding that ‘Regulation No 883/2004 [had to] be interpreted as meaning that “special non-contributory cash benefits” as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation’.

### **Consideration of the questions referred**

#### *The second question*

36 By its second question, the referring court asks, in essence, whether Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are in a situation such as that referred to in Article 6(1) of that directive are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38.

37 As a preliminary point, it should be recalled that, in the judgment in *Alimanovic* (C-67/14, EU:C:2015:597, paragraphs 44 to 46), the Court held that benefits such as the benefits at issue cannot be considered to be benefits of a financial nature which are intended to facilitate access to the labour market of a Member State, but must be regarded as ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38.

38 As regards access to such benefits, a Union citizen can claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38 (judgments in *Dano*, C-333/13, EU:C:2014:2358, paragraph 69, and *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 49).

39 To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social assistance under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State (judgments in *Dano*, C-333/13, EU:C:2014:2358, paragraph 74, and *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 50).

40 Consequently, in order to determine whether social assistance, such as the benefits at issue, may be refused on the basis of the derogation in Article 24(2) of Directive 2004/38, it is necessary to determine beforehand whether the principle of equal treatment referred to in Article 24(1) of that directive is applicable and, accordingly, whether the Union citizen concerned is lawfully resident on the territory of the host Member State (judgment in *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 51).

41 It should be noted that, as the file submitted to the Court shows, Mr Peña Cuevas may base a right of residence on Article 6(1) of Directive 2004/38.

42 Article 6(1) of Directive 2004/38 provides that Union citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport and, under Article 14(1) of that directive, that right is retained

as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State (judgments in *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 39, and *Dano*, C-333/13, EU:C:2014:2358, paragraph 70).

43 That said, it must nevertheless be observed that, in such a case, the host Member State may rely on the derogation in Article 24(2) of Directive 2004/38 in order to refuse to grant that citizen the social assistance sought (judgment in *Dano*, C-333/13, EU:C:2014:2358, paragraph 70).

44 Indeed, it follows from the express wording of that provision that the host Member State may refuse to grant persons other than workers, self-employed persons or those who retain that status any social assistance during the first three months of residence.

45 As the Advocate General observed in point 70 of his Opinion, that provision is consistent with the objective of maintaining the financial equilibrium of the social assistance system of the Member States pursued by Directive 2004/38, as is apparent, in particular, from recital 10 in the preamble to that directive. Since the Member States cannot require Union citizens to have sufficient means of subsistence and personal medical cover for a period of residence of a maximum of three months in their respective territories, it is legitimate not to require those Member States to be responsible for those citizens during that period.

46 In that context, it must also be stated that, although Directive 2004/38 requires the host Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in *Brey*, C-140/12, EU:C:2013:565, paragraphs 64, 69 and 78), no such individual assessment is necessary in circumstances such as those at issue in the main proceedings.

47 In the judgment in *Alimanovic* (C-67/14, EU:C:2015:597, paragraph 60), the Court stated that Directive 2004/38, establishing a gradual system as regards the retention of the status of ‘worker’ which seeks to safeguard the right of residence and access to social assistance, itself takes into consideration various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity.

48 Therefore, if such an assessment is not necessary in the case of a citizen seeking employment who no longer has the status of ‘worker’, the same applies *a fortiori* to persons who are in a situation such as that of Mr Peña Cuevas in the main proceedings.

49 By enabling those concerned to know, without any ambiguity, what their rights and obligations are, the exception set out in point 1 of the second sentence of Paragraph 7(1) of Book II of the Social Code, read in conjunction with Article 24(2) of Directive 2004/38, according to which the Federal Republic of Germany is not required to confer entitlement to social assistance during the first three months of a Union citizen’s residence in its territory, is such as to guarantee a significant level of legal certainty and transparency in the context of the award of social assistance by way of basic provision, while complying with the principle of proportionality (see, by analogy, judgment in *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 61).

50 Moreover, as regards the individual assessment for the purposes of making an overall appraisal of the burden which the grant of a specific benefit would place on the national system of social assistance in question in the main proceedings as a whole, it must be recalled that the assistance awarded to a single applicant can scarcely be described as an ‘unreasonable burden’ for a Member State, within the meaning of Article 14(1) of Directive 2004/38, for an individual claim is not liable to place the Member State concerned under an unreasonable burden, but the accumulation of all the individual claims which might be submitted to it would be bound to do so (see judgment in *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 62).

51 In those circumstances, Article 24(2) of Directive 2004/38 does not preclude national legislation, such as that at issue in the main proceedings, in so far as it excludes nationals of other Member States who are in a situation such as that referred to in Article 6(1) of that directive from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004.

52 The same conclusion must be reached as regards the interpretation of Article 4 of Regulation No 883/2004. The benefits at issue, which constitute ‘special non-contributory cash benefits’ within the meaning of Article 70(2)

of that regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with the legislation of that Member State. It follows that there is nothing to prevent such benefits being refused to nationals of other Member States who do not have the status of workers or self-employed persons or persons who retain such status during the first three months of residence in the host Member State (see, to that effect, judgments in *Brey*, C-140/12, EU:C:2013:965, paragraph 44, and *Dano*, C-333/13, EU:C:2014:2358, paragraph 83).

53 Having regard to all the foregoing considerations, the answer to the second question is that Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States who are in a situation such as that referred to in Article 6(1) of that directive are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38.

#### *The third question*

54 Since the third question was asked in the event the first question was answered in the negative, and since the Court provided an affirmative reply to a substantially similar question referred in the cases that gave rise to the judgments in *Dano* (C-333/13, EU:C:2014:2358) and *Alimanovic* (C-67/14, EU:C:2015:597), there is no need to reply to the third question referred.

#### **Costs**

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Article 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, and Article 4 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as not precluding legislation of a Member State under which nationals of other Member States who are in a situation such as that referred to in Article 6(1) of that directive are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38.**



### 3. IMPROVING THE EU'S INSTITUTIONAL FUNCTIONING

European Union law and its accompanying tools and doctrines not only enable the perfection of the internal market or EU regulations, they also directly contribute to the organisation and functioning of the EU institutions. It is true that the EU is a peculiar international organisation, structured by legal rules and principles. Those rules and principles above all aim to improve the EU's institutional functioning and to increase its legitimacy vis-à-vis the Member States and individual citizens. In creating a legally certain environment in which EU decisions can be taken, EU law directly encapsulates the institutions' functioning in a "rule of law" framework. At the same time, however, EU institutional functioning and the legal principles underlying it are not free from criticism. Indeed, attempts to make the EU institutions function better through law have not always attained the desired result.

In this part of the course, five themes outlining the role, potential and limits of EU law in perfecting the institutions' operations will be analysed. They have been chosen for two reasons. On the one hand, they all allow to better understand existing legal gaps or lack of coherence situations in the EU's institutional functioning. On the other hand, they permit to demonstrate how law has been used by the Masters of the Treaties or the institutions themselves to remedy defects in the EU's functioning.

First of all, a perennial problem of EU institutional functioning has been the classification of its legal acts. Although Article 288 TFEU distinguishes between regulations, directives, decisions, recommendations and opinions, it does not link those instruments to particular types of legislative or administrative acts. For a long time indeed, the distinction between legislative and administrative/implementing acts caused problems of competence-division between different institutions. In the wake of the Lisbon Treaty, Article 289(3) TFEU now distinguishes legislative acts from non-legislative acts, the core of which is outlined in Articles 290 and 291 TFEU. The course will offer you a status quo of the current division and show the remaining legal uncertainty surrounding the classification of non-legislative acts in the post-Lisbon Treaty EU institutional law framework.

Secondly, and related to the classification of legal acts, the European Union has endeavoured for the past two decades to become ever more transparent and open in its decision-making processes. To that extent, EU institutions have had to adopt pro-active openness strategies in addition to granting individuals, upon request, access to their documents. A regulatory framework enabling and restricting such access has been in place since the mid-1990s, the most recent elaboration of it contained in Regulation 1049/2001. Although that Regulation envisages access to EU documents to the "widest extent possible", that does not mean unfettered access to each document. Indeed, EU law – backed by the Court of Justice – acknowledged the need for confidentiality safe zones as an inherent part of its transparency rules. One could therefore wonder to what extent different transparency standards should govern decision-making processes of different kinds of (legislative or non-legislative) acts.

Thirdly, the EU's institutional functioning is embedded in the "rule of law", which above all includes respect for fundamental human rights. Human rights protection has been recognised and embedded consistently in EU law – through general principles of law and in looking for inspiration from the Council of Europe's European Convention on the Protection of Human

Rights and Fundamental Freedoms (ECHR) – resulting in the adoption of a now-binding Charter of Fundamental Rights. Despite those legal initiatives, however, questions remain to be asked regarding the scope of that Charter in day-to-day legal relationships and to its interaction with the ECHR. The latter situation is complicated by the obligation, stated in Article 6 TEU to accede to the ECHR system. In its Opinion 2/13, the Court of Justice nevertheless advised against this. Coupled with its interpretation on the scope of the Charter, the Opinion allows to determine the potential and limits of fundamental rights protection within the current EU law framework.

Fourthly, attention to fundamental rights also relates to the right to a remedy and access to courts, as recognised by Article 47 of the Charter and Article 6 ECHR. In EU practice, however, direct access to the EU Courts has been interpreted in a rather restrictive fashion, above all for private individuals seeking to apply for the annulment of an EU act of general application. The *Plaumann* case law remaining firmly in place in this regard, the Lisbon Treaty nevertheless sought to enhance direct access to the EU Courts by introducing the notion of “regulatory acts”. The Court’s case law has not always been consistent regarding the interpretation of that notion, resulting in questions whether or not the new concept is useful in practice. In addition, questions can also be asked regarding the relationship between that notion and the legal classification of acts proposed by Articles 290-291 TFEU.

Finally, a session of the course will be devoted to a rather peculiar institutional development in EU law, which seems to have taken off recently: enhanced cooperation. Inserted as a possibility in the Treaty of Amsterdam, enhanced cooperation allows for a group of Member States to proceed with integration under the banner of EU law, without however involving all EU Member States. The Treaty envisages specific procedures and steps to be taken, which have led to litigation by non-participating Member States. Recent examples have included the unitary patent and the financial transaction tax regimes, which demonstrate the potential and limits of enhanced cooperation in the current EU Treaty framework. It will be questioned to what extent enhanced cooperation renders EU law more or rather less coherent and predictable as a body of legal norms in its own right.

Throughout the five themes discussed, we will analyse how EU law contributes to – or limits – improvements of the EU’s institutional functioning. It will be argued that, similar to the internal market theme discussed before, good intentions voiced through law often run into practical difficulties in the day-to-day institutional functioning of the European Union. Although improved legal solutions can contribute to remedying those difficulties, the law in itself is not always sufficient. An important part of the learning experience offered by this course is also to show you precisely those limits, in an attempt to stimulate more general critical reflection on the role of EU law in today’s EU integration project.

## LECTURE 6: THE CLASSIFICATION OF LEGAL ACTS IN EUROPEAN UNION LAW

In contrast with national public law regimes, the classification of acts in EU law has generally taken place in accordance with the *type* and *legal features* of a specific act (regulation, directive, decision, recommendation, and opinion) rather than with the legislative or administrative procedure accompanying it. As a result, the existence of and differences between legislative and administrative/implementing acts were characterised by somewhat of an EU law vacuum. The Court of Justice nevertheless intervened in its 25/70 *Koster*-case, resulting in a specific implementing procedure taking shape: the so-called “comitology” procedure. With the emergence of the Lisbon Treaty, an explicit distinction between legislative and non-legislative acts has been introduced. Article 289(3) TFEU now proclaims that legal acts adopted by legislative procedure shall constitute legislative acts. Articles 290-291 TFEU add to this by recognising delegated and implementing acts. According to Article 290, a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power. Article 291 adds to this that Member States shall adopt all measures of national law necessary to implement legally binding Union acts. In addition, where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases on the Council. Both Treaty provisions gave rise to a renewed comitology framework and to increasing discussions on when and how to classify an EU institutions act and the legal consequences attached thereto. In this lecture, we will frame and explore those discussions, asking to what extent the Lisbon Treaty clarified the classification of legal acts and the limits reflected in the current EU law setup.

### Materials to read:

- Court of Justice, 5 September 2012, Case C-355/10, *European Parliament v Council*, ECLI:EU:C:2012:516.
- Court of Justice, 18 March 2014, Case C-427/12, *European Commission v European Parliament and Council*, ECLI:EU:C:2014:170.
- Court of Justice, 15 October 2014, C-65/13, *European Parliament v European Commission*, ECLI:EU:C:2014:2289.
- Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, [2011] O.J. L55/13.
- M. Chamon, “Clarifying the Divide between Delegated and Implementing Acts?”, 42 *Legal Issues of Economic Integration* (2015), 175-190 (via eCampus).
- Schütze, “‘Delegated legislation’ in the (new) European Union: a Constitutional Analysis”, 74 *Modern Law Review* (2011), 661-693 (via eCampus).

### Lecture 6 outline:

- a. Classification of EU legal acts prior to Lisbon

1. No classification
  2. A pragmatic distinction between legislative and implementing acts in the wake of *Koster*
  3. Developing a comitology regime
  4. A more explicit distinction in the Treaty establishing a Constitution for Europe
- b. The post-Lisbon framework
1. Legislative acts
  2. Non legislative acts: delegated and implementing acts
  3. The difference between delegated and implementing acts
  4. The new Comitology framework: Regulation 182/2011
- c. EU law issues in the legal classification framework
1. Delineation problems
  2. Application problems
  3. Day-to-day implementation at Member State level: the forgotten dimension?
- d. Remedying gaps in the current EU legal acts classification regime
1. Recognising a fourth type of (non-legislative) act
  2. Reconsidering Court of Justice interventions
  3. Enhancing accountability and oversight regimes over delegated and implementing acts
  4. Towards clearer *ex ante* institutional guidelines?

Questions for discussion:

- Did the Court offer clear and predictable criteria in order to distinguish delegated and implementing acts? What, in your opinion, would have to be changed as a matter of EU law to make the distinction (even) more clear?
- When would uniform conditions be necessary for the implementation of EU law? Does the Court offer any guidance in this respect? What criteria should be guiding in light of the current EU law setup in Articles 289-291 TFEU?

## Case C-355/10, *European Parliament v Council*

In Case C-355/10,

ACTION for annulment under Article 263 TFEU, brought on 12 July 2010,

**European Parliament**, represented by M. Dean, A. Auersperger Matic and K. Bradley, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Council of the European Union**, represented by Z. Kupčová and R. Szostak, acting as Agents,

defendant,

supported by:

**European Commission**, represented by C. O'Reilly and M. Wilderspin, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Prechal, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann, E. Juhász, G. Arestis, T. von Danwitz (Rapporteur), M. Berger and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 January 2012,

after hearing the Opinion of the Advocate General at the sitting on 17 April 2012,

gives the following

### **Judgment**

1 By its action, the European Parliament seeks the annulment of Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2010 L 111, p. 20, 'the contested decision').

2 In support of its action, the Parliament submits, inter alia, that that decision exceeds the limits of the implementing powers laid down in Article 12(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), as amended by Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 (OJ 2008 L 97, p. 60, 'the Schengen Borders Code' or 'the SBC'). The Parliament submits that the provisions of the contested decision ought to have been adopted by the ordinary legislative procedure and not by the comitology procedure based on Article 12(5) of the SBC.

## I – Legal context

### A – *Decision 1999/468/EC*

3 Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), as amended by Council Decision 2006/512/EC of 17 July 2006 (OJ 2006 L 200, p. 11, the ‘second “comitology” decision’) was adopted on the basis of Article 202 EC.

4 As regards the regulatory procedure with scrutiny, recital 7a of the second ‘comitology’ decision is worded as follows:

‘It is necessary to follow the regulatory procedure with scrutiny as regards measures of general scope which seek to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article 251 of the [EC] Treaty, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new nonessential elements. This procedure should enable the two arms of the legislative authority to scrutinise such measures before they are adopted. The essential elements of a legislative act may only be amended by the legislator on the basis of the Treaty.’

5 Article 2(2) of the second ‘comitology’ decision provides:

‘Where a basic instrument, adopted in accordance with the procedure referred to in Article 251 of the Treaty, provides for the adoption of measures of general scope designed to amend non-essential elements of that instrument, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements, those measures shall be adopted in accordance with the regulatory procedure with scrutiny.’

6 The conduct of the regulatory procedure with scrutiny is governed by Article 5a of the second ‘comitology’ decision. In the course of that procedure, a Regulatory Procedure with Scrutiny Committee is also involved, composed of the representatives of the Member States and chaired by the representative of the Commission (the ‘Committee’), which delivers its opinion on a draft of the measures to be taken. The procedure varies according to whether, on the one hand, the measures envisaged are in accordance with the opinion of the Committee or, on the other, are not in accordance with such an opinion or if that committee has not delivered an opinion.

7 If the measures envisaged are not in accordance with the opinion of the Committee, or if the Committee has not delivered an opinion, Article 5a(4) of the second ‘comitology’ committee provides that the following procedure is to apply:

‘(a) the Commission shall without delay submit a proposal relating to the measures to be taken to the Council and shall forward it to the European Parliament at the same time;

(b) the Council shall act on the proposal by a qualified majority within two months from the date of referral to it;

(c) if, within that period, the Council opposes the proposed measures by a qualified majority, the measures shall not be adopted. In that event, the Commission may submit to the Council an amended proposal or present a legislative proposal on the basis of the Treaty;

(d) if the Council envisages adopting the proposed measures, it shall without delay submit them to the European Parliament. If the Council does not act within the two-month period, the Commission shall without delay submit the measures for scrutiny by the European Parliament;

(e) the European Parliament, acting by a majority of its component members within four months from the forwarding of the proposal in accordance with point (a), may oppose the adoption of the measures in question, justifying their opposition by indicating that the proposed measures exceed the implementing powers provided for in the basic instrument or are not compatible with the aim or the content of the basic instrument or do not respect the principles of subsidiarity or proportionality;

(f) if, within that period, the European Parliament opposes the proposed measures, the latter shall not be adopted. In that event, the Commission may submit to the Committee an amended draft of the measures or present a legislative proposal on the basis of the Treaty;

(g) if, on expiry of that period, the European Parliament has not opposed the proposed measures, the latter shall be adopted by the Council or by the Commission, as the case may be.’

#### B – *The SBC*

8 As is apparent from the second paragraph of Article 1 thereof, the SBC establishes rules governing the border control of persons crossing the external borders of the Member States of the European Union.

9 As stated in recital 6 of the SBC, such border control is intended to ‘help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations’.

10 Recital 17 of the SBC states, ‘[p]rovision should be made for a procedure enabling the Commission to adapt certain detailed practical rules governing border control. In such cases, the measures needed to implement [the SBC] should be taken pursuant to ... Decision 1999/468/EC ...’

11 Article 2(9) of the SBC defines ‘border control’ as consisting of border checks and border surveillance and includes ‘the activity carried out at a border, in accordance with and for the purposes of [the SBC], in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration’.

12 Border surveillance is defined in Article 2(11) of the SBC as ‘the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks’.

13 Articles 6 to 11 of the SBC lay down rules on border checks at external borders.

14 As regards border surveillance, Article 12 of the SBC states:

‘1. The main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.

2. The border guards shall use stationary or mobile units to carry out border surveillance.

That surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points.

3. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. It shall involve frequent and sudden changes to surveillance periods, so that unauthorised border crossings are always at risk of being detected.

4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means.

5. Additional measures governing surveillance may be adopted. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 33(2).’

15 Third-country nationals are to be refused entry to the territories of the Member States by a substantiated decision which, pursuant to Article 13(2) of the SBC, must be given by means of a standard form set out in Annex V, Part B of that code.

16 Article 33(2) of the SBC provides:

‘Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.’

*C – Regulation (EC) No 2007/2004*

17 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2004 L 349, p. 1), as amended by Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 (OJ 2007 L 199, p. 30, the ‘Frontex Regulation’), establishes, inter alia, the tasks to be performed by that European agency (the ‘Agency’).

18 As set out in Article 2(1) of the Frontex Regulation, the Agency is to perform, inter alia, the following tasks:

‘(a) coordinate operational cooperation between Member States in the field of management of external borders;

...

(e) assist Member States in circumstances requiring increased technical and operational assistance at external borders;

...

(g) deploy Rapid Border Intervention Teams to Member States ...’

19 If the Executive Director of the Agency decides, at the request of a Member State, to deploy one or more Rapid Border Intervention Teams to the external borders of that Member State, the Agency and the requesting Member State are to draw up an operational plan pursuant to Article 8d(5).

20 Article 8e of the Frontex Regulation, entitled ‘Operational plan’, provides:

‘1. The Executive Director and the requesting Member State shall agree on an operational plan detailing the precise conditions for deployment of the teams. The operational plan shall include the following:

(a) description of the situation, with modus operandi and objectives of the deployment, including the operational aim;

(b) the foreseeable duration of deployment of the teams;

(c) the geographical area of responsibility in the requesting Member State where the teams will be deployed;

(d) description of tasks and special instructions for members of the teams, including on permissible consultation of databases and permissible service weapons, ammunition and equipment in the host Member State;

(e) the composition of the teams;

(f) the names and ranks of the host Member State’s border guards responsible for cooperating with the teams, in particular those of the border guards who are in command of the teams during the period of deployment, and the place of the teams in the chain of command;

(g) the technical equipment to be deployed together with the teams in accordance with Article 8.

2. Any amendments to or adaptations of the operational plan shall require the agreement of both the Executive Director and the requesting Member State. A copy of the amended or adapted operational plan shall immediately be sent by the Agency to the participating Member States.’

21 As regards implementation of the operational plan, Article 8g(2) of the Frontex Regulation provides:

‘The coordinating officer shall act on behalf of the Agency in all aspects of the deployment of the teams. In particular, the coordinating officer shall:

...

(c) monitor the correct implementation of the operational plan;

...’

#### D – *The contested decision*

22 The contested decision was adopted on the basis of Article 12(5) of the SBC in the context of the regulatory procedure with scrutiny as laid down in Article 5a of the second ‘comitology’ decision. Since the Committee did not deliver an opinion on the Commission’s initial proposal, the Commission submitted – in accordance with that Article 5a(4) – a proposal relating to the measures to be taken to the Council and forwarded it to the Parliament. As the latter did not oppose that proposal, the Council adopted the contested decision.

23 According to recital 9 of the contested decision:

‘In order to provide for better coordination among the Member States participating in the operations with regard to such situations and to facilitate the conduct of such operations, non-binding guidelines should be included in this Decision. This Decision should not affect the responsibilities of search and rescue authorities, including for ensuring that coordination and cooperation is carried out in such a way that the persons rescued can be delivered to a place of safety.’

24 Article 1 of the contested decision provides:

‘The surveillance of the sea external borders in the context of the operational cooperation between Member States coordinated by the [Agency] shall be governed by the rules laid down in Part I to the Annex. Those rules and the non-binding guidelines laid down in Part II to the Annex shall form part of the operational plan drawn up for each operation coordinated by the Agency.’

25 Paragraph 1 of Part I to the Annex of the contested decision sets out general principles for sea border operations coordinated by the Agency and paragraph 2 of Part I lays down specific measures to be taken during such operations. Paragraphs 2.1 to 2.3 of Part I prescribe the conduct to be adopted for the approach and survey of ships detected and the communication to the competent authorities of information about those ships. Paragraph 2.4 of Part I concerns measures which are to be taken against ships detected and persons on board, and paragraph 2.5 sets out the conditions that must be complied with when taking those measures. Those conditions vary according to whether the measures are to be taken in territorial waters and contiguous zone, on the one hand, or on the high seas, on the other.

26 As regards the measures to be taken against ships detected or persons on board, paragraph 2.4 of Part I provides:

‘Measures taken in the course of the surveillance operation against ships or other sea craft with regard to which there are reasonable grounds for suspecting that they carry persons intending to circumvent the checks at border crossing points may include:

(a) requesting information and documentation on ownership, registration and elements relating to the voyage, and on the identity, nationality and other relevant data on persons on board;

(b) stopping, boarding and searching the ship, its cargo and persons on board, and questioning persons on board;

- (c) making persons on board aware that they are not authorised to cross the border and that persons directing the craft may face penalties for facilitating the voyage;
- (d) seizing the ship and apprehending persons on board;
- (e) ordering the ship to modify its course outside of or towards a destination other than the territorial waters or contiguous zone, escorting the vessel or steaming nearby until the ship is heading on such course;
- (f) conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country;
- (g) conducting the ship or persons on board to the host Member State or to another Member State participating in the operation.’

27 Part II to the Annex of the contested decision is entitled ‘Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Agency’.

28 Part II provides, at paragraph 1.1 thereof, inter alia, that ‘[t]he obligation to render assistance to the persons in distress at sea shall be carried out [by Member States]’ and that ‘[p]articipating units shall provide assistance to any vessel or person in distress at sea’. Paragraphs 1.2 to 1.5 of Part II relate to the assessment of the situation, the communication of that assessment and other information to the Rescue Coordination Centre and the taking of appropriate or necessary measures to ensure the safety of the persons concerned. Paragraph 1.6 of Part II states that the operation should, under certain conditions, be resumed in accordance with Part I to the Annex of the contested decision.

29 In addition, the first sentence of the first subparagraph of paragraph 2.1 of Part II to the Annex provides, in particular, that ‘[t]he operational plan should spell out the modalities for the disembarkation of the persons intercepted or rescued, in accordance with international law and any applicable bilateral agreements’. As set out in the second sentence of that subparagraph, that operational plan ‘shall not have the effect of imposing obligations on Member States not participating in the operation’. As regards the second subparagraph of paragraph 2.1, this states that, unless otherwise specified in the operational plan, ‘priority should be given to disembarkation [of the above persons] in the third country from where the ship carrying [them] departed or through the territorial waters or search and rescue region of which that ship transited’.

## **II – Forms of order sought by the parties and the procedure before the Court**

30 The Parliament claims that the Court should:

- annul the contested decision;
- order that the effects of the contested decision be maintained until it is replaced, and
- order the Council to pay the costs.

31 The Council contends that the Court should:

- dismiss the Parliament’s action as inadmissible;
- in the alternative, dismiss the action as unfounded, and
- order the Parliament to pay the costs.

32 By order of the President of the Court of 30 November 2010, the Commission was granted leave to intervene in support of the form of order sought by the Council and, in its statement in intervention, it requests the Court to dismiss the Parliament’s action and to order the Parliament to pay the costs.

### III – The action

#### A – *The admissibility of the action*

[...]

#### B – *Substance*

##### 1. Arguments of the parties

42 The parties disagree in essence, firstly, over the principles governing the implementing powers and, secondly, over whether the contested decision could be adopted by virtue of the implementing powers.

##### (a) As regards the principles governing the implementing powers

43 The Parliament submits that the regulatory procedure with scrutiny can have as its subject-matter the modification or removal of non-essential elements of a basic instrument or the addition of new non-essential elements, but not the modification of the essential elements of such an instrument. Any exercise of implementing powers has to respect the essential elements of the content of the basic act. In addition, the Parliament takes the view that the Commission is not authorised to regulate activities which do not fall within the material scope of the basic legislation.

44 In the Parliament’s view, the concept of ‘essential elements’ includes in particular the definitions laid down by basic legislation which delimit its material scope and it sets the framework within which that legislation applies; that legislation may also be supplemented by the addition of new non-essential elements. In order to determine the limitations on the implementing powers, the Parliament submits that regard must be had, in particular, to the material limitations on those powers which derive from the essential elements of the basic act and also to the provisions of the EC Treaty and the requirement to respect fundamental rights.

45 The Council contends, by contrast, that the European Union legislature can itself fix the limits of the delegation, define what the essential aims of the basic legislation are and also decide the essential elements which cannot be delegated to the Commission. The permissible scope of the delegation of implementing powers depends, inter alia, upon the discretion attributed to the Commission by the legislature, and in that connection the Court has authorised an extensive delegation of implementing powers to that institution.

46 The Commission contends that, as regards the concept of ‘essential elements’, the case-law of the Court should be relied on which states that those elements are the rules which are essential to the subject-matter envisaged (Case 25/70 *Köster, Berodt & Co.* [1970] ECR 1161, paragraph 6, and Case C-240/90 *Germany v Commission* [1992] ECR I-5383, paragraph 36). The use in Article 2(2) of the second ‘comitology’ decision of the terms ‘supplementing by the addition of new non-essential elements’ allows the Commission to be granted the power to put flesh on the bones of the essential elements which the co-legislators have chosen not to detail *in extenso*. It is authorised to supplement those elements and to regulate new activities within the scope of the essential subject-matter and of the essential rules.

##### (b) As regards the contested decision

47 Although the Parliament does not challenge the objectives of the contested decision, it takes the view that its content ought to have been adopted by means of a legislative act and not by an implementing measure. That decision goes beyond the scope of the implementing powers referred to in Article 12(5) of the SBC because it introduces new essential elements into that code and alters essential elements of the SBC as well as the content of the Frontex Regulation.

##### (i) Introduction of new essential elements into the SBC

48 As regards the introduction of new essential elements into the SBC, the Parliament submits that Parts I and II to the Annex of the contested decision lay down measures which cannot be considered to be within the scope of border surveillance as defined by the SBC or to be a non-essential element of that code.

49 Thus, contrary to Article 12(5) and recital 17 of the SBC, paragraph 2.4 of Part I to the Annex of the contested decision does not merely lay down detailed practical rules of border surveillance but grants border guards far-reaching powers. The SBC is silent as to the measures which might be taken against persons or ships. However, the contested decision lays down far-reaching enforcement measures, yet does not ensure the right of persons intercepted on the high seas to claim asylum and associated rights, whereas, in accordance with Article 13 of the SBC, returning the persons concerned to the country from where they came can only arise in the context of a formal refusal of entry.

50 In addition, the rules relating to activities such as search and rescue and disembarkation in Part II to the Annex of the contested decision do not, in the Parliament's view, fall within the concept of surveillance. Even though the title of Part II contains the word 'guidelines', Part II is binding and is intended to produce legal effects as against Member States which participate in an operation coordinated by the Agency, due to its wording, the fact that it is contained in a legally binding instrument, and the fact that it forms part of an operational plan provided for by the Frontex Regulation. The contested decision thus contains essential elements of the SBC and could not therefore be regulated in an implementing measure.

51 In addition, the Parliament submits that the contested decision exceeds the territorial scope of the SBC. In accordance with Article 2(11) of the SBC, surveillance is limited to the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, whereas, in accordance with paragraph 2.5 of Part I to its Annex, the contested decision applies not only to territorial waters, but also to contiguous zones and to the high seas.

52 The Council contends that the European Union legislature took the view that the border checks were the essential element of external border control that it extensively regulated. As for border surveillance, the Council contends that, by contrast, the legislature took the view that it was enough to define the general objectives and basic methods by granting the Commission the authorisation to adopt, in case of need, supplementary measures which are relevant to surveillance, and extensive implementing powers.

53 The Council contends that the measures listed in paragraph 2.4 of Part I to the Annex are not contrary to the policy aims of border surveillance defined in Article 12 of the SBC. The rules on coordination of surveillance operations during joint operations, set out in paragraph 2.5 of Part I to the Annex, are intended to facilitate the running of operations. The Council contends that the argument alleging an extension of the territorial scope of the SBC is unfounded, since that code does not define the concept of a sea border, which must be understood as applying also to border surveillance carried out in the contiguous zones as well as on the high seas.

54 As regards Part II to the Annex of the contested decision, not only the language used in recitals 7 to 9 of that decision, but also the difference in the titles of the two Parts to the Annex and the manner in which the guidelines are formulated demonstrate the drafter's intention not to grant binding force to Part II. Admittedly, helping ships in distress is not a surveillance measure in the narrow sense. However, if such a situation were to occur during a surveillance operation coordinated by the Agency, it would be indispensable to coordinate in advance how the search and rescue was conducted by various participating Member States. In those circumstances, the Council takes the view that the contested decision does not introduce new elements into the SBC.

55 The Commission contends that border surveillance is an essential element of the SBC, but that the essential rules governing that matter are found in Article 12 of the SBC which lays down provisions regarding the content as well as the object and purpose of the surveillance without serving to regulate that surveillance extensively and exhaustively. The co-legislators conferred on the Commission the power to supplement those essential elements. The power to regulate new activities allows the Commission to regulate the content of border surveillance and to define what that activity entails.

56 The Commission contends that the contested decision does not introduce new essential elements into the SBC. Surveillance must, in the light of its purpose, not only encompass the detection of attempts to gain illegal entry into the European Union but also extend to positive steps such as intercepting ships which are suspected of trying to gain entry to the Union without submitting to border checks. Article 12(4) of the SBC specifically mentions one of the purposes of surveillance as being to apprehend individuals. In order to assess whether 'search and rescue' falls within the concept of surveillance, it is important to take into consideration the factual circumstances in which attempted illegal entries arise. In many instances, the surveillance operation will prompt the search and rescue situation, and it is not possible to draw a sharp distinction between those operations. The

issue of whether or not the guidelines are binding does not arise, given that the measures which they lay down fall within the concept of surveillance.

(ii) Modification of essential elements of the SBC

57 As regards the modification of the essential elements of the SBC, the Parliament contends, in particular, that the contested decision alters Article 13 of the Code. Since that article applies to any form of interception, persons who have entered illegally into the territorial waters and contiguous zones cannot be forced back or asked to leave without a decision pursuant to Article 13 of the SBC. However, paragraph 2.4 of Part I to the Annex of the contested decision confers on border guards the power to order the ship to modify its course outside of the territorial waters, without a decision within the meaning of Article 13 being taken or without the persons concerned having the possibility to challenge the refusal of entry.

58 In that connection, the Council and the Commission contend that Article 13 of the SBC does not apply to border surveillance activities so that the contested decision does not amend that article.

(iii) Amendment of the Frontex Regulation

59 As regards the amendment of the Frontex Regulation, the Parliament contends that Article 12(5) of the SBC does not grant the Commission the power to lay down rules which amend the powers and obligations set out by the Frontex Regulation for the operations co-ordinated by the Agency. The contested decision is not the appropriate legal instrument for creating obligations in relation to those operations or for modifying the provisions of the Frontex Regulation.

60 However, the contested decision is intended to apply only within the context of operations coordinated by the Agency and is obligatory not only for the Member States but also for the Agency, in light of the fact that its Annex forms part of the operational plan for each operation, whilst Article 8e of the Frontex Regulation determines the main elements of that plan. The mandatory inclusion in the operational plan of the rules and guidelines set out in the Annex of the contested decision significantly amends the list of necessary elements for the implementation of that plan, such as the roles of border guards, the participating units and the Rescue Coordination Centre, respectively.

61 In that connection, the Council contends that the contested decision does not amend the tasks of the Agency, even though the Annex of that decision forms part of the operational plan. The modalities of border surveillance are subsumed within the necessary elements of the operational plan listed in Article 8e of the Frontex Regulation. Even if the contested decision were to add new non-essential elements to the provisions of Article 8e of the Frontex Regulation, that would not, however, result in that regulation's illegality. The SBC together with its implementing measures, on the one hand, and the Frontex Regulation, on the other, are complementary. Both basic acts are legal instruments for the implementation of the external border policy as set out in Article 77 TFEU and coordination with the system implemented by the Frontex Regulation is regulated in the SBC. Consequently, the new non-essential elements added by the contested decision are compatible with the Frontex Regulation and the SBC.

62 According to the Commission, the contested decision does not affect the operation of the Frontex Regulation. The requirement in Article 1 of the contested decision that both Parts to the Annex are to be part of the operational plan imposes a requirement not upon the Agency, but rather the Member States as the persons to whom that decision is addressed and responsible for ensuring that the Annex forms part of that plan. In those circumstances, the contested decision does not amend the Frontex Regulation.

## 2. Findings of the Court

63 It is to be noted that the enabling provision at issue in the present case – Article 12(5) of the SBC – provides that ‘Additional measures governing surveillance [may be adopted] ... designed to amend non-essential elements of [the SBC] by supplementing it’. That provision, read in conjunction with Article 33(2) of the SBC refers, as regards the procedure to be followed, to the second ‘comitology’ decision, itself based on the third indent of Article 202 EC.

64 According to settled case-law, the adoption of rules essential to the subject-matter envisaged is reserved to the legislature of the European Union (see, to that effect, *Germany v Commission*, paragraph 36; Case C-104/97 P *Atlanta v European Community* [1999] ECR I-6983, paragraph 76; and C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461, paragraph 21). The essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated (see, to that effect, Case C-156/93 *Parliament v Commission* [1995] ECR I-2019, paragraph 18; *Parliament v Council*, paragraph 23; Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 34; and Case C-133/06 *Parliament v Council* [2008] ECR I-3189, paragraph 45).

65 Thus, provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated.

66 It follows from this that implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements.

67 Ascertaining which elements of a matter must be categorised as essential is not – contrary to what the Council and the Commission claim – for the assessment of the European Union legislature alone, but must be based on objective factors amenable to judicial review.

68 In that connection, it is necessary to take account of the characteristics and particularities of the domain concerned.

69 As to whether the Council was empowered to adopt the contested decision as a measure implementing Article 12 of the SBC on border surveillance, on the basis of Article 12(5) of that code, it is first of all necessary to assess the meaning of that article.

70 Article 12(1) and (4) of the SBC provides that the purpose of border surveillance is to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally and to apprehend such persons. Recital 6 of the SBC states, in addition, that border control is intended to help to ‘combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations’.

71 As regards border surveillance operations, Article 12(2) to (4) of the SBC contains provisions relating to certain aspects of the functioning of surveillance operations, although those provisions merely describe in an abstract manner the duties of border guards. In particular, the second subparagraph of Article 12(2) provides that surveillance is to be ‘carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points’. Similarly, the first sentence of Article 12(3) provides that ‘[s]urveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats’.

72 As to whether the institution concerned is empowered to take the implementing measures relating to border surveillance, Article 12(5) of the SBC states, in accordance with the case-law cited in paragraph 64 above, that ‘Additional measures governing surveillance [may be adopted] ... designed to amend non-essential elements of [the SBC] by supplementing it’. In addition, in accordance with recital 17 of the SBC and recital 4 of Regulation No 296/2008, the delegation of implementing powers relates only to certain detailed practical rules governing border control.

73 Although the SBC, which is the basic legislation in the matter, states in Article 12(4) thereof, that the aim of such surveillance is to apprehend individuals crossing the border illegally, it does not contain any rules concerning the measures which border guards are authorised to apply against persons or ships when they are apprehended and subsequently – such as the application of enforcement measures, the use of force or conducting the persons apprehended to a specific location – or even measures against persons implicated in human trafficking.

74 That said, paragraph 2.4 of Part I to the Annex of the contested decision lays down the measures which border guards may take against ships detected and persons on board. In that connection, paragraph 2.4 (b), (d), (f) and (g) allows, inter alia, ships to be stopped, boarded, searched and seized, the persons on board to be searched and stopped, the ship or persons on board to be conducted to another Member State, and thus enforcement measures to be taken against persons and ships which could be subject to the sovereignty of the State whose flag they are flying.

75 In addition, paragraph 1.1 of Part II to the Annex of the contested decision lays down, *inter alia*, the obligation of the units participating in sea external border operations coordinated by the Agency to provide assistance to any vessel or person in distress at sea. Paragraph 2 of Part II lays down rules on the disembarkation of the persons intercepted or rescued, the second subparagraph of paragraph 2.1 stating that priority should be given to disembarkation in the third country from where the ship carrying the persons departed.

76 First, the adoption of rules on the conferral of enforcement powers on border guards, referred to in paragraphs 74 and 75 above, entails political choices falling within the responsibilities of the European Union legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments. Depending on the political choices on the basis of which those rules are adopted, the powers of the border guards may vary significantly, and the exercise of those powers require authorisation, be an obligation or be prohibited, for example, in relation to applying enforcement measures, using force or conducting the persons apprehended to a specific location. In addition, where those powers concern the taking of measures against ships, their exercise is liable, depending on the scope of the powers, to interfere with the sovereign rights of third countries according to the flag flown by the ships concerned. Thus, the adoption of such rules constitutes a major development in the SBC system.

77 Second, it is important to point out that provisions on conferring powers of public authority on border guards – such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location – mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required.

78 Thus, the adoption of provisions such as those laid down in paragraph 2.4 of Part I, and paragraphs 1.1 and 2.1 of Part II, of the Annex to the contested decision, requires political choices to be made as referred to in paragraphs 76 and 77 above. Accordingly, the adoption of such provisions goes beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC and, in the context of the European Union’s institutional system, is a matter for the legislature.

79 In those circumstances, it must be found that, as the Advocate General observed in points 61 and 66 of his Opinion, Parts I and II to the Annex of the contested decision contain essential elements of external maritime border surveillance.

80 The mere fact that the title of Part II to the Annex of the contested decision contains the word ‘guidelines’ and that the second sentence of Article 1 of that decision states that the rules and guidelines in Part II are ‘non-binding’ cannot affect their classification as essential rules.

81 In accordance with the second sentence of Article 1 of that decision, Part II of that annex forms part of the operational plan drawn up for each operation coordinated by the Agency. As laid down in Article 8e of the Frontex Regulation, that plan details ‘the precise conditions for deployment of the teams’, the monitoring of the ‘correct implementation’ of which is a matter for the coordinating officer, pursuant to Article 8g of that regulation.

82 Since the conditions provided for by that plan must therefore be complied with, it necessarily follows that the rules in paragraphs 1.1 and 2.1 of Part II to the Annex of the contested decision are intended to produce binding legal effects.

83 Lastly, even though the contested decision also contains provisions governing the practical arrangements for carrying out border surveillance, it must be found that the entirety of the rules laid down in Parts I and II to the Annex of the contested decision, respectively, are connected due to the fact that they relate to the conduct of surveillance operations and rescue operations in turn.

84 In those circumstances, the contested decision must be annulled in its entirety because it contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC, and only the European Union legislature was entitled to adopt such a decision.

85 Consequently, the Parliament’s arguments to the effect that the contested decision amends the essential elements of the SBC and also the Frontex Regulation do not require to be examined.

#### IV – The application for the effects of the contested decision to be maintained

86 The Parliament requests the Court, should it annul the contested decision, to maintain its effects, pursuant to the second paragraph of Article 264 TFEU, until that decision is replaced.

87 The Parliament submits that it is necessary to maintain the effects of the contested decision, in the light of the importance of the objectives of the proposed measures in the context of the European Union’s policy on border control operations.

88 Under the second paragraph of Article 264 TFEU, the Court may, if it considers it necessary, state which of the effects of the act which it has declared void are to be considered as definitive.

89 The annulment of the contested decision without maintaining its effects on a provisional basis could compromise the smooth functioning of the current and future operations coordinated by the Agency and, consequently, the surveillance of the sea external borders of the Member States.

90 In those circumstances, there are important grounds of legal certainty which justify the Court exercising the power conferred on it by the second paragraph of Article 264 TFEU. In the present case, the effects of the contested decision must be maintained until the entry into force, within a reasonable time, of new rules intended to replace the contested decision annulled by the present judgment.

#### V – Costs

91 Under the first subparagraph of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Parliament has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. The Commission, which intervened in support of the form of order sought by the Council, must be ordered to bear its own costs, in accordance with the first subparagraph of Article 69(4) of the Rules of Procedure.

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

1. **Annuls Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union;**
2. **Maintains the effects of Decision 2010/252 until the entry into force of new rules within a reasonable time;**
3. **Orders the Council of the European Union to pay the costs;**
4. **Orders the European Commission to bear its own costs.**

**Case C-427/12, *European Commission v European Parliament and Council***

In Case C-427/12,

ACTION for annulment under Article 263 TFEU, brought on 19 September 2012,

**European Commission**, represented by B. Smulders, C. Zadra and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**European Parliament**, represented by L. Visaggio and A. Troupiotis, acting as Agents, with an address for service in Luxembourg,

**Council of the European Union**, represented by M. Moore and I. Šulce, acting as Agents,

defendants,

supported by:

**Czech Republic**, represented by M. Smolek, E. Ruffer and D. Hadroušek, acting as Agents,

**Kingdom of Denmark**, represented by V. Pasternak Jørgensen and C. Thorning, acting as Agents,

**French Republic**, represented by G. de Bergues, D. Colas and N. Rouam, acting as Agents,

**Kingdom of the Netherlands**, represented by M. Bulterman and M. Noort, acting as Agents,

**Republic of Finland**, represented by H. Leppo and J. Leppo, acting as Agents,

**United Kingdom of Great Britain and Northern Ireland**, represented by C. Murrell and M. Holt, acting as Agents, and by B. Kennelly, Barrister,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz, E. Juhász and M. Safjan, Presidents of Chambers, A. Rosas, E. Levits, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev, C. Toader, D. Šváby and S. Rodin, Judges,

Advocate General: P. Cruz Villalón,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 1 October 2013,

after hearing the Opinion of the Advocate General at the sitting on 19 December 2013,

gives the following

**Judgment**

1 By its application, the European Commission seeks the annulment of Article 80(1) of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1), in so far as Article 80(1) provides for the adoption of measures setting the fees payable to the European Chemicals Agency ('the Agency') by an act based on Article 291(2) TFEU ('implementing act'), and not by an act adopted under Article 290(1) TFEU ('delegated act').

### **Legal context**

#### *Regulation No 528/2012*

2 Regulation No 528/2012, which harmonises certain rules concerning the making available on the market and use of biocidal products, assigns to the Agency, as is apparent from recital 17 in the preamble thereto, 'specified tasks with regard to the evaluation of active substances as well as the Union authorisation of certain categories of biocidal products ...'.

3 Recital 64 in the preamble to that regulation states:

'The costs of the procedures associated with the operation of this Regulation need to be recovered from those making biocidal products available on the market and those seeking to do so in addition to those supporting the approval of active substances. To promote the smooth operation of the internal market, it is appropriate to establish certain common principles applicable both to fees payable to the Agency and to Member States' competent authorities, including the need to take into account, as appropriate, the specific needs of SMEs [small and medium-sized enterprises].'

4 In accordance with the first subparagraph of Article 7(2), the second subparagraph of Article 13(3), the first subparagraph of Article 43(2), Article 45(1) and (3), the second subparagraph of Article 50(2), Article 54(1) and (3) and Article 80(1)(a) of Regulation No 528/2012, a fee is payable to the Agency for its action in the respective procedures for (i) the approval of an active substance or making subsequent amendments to the conditions of approval of an active substance, (ii) renewal of such an approval, (iii) European Union ('EU') authorisation for biocidal products, (iv) renewal and amendment of such an authorisation, and (v) establishing technical equivalence of active substances. In accordance with the third subparagraph of Article 77(1) of that regulation, '[f]ees may be payable ... by the person bringing an appeal [against a decision of the Agency]'.

5 As regards the time-limits for payment of the fees payable to the Agency, the first subparagraph of Article 7(2), the second subparagraph of Article 13(3), the first subparagraph of Article 43(2), the second subparagraph of Article 45(3) and Article 54(3) of that regulation provide that '[t]he Agency shall inform the applicant of the fees payable under Article 80(1) and shall reject the application if the applicant fails to pay the fees within 30 days'.

6 Article 78(1) of Regulation No 528/2012, dealing with the budget of the Agency, provides:

'For the purposes of this Regulation, the revenues of the Agency shall consist of:

- (a) a subsidy from the Union, entered in the general budget of the European Union (Commission Section);
- (b) the fees paid to the Agency in accordance with this Regulation;
- (c) any charges paid to the Agency for services that it provides under this Regulation;
- (d) any voluntary contributions from Member States.'

7 Article 80 of Regulation No 528/2012, entitled 'Fees and charges', provides:

'1. The Commission shall adopt, on the basis of the principles set out in paragraph 3, an implementing Regulation specifying:

- (a) the fees payable to the Agency, including an annual fee for products granted a Union authorisation in accordance with Chapter VIII and a fee for applications for mutual recognition in accordance with Chapter VII;
- (b) the rules defining conditions for reduced fees, fee waivers and the reimbursement of the member of the Biocidal Products Committee who acts as a rapporteur; and
- (c) conditions of payment.

That implementing Regulation shall be adopted in accordance with the examination procedure referred to in Article 82(3). It shall apply only with respect to fees paid to the Agency.

The Agency may collect charges for other services it provides.

The fees payable to the Agency shall be set at such a level as to ensure that the revenue derived from the fees, when combined with other sources of the Agency's revenue pursuant to this Regulation, is sufficient to cover the cost of the services delivered. The fees payable shall be published by the Agency.

2. Member States shall directly charge applicants fees for services that they provide with respect to the procedures under this Regulation, including the services undertaken by Member States' competent authorities when acting as evaluating competent authority.

Based on the principles set out in paragraph 3, the Commission shall issue guidance concerning a harmonised structure of fees.

Member States may levy annual fees with respect to biocidal products made available on their markets.

Member States may collect charges for other services they provide.

Member States shall set and publish the amount of fees payable to their competent authorities.

3. Both the implementing Regulation referred to in paragraph 1 and Member States' own rules concerning fees shall respect the following principles:

- (a) fees shall be set at such a level as to ensure that the revenue derived from the fees is, in principle, sufficient to cover the cost of the services delivered and shall not exceed what is necessary to cover those costs;
- (b) partial reimbursement of the fee if the applicant fails to submit the information requested within the specified time-limit;
- (c) the specific needs of SMEs shall be taken into account, as appropriate, including the possibility of splitting payments into several instalments and phases;
- (d) the structure and amount of fees shall take into account whether information has been submitted jointly or separately;
- (e) in duly justified circumstances, and where it is accepted by the Agency or the competent authority, the whole fee or a part of it may be waived; and
- (f) the deadlines for the payment of fees shall be fixed taking due account of the deadlines of the procedures provided for in this Regulation.'

8 In accordance with the second paragraph of Article 97 of Regulation No 528/2012, that regulation is applicable from 1 September 2013.

#### **Procedure before the Court and forms of order sought by the parties**

9 By decisions of the President of the Court of 15 January and 5 February 2013, respectively, the Czech Republic, the French Republic, the Kingdom of the Netherlands, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the European Parliament and the Council of the European Union. By decision of the President of the Court of 5 February 2013, the Kingdom of Denmark was granted leave to intervene in support of the form of order sought by the Council.

10 The Commission claims that the Court should:

- annul Article 80(1) of Regulation No 528/2012, in so far as it provides for the adoption of measures setting the fees payable to the Agency by an implementing act pursuant to Article 291 TFEU, and not by a delegated act adopted on the basis of Article 290 TFEU;
- maintain the effects of the provision annulled, and of all acts adopted on the basis thereof, until the entry into force, within a reasonable period, of a new provision intended to replace it;
- order the Parliament and the Council to pay the costs.

11 In the alternative, in the event that the Court should take the view that that application for partial annulment of Regulation No 528/2012 is not admissible, the Commission asks the Court to annul that regulation in its entirety, with its effects in time being maintained.

12 The Parliament and the Council contend that the Court should:

- dismiss the action; and
- order the Commission to pay the costs.

13 In the alternative, the Parliament also asks that, in the event that the action is successful, the effects of Article 80(1) of Regulation No 528/2012 and of any acts adopted on the basis thereof be maintained until the entry into force, within a reasonable time, of a new provision intended to replace the provision annulled.

### **Admissibility**

#### *Arguments of the parties*

14 The Council, supported by the Kingdom of the Netherlands and the United Kingdom, argues that the application for partial annulment of Regulation No 528/2012 is inadmissible on the ground that Article 80(1) of that regulation, the annulment of which is sought by the Commission, cannot be severed from the other provisions of that regulation. In support of that conclusion, the Council and those Member States refer to the fact that the participation of the Agency throughout the entire process of approval of a biocidal product is dependent on payment of the fee.

15 By contrast, the Parliament, the Commission and the Republic of Finland contend that the annulment of Article 80(1) of Regulation No 528/2012 alone would not affect the substance of that regulation. The application for partial annulment is therefore, in their view, admissible.

#### *Findings of the Court*

16 According to settled case-law of the Court, partial annulment of an EU act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act (see, *inter alia*, *Commission v Council*, C-29/99, EU:C:2002:734, paragraph 45, and *Germany v Council*, C-239/01, EU:C:2003:514, paragraph 33). The Court has repeatedly ruled that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (*Commission v Poland*, C-504/09 P, EU:C:2012:178, paragraph 98 and the case-law cited).

17 In the present case, it should be noted that Regulation No 528/2012 establishes harmonised rules concerning the making available on the market and the use of biocidal products. Within the framework of that regulation, the Agency carries out tasks with regard to the evaluation of active substances as well as to the EU authorisation of certain categories of biocidal products.

18 As the Advocate General has observed in point 19 of his Opinion, Article 80(1) of Regulation No 528/2012 does no more than confer on the Commission the necessary powers to adopt an implementing regulation specifying the fees payable to the Agency for the tasks carried out in implementation of that regulation as well as the conditions governing payment of those fees.

19 It follows that Article 80(1) of Regulation No 528/2012 concerns a severable aspect of the regulatory framework established by that regulation and, consequently, the annulment of Article 80(1) would not affect the substance of Regulation No 528/2012.

20 The Commission's action for partial annulment of Regulation No 528/2012 is for that reason admissible.

### **Substance**

#### *Arguments of the parties*

21 The Commission raises a single plea in law in support of its action, alleging a breach of the Treaty on the Functioning of the European Union consisting in a failure to comply with the system for attributing the powers which the EU legislature may confer on the Commission under Articles 290 TFEU and 291 TFEU.

22 As to the respective scopes of those articles, the Commission submits, in the first place, that the power conferred on it on the basis of Article 291 TFEU is purely implementing in nature, whereas it has quasi-legislative powers under Article 290 TFEU.

23 In the second place, the choice made by the EU legislature to confer on the Commission the power to adopt a delegated act or an implementing act must, it contends, be based on objective and clear factors that are amenable to judicial review. In that regard, the Commission submits, first, that the respective scopes of Articles 290 TFEU and 291 TFEU are different and mutually exclusive. Secondly, in the light of the actual wording of those articles, the only decisive criterion which makes it possible for a delegated act to be distinguished from an implementing act relates to the nature and purpose of the powers conferred on the Commission. If the purpose of those powers is to adopt non-essential rules of general application, having the legal function of completing the normative framework of the legislative act concerned, those rules supplement the legislative act in accordance with the first subparagraph of Article 290(1) TFEU. If, by contrast, those rules are intended merely to give effect to the rules already laid down in the basic act while ensuring uniform conditions of application within the European Union, they come under Article 291 TFEU. The exercise of implementing powers under Article 291 TFEU may in no way affect the content of the legislative act.

24 Neither the fact that the legislative provision conferring the power on the Commission is very detailed, nor the resulting discretion for the Commission or the question of whether the act to be adopted by it creates new rights and obligations may, if taken in isolation, be considered decisive for the purpose of distinguishing between delegated acts and implementing acts. It is the nature and purpose of the power conferred on the Commission which determine whether that power belongs to the domain of legislative delegation or to that of implementing power.

25 As to the lawfulness of Article 80(1) of Regulation No 528/2012, the Commission submits that, by that provision, the EU legislature incorrectly conferred on it an implementing power pursuant to Article 291 TFEU. An examination of the nature and purpose of the powers thereby conferred on the Commission shows that it will be led to adopt an act supplementing certain non-essential elements of the legislative act within the meaning of Article 290 TFEU.

26 The Commission states, in the first place, that, under Article 78 of Regulation No 528/2012, the revenues of the Agency are to consist not only of the fees paid to it, but also of a subsidy from the European Union, any charges paid to the Agency for services that it provides as well as any voluntary contributions from Member

States. However, Article 80 of that regulation does not lay down criteria designed to ensure that the various methods of financing the Agency are coordinated and coherent.

27 In the second place, according to the Commission, it is apparent from paragraphs 1 and 3 of Article 80 of Regulation No 528/2012, read together, that, in accordance with the ‘principles’ on fees laid down by those provisions, the Commission has not simply the task of determining, for each authorisation procedure, the corresponding amount of the fee. Article 80(1)(a) and (3)(a) provides, first, that ‘in principle’ the fees must be proportionate to the services delivered and cover the costs thereof. Consequently, it falls to the Commission to define the exceptions to the principle on the basis of specific criteria and, therefore, to supplement the legislation. Secondly, as regards the rules defining conditions for reduced fees, fee waivers and reimbursement, referred to in Article 80(1)(b) and (3)(e), the EU legislature did not specify the circumstances justifying waiver of the fee in whole or in part. Those provisions thus give the Commission the power to supplement the legislation in this area by the addition of non-essential elements.

28 The same, it argues, applies to the ‘conditions of payment’ provided for in Article 80(1)(c) of Regulation No 528/2012, a concept the scope of which is not specified and which could therefore cover both mere payment methods the breach of which would have no impact on the authorisation procedure and conditions the breach of which could, in certain circumstances, be detrimental to the acceptance of an application for authorisation.

29 The Commission also relies on the fact that Article 80(3)(c) of Regulation No 528/2012 states that it must take into account the specific needs of small and medium-sized enterprises (SMEs) ‘as appropriate’, which allows it not only the choice as to the methods of ‘implementation’, but also the power to supplement the legislative framework by laying down general criteria in relation to fee reductions from which SMEs could benefit.

30 Lastly, the fact that Article 80(3) of Regulation No 528/2012 also sets out the principles which the Member States’ rules concerning fees must respect has, the Commission submits, no bearing on the issue of whether the powers conferred on it belong to the domain of delegated acts under Article 290 TFEU or implementing acts adopted on the basis of Article 291 TFEU.

31 The Parliament, the Council and all of the Member States intervening in the present proceedings contend that Article 80(1) of Regulation No 528/2012 properly confers on the Commission an implementing power within the meaning of Article 291 TFEU. The system of fees established in Article 80 of Regulation No 528/2012 is, they submit, sufficiently detailed and defined in terms of legislation, with the result that the powers conferred on the Commission are of a purely implementing nature under Article 291 TFEU.

#### *Findings of the Court*

32 Article 80(1) of Regulation No 528/2012 confers on the Commission the power to adopt an implementing regulation, pursuant to Article 291(2) TFEU, concerning the fees payable to the Agency which are linked to its various actions in implementation of that regulation.

33 It should be noted that Article 291 TFEU does not provide a definition of the concept of an implementing act, but simply refers, in paragraph 2 thereof, to the need for such an act to be adopted by the Commission or, in certain specific cases, by the Council, in order to ensure that a legally binding EU act is implemented under uniform conditions in the European Union.

34 It is, moreover, apparent from Article 291(2) TFEU that it is only ‘[w]here uniform conditions for implementing legally binding Union acts are needed [that] those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 [TFEU] and 26 [TFEU], on the Council’.

35 Lastly, the concept of an implementing act within the meaning of Article 291 TFEU must be assessed in relation to the concept of a delegated act, as derived from Article 290 TFEU.

36 Before the entry into force of the Treaty of Lisbon, the expression ‘implementing powers’ in the third indent of Article 202 EC covered the power to implement, at EU level, an EU legislative act or certain EU provisions and also, in certain circumstances, the power to adopt normative acts which supplement or amend certain non-essential elements of a legislative act. The European Convention proposed making a distinction between those

two types of power, which is found in Articles I-35 and I-36 of the Draft Treaty establishing a Constitution for Europe. That amendment was ultimately incorporated in the Treaty of Lisbon in Articles 290 TFEU and 291 TFEU.

37 In accordance with the first subparagraph of Article 290(1) TFEU '[a] legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act'.

38 When the EU legislature confers, in a legislative act, a delegated power on the Commission pursuant to Article 290(1) TFEU, the Commission is called on to adopt rules which supplement or amend certain non-essential elements of that act. In accordance with the second subparagraph of Article 290(1) TFEU, the objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative act granting such a delegation. That requirement implies that the purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act.

39 By contrast, when the EU legislature confers an implementing power on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States.

40 It must be noted that the EU legislature has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU. Consequently, judicial review is limited to manifest errors of assessment as to whether the EU legislature could reasonably have taken the view, first, that, in order to be implemented, the legal framework which it laid down regarding the system of fees referred to in Article 80(1) of Regulation No 528/2012 needs only the addition of further detail, without its non-essential elements having to be amended or supplemented and, secondly, that the provisions of Regulation No 528/2012 relating to that system require uniform conditions for implementation.

41 In the first place, Article 80(1) of Regulation No 528/2012 confers on the Commission the power to 'specify' the fees payable to the Agency, their conditions of payment and certain rules concerning reduced fees, fee waivers and reimbursement, 'on the basis of the principles set out in paragraph 3 [of that article]'.

42 In that regard, it should be noted, first, that recital 64 in the preamble to Regulation No 528/2012 lays down the very principle of the payment of fees to the Agency and, secondly, that the final subparagraph of Article 80(1) of that regulation states that those fees 'shall be set at such a level as to ensure that the revenue derived from the fees, when combined with other sources of the Agency's revenue pursuant to this Regulation, is sufficient to cover the cost of the services delivered'.

43 Thus, the guiding principle of the system of fees provided for in Article 80(1) of Regulation No 528/2012 was laid down by the legislature itself when it decided that the fees should be used solely to cover the costs of the service, without any possibility that they could be used for any other purpose or set at a level that exceeds the costs of the services delivered by the Agency.

44 Contrary to the Commission's claims, the fact that Regulation No 528/2012 does not establish the criteria for coordinating the various sources of financing for the Agency referred to in Article 78(1) of that regulation and the fact that, in accordance with Article 80(3)(a) thereof, the fees to be collected must 'in principle' cover the costs do not in any way support the contention that a delegated power has been conferred on the Commission.

45 It must be stated, in this regard, that setting the amount of the fees paid to the Agency at a level which is sufficient to cover the costs of the services which it delivers is by nature a forward-looking exercise subject to certain variables such as, inter alia, the number of applications submitted to the Agency. As the Council and the Parliament observe, the expression 'in principle' thus essentially expresses the difficulty of ensuring in all circumstances that the fees collected by the Agency will be sufficient to cover the costs of the corresponding services. It is, moreover, for that reason that Article 78(1) of Regulation No 528/2012 provides also for other sources of finance for the Agency, which, when combined with the fees, enable such coverage to be achieved.

46 It must also be noted that the exercise by the Commission of the power conferred on it by Article 80(1) of Regulation No 528/2012 is made subject to other conditions and criteria which have been laid down by the EU legislature itself in that legislative act. In that regard, Article 80(3) provides that (i) there is to be partial

reimbursement of the fee if the applicant fails to submit the information requested within the specified time-limit (Article 80(3)(b)); (ii) the specific needs of SMEs are to be taken into account, as appropriate, including the possibility of splitting payments into several instalments and phases (Article 80(3)(c)); (iii) the structure and amount of fees are to take into account whether information has been submitted jointly or separately (Article 80(3)(d)); (iv) in duly justified circumstances, and where it is accepted by the Agency, the whole fee or a part of it may be waived (Article 80(3)(e)); and, lastly, (v) the deadlines for the payment of fees are to be fixed taking due account of the deadlines of the procedures provided for in the regulation (Article 80(3)(f)).

47 The Commission contends, however, as regards the rules defining conditions for reduced fees, fee waivers and reimbursement, referred to in Article 80(1)(b) and (3)(e) of Regulation No 528/2012, that the EU legislature has not specified the circumstances which justify waiver of the fee in whole or in part and therefore, by implication, conferred on the Commission the power to supplement the legislative act. Likewise, the Commission contends, Article 80(1)(c) of Regulation No 528/2012 infringes Article 291 TFEU in conferring on the Commission the power to determine the ‘conditions of payment’ of the fees payable to the Agency.

48 That argument cannot be accepted. The EU legislature could reasonably take the view that Regulation No 528/2012 lays down a complete legal framework within the meaning of paragraph 40 above, as regards reductions, waivers and reimbursements of the fees payable to the Agency, in (i) prescribing in Articles 7(4), 43(4) and 80(3)(b) of that regulation the various situations in which partial reimbursement of fees must be authorised, (ii) stating in Article 80(3)(c) that ‘the specific needs of SMEs shall be taken into account’, and (iii) specifying in Article 80(3)(e) that the whole fee or a part of it may be waived ‘in duly justified circumstances, and where it is accepted by the Agency’.

49 The same applies with regard to the power to set the ‘conditions of payment’ which is conferred on the Commission by Article 80(1)(c) of Regulation No 528/2012. The first subparagraph of Article 7(2), the second subparagraph of Article 13(3), the first subparagraph of Article 43(2), the second subparagraph of Article 45(3) and Article 54(3) of that regulation themselves set a period of 30 days for payment of the fee payable to the Agency for its various actions. Under Article 80(3)(f), the deadlines for payment of the fees payable in respect of the Agency’s other actions ‘shall be fixed taking due account of the deadlines of the procedures provided for in [the] Regulation’. As regards the other conditions of payment, Article 80(3)(c) refers to the ‘possibility of splitting payments into several instalments and phases’ in order to take into account the specific needs of SMEs. The Commission’s exercise of the power conferred on it by Article 80(1)(c) therefore takes place within a normative framework laid down by the legislative act itself, the non-essential elements of which can neither be amended nor supplemented by the implementing act.

50 Lastly, the Commission relies, in support of its action, on the fact that Article 80(3)(c) of Regulation No 528/2012 states that it must take into account the specific needs of SMEs ‘as appropriate’, which, in the Commission’s view, confers on it not only the choice as to the methods of ‘implementation’, but also the power to lay down general criteria providing for whether and to what extent the SMEs may benefit from reduced fees.

51 That argument cannot be accepted either. The use of the words ‘as appropriate’ shows that the Commission’s implementing regulation does not have to provide, in all cases, for a reduced fee for SMEs. Such a reduction is necessary only when the specific features of those undertakings so require. Thus, the obligation on the Commission to take into account the specific needs of SMEs ‘as appropriate’ bears out the fact that the EU legislature itself considered it necessary to lay down a complete legal framework within the meaning of paragraph 40 above in relation to the system of fees provided for in Article 80(1) of Regulation No 528/2012. Consequently, in accordance with Article 80(3)(a) and (c) of that regulation, the fees must be set at a level which not only, in principle, ensures that the costs of the services delivered by the Agency are covered but, with regard to SMEs, also takes account of the specific features of those undertakings. As regards the conditions of payment, Article 80(3)(c) itself refers to the possibility for SMEs to split payments into several instalments and phases.

52 It follows from the foregoing that the EU legislature could reasonably take the view that Article 80(1) of Regulation No 528/2012 confers on the Commission the power, not to supplement certain non-essential elements of that legislative act, but to provide further detail in relation to the normative content of that act, in accordance with Article 291(2) TFEU.

53 In the second place, since the system of fees referred to in Article 80(1) of Regulation No 528/2012 relates to fees payable to an EU agency, the conferral of an implementing power on the Commission under Article 291(2)

TFEU may be considered reasonable for the purposes of ensuring uniform conditions for the implementation of that system within the European Union.

54 It follows from all of the foregoing that the single plea in law relied on by the Commission in support of its action is unfounded and that the action must therefore be dismissed.

#### **Costs**

55 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament and the Council have applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs. The Czech Republic, the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands, the Republic of Finland and the United Kingdom, which have intervened in support of the form of order sought by the Parliament and the Council, are to bear their own respective costs, in accordance with Article 140(1) of the Rules of Procedure.

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

1. **Dismisses the action;**
2. **Orders the European Commission to pay the costs;**
3. **Orders the Czech Republic, the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands, the Republic of Finland and the United Kingdom of Great Britain and Northern Ireland to bear their own respective costs.**



## **C-65/13, *European Parliament v European Commission***

In Case C-65/13,

ACTION for annulment under Article 263 TFEU, brought on 7 February 2013,

**European Parliament**, represented by A. Tamás and J. Rodrigues, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**European Commission**, represented by J. Enegren and C. Zadra, acting as Agents, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

[...]

gives the following

### **Judgment**

1 By its application, the European Parliament seeks the annulment of Commission Implementing Decision 2012/733/EU of 26 November 2012 implementing Regulation (EU) No 492/2011 of the European Parliament and of the Council as regards the clearance of vacancies and applications for employment and the re-establishment of EURES (OJ 2012 L 328, p. 21; ‘the contested decision’).

#### **Legal context**

*Regulation No 492/2011*

2 Recitals 8 and 9 in the preamble to Regulation No 492/2011 state:

‘(8) The machinery for vacancy clearance, in particular by means of direct cooperation between the central employment services and also between the regional services, as well as by coordination of the exchange of information, ensures in a general way a clearer picture of the labour market. Workers wishing to move should also be regularly informed of living and working conditions.

(9) Close links exist between freedom of movement for workers, employment and vocational training, particularly where the latter aims at putting workers in a position to take up concrete offers of employment from other regions of the Union. Such links make it necessary that the problems arising in this connection should no longer be studied in isolation but viewed as interdependent, account also being taken of the problems of employment at the regional level. It is therefore necessary to direct the efforts of Member States toward coordinating their employment policies.’

3 Under Article 11 of the regulation:

‘1. ...

The central employment services of the Member States shall cooperate closely with each other and with the Commission with a view to acting jointly as regards the clearing of vacancies and applications for employment within the Union and the resultant placing of workers in employment.

2. To this end the Member States shall designate specialist services which shall be entrusted with organising work in the fields referred to in the second subparagraph of paragraph 1 and cooperating with each other and with the departments of the Commission.

...’

4 Article 12 of Regulation No 492/2011 provides:

‘1. The Member States shall send to the Commission information on problems arising in connection with the freedom of movement and employment of workers and particulars of the state and development of employment.

2. The Commission, taking the utmost account of the opinion of the Technical Committee referred to in Article 29 (“the Technical Committee”), shall determine the manner in which the information referred to in paragraph 1 of this Article is to be drawn up.

3. In accordance with the procedure laid down by the Commission taking the utmost account of the opinion of the Technical Committee, the specialist service of each Member State shall send to the specialist services of the other Member States and to the European Coordination Office [the European Office for Coordinating the Clearance of Vacancies and Applications for Employment (“the European Coordination Office”)] referred to in Article 18 such information concerning living and working conditions and the state of the labour market as is likely to be of guidance to workers from the other Member States. Such information shall be brought up to date regularly.

...’

5 Article 13 of Regulation No 492/2011 provides:

‘1. The specialist service of each Member State shall regularly send to the specialist services of the other Member States and to the European Coordination Office referred to in Article 18:

- (a) details of vacancies which could be filled by nationals of other Member States;
- (b) details of vacancies addressed to third countries;
- (c) details of applications for employment by those who have formally expressed a wish to work in another Member State;
- (d) information, by region and by branch of activity, on applicants who have declared themselves actually willing to accept employment in another country.

The specialist service of each Member State shall forward this information to the appropriate employment services and agencies as soon as possible.

2. The details of vacancies and applications referred to in paragraph 1 shall be circulated according to a uniform system to be established by the European Coordination Office referred to in Article 18 in collaboration with the Technical Committee.

This system may be adapted if necessary.’

6 Section 3 of Regulation No 492/2011, headed ‘Measures for controlling the balance of the labour market’, contains only one article, Article 17, which provides:

‘1. On the basis of a report from the Commission drawn up from information supplied by the Member States, the latter and the Commission shall at least once a year analyse jointly the results of Union arrangements regarding vacancies and applications.

2. The Member States shall examine with the Commission all the possibilities of giving priority to nationals of Member States when filling employment vacancies in order to achieve a balance between vacancies and applications for employment within the Union. They shall adopt all measures necessary for this purpose.

...’

7 Article 18 of Regulation No 492/2011 provides:

‘The European [Coordination] Office ..., established within the Commission, shall have the general task of promoting vacancy clearance at Union level. It shall be responsible in particular for all the technical duties in this field which, under the provisions of this Regulation, are assigned to the Commission, and especially for assisting the national employment services.

It shall summarise the information referred to in Articles 12 and 13 and the data arising out of the studies and research carried out pursuant to Article 11, so as to bring to light any useful facts about foreseeable developments on the Union labour market ...’

8 Under Article 19(1) of the regulation:

‘The European Coordination Office shall be responsible, in particular, for:

(a) coordinating the practical measures necessary for vacancy clearance at Union level and for analysing the resulting movements of workers;

...’

9 Article 20 of Regulation No 492/2011 states:

‘The Commission may, in agreement with the competent authority of each Member State, and in accordance with the conditions and procedures which it shall determine on the basis of the opinion of the Technical Committee, organise visits and assignments for officials of other Member States, and also advanced programmes for specialist personnel.’

10 Article 21 of Regulation No 492/2011 establishes an Advisory Committee that is responsible for assisting the Commission in the examination of any questions arising from the application of the FEU Treaty and measures taken in pursuance thereof, in matters concerning the freedom of movement of workers and their employment.

11 Article 29 of the regulation establishes a Technical Committee that is responsible for assisting the Commission in the preparation, promotion and follow-up of all technical work and measures for giving effect to the regulation and any supplementary measures.

12 Article 38 of Regulation No 492/2011 provides:

‘The Commission shall adopt measures pursuant to this Regulation for its implementation. To this end it shall act in close cooperation with the central public authorities of the Member States.’

#### *The contested decision*

13 Recitals 4 and 7 in the preamble to the contested decision state:

‘(4) EURES should promote better functioning of the labour markets and satisfaction of economic needs by facilitating transnational and cross-border geographical mobility of workers, while ensuring mobility under fair conditions and respect of applicable labour standards. It should provide greater transparency on the labour markets, ensuring the exchange and processing of vacancies and applications for employment (i.e. the “clearance” or “matching” within the meaning of the Regulation) and supporting activities in the areas of recruitment, advice and guidance at national and cross-border level, thereby contributing to the objectives of the Europe 2020 strategy.

(7) The abolishment of monopolies together with other developments has led to the emergence of a wide variety of employment service providers on the labour market. To reach its full potential, EURES needs to be opened to the participation of these operators, committed to fully respect applicable labour standards and legal requirements, and other EURES quality standards.’

14 Article 1 of the contested decision provides:

‘In order to fulfil the obligations laid down in Chapter II of Regulation (EU) No 492/2011 the Commission shall together with the Member States establish and operate a European network of employment services, designated EURES.’

15 Article 2 of the contested decision provides:

‘For the benefit of jobseekers, workers and employers, EURES shall promote, in cooperation as appropriate with other European services or networks:

...

(b) the clearance and placement at the transnational, interregional and cross-border level through the exchange of vacancies and applications for employment, and participation in targeted mobility activities at EU level;

...

(d) the development of measures to encourage and facilitate mobility of young workers;

...’

16 Under Article 3 of the contested decision, EURES is to comprise, in addition to the European Coordination Office and the EURES Members (the designated specialist services appointed by the Member States, namely, the National Coordination Offices), also:

‘...

(c) the EURES Partners, in accordance with Article 15(1) of Regulation (EU) No 492/2011. EURES Partners are designated by the respective EURES Member and may include public or private service providers active in the relevant field of placement and employment, and trades union and employer organisations. In order to qualify, a EURES Partner must undertake to fulfil the roles and responsibilities laid down in Article 7;

(d) the Associated EURES Partners, which in accordance with Article 6 provide limited services under the supervision and responsibility of a EURES Partner or the European Coordination Office.’

17 Under Article 4(3) of the contested decision, the European Coordination Office:

‘... shall, in particular, undertake:

...

(b) the analysis of geographic and occupational mobility, in the light of the achievement of a balance between supply and demand, and the development of a general approach to mobility in accordance with the European Employment Strategy;

...’

18 Article 7 of the contested decision provides:

‘1. The full range of EURES Services shall comprise recruitment, job matching and placement, covering all phases of placement from pre-recruitment preparation to post-placement assistance, and related information and advice.

2. They shall be further detailed in the EURES Service Catalogue that shall be part of the EURES Charter as provided for in Article 10 and shall consist of the universal services provided by all EURES Partners and complementary services.

3. Universal services are those provided for in Chapter II of Regulation (EU) No 492/2011, in particular Article 12(3) and Article 13. Complementary services are not obligatory in the sense of Chapter II of Regulation (EU) No 492/2011, but fulfil important labour market needs.

...’

19 Article 8 of the contested decision provides:

‘1. The EURES Management Board shall assist the Commission, its European Coordination Office and the National Coordination Offices in promoting and overseeing the development of EURES.

...

7. The Commission shall consult the EURES Management Board on questions concerning the strategic planning, development, implementation, monitoring and evaluation of the services and activities referred to in this Decision, including:

- (a) the EURES Charter, in accordance with Article 10;
- (b) strategies, operational objectives and work programmes for the EURES network;
- (c) the Commission’s reports required by Article 17 of Regulation (EU) No 492/2011.’

20 Article 10 of the contested decision provides:

‘1. The Commission shall adopt the EURES Charter in accordance with the procedures set out in Articles 12(2), 13(2) and 19(1) and Article 20 of Regulation (EU) No 492/2011, after consultation of the EURES Management Board established by Article 8 of this Decision.

2. On the basis of the principle that all vacancies and applications for employment that are made public by any of the EURES Members must be accessible throughout the Union, the EURES Charter shall, in particular, establish:

(a) the EURES Service Catalogue, describing the universal and complementary services to be rendered by the EURES Members and Partners, including job-matching services, such as personalised counselling and advice to customers, whether they be jobseekers, workers or employers;

...

(d) the operational objectives of the EURES network, the quality standards to be applied as well as the obligations of the EURES Members and Partners, which include:

...

(ii) the kind of information, such as labour market information, information on living and working conditions, information on job offers and requests, information on traineeships and apprenticeships, measures to encourage youth mobility, acquisition of skills, and obstacles to mobility, which they have to supply to their customers and to the rest of the network, in cooperation with other relevant European services or networks;

(iii) task descriptions and criteria for appointment of national coordinators, EURES advisers and other key personnel at national level;

(iv) the training and qualifications required for EURES personnel and conditions and procedures for the organisation of visits and assignments for officials and specialised personnel;

...’

#### **Forms of order sought**

21 The Parliament claims that the Court should:

- annul the contested decision; and
- order the Commission to pay the costs.

22 The Commission contends that the Court should:

- dismiss the action; and
- order the Parliament to pay the costs.

23 The Commission requests, in the alternative, should the Court uphold the action in whole or in part, that the effects of the contested decision or the provisions annulled thereof be maintained until the entry into force, within a reasonable time, of a new decision designed to replace the contested decision.

#### **The action**

##### *Arguments of the parties*

24 The Parliament raises, in support of its action, a single plea in law alleging infringement of Article 38 of Regulation No 492/2011 and misuse of the implementing power that the legislature conferred on the Commission under that article.

25 The Parliament states, first of all, that Article 38 of Regulation No 492/2011 confers on the Commission the power to adopt measures ‘pursuant to this Regulation for its implementation’. The EU legislature thus sought to limit the implementing power to the strict minimum. It was not, therefore, for the Commission to seek, by means of implementing measures, to perfect the framework established by that regulation. Indeed, under the normative architecture of the treaty, an implementing measure under Article 291 TFEU is only supposed to give effect to the existing rules in the act on which it is based, without, however, supplementing it.

26 The Parliament then refers to six articles in the contested decision, which, it claims, supplement certain elements of Regulation No 492/2011 and therefore go beyond the implementing power conferred on the Commission by Article 38 of Regulation No 492/2011.

27 First, the Parliament claims that the objectives set out in Article 2(b) and (d) of the contested decision reflect policy choices in that they serve to focus the activity of EURES by prioritising certain categories of workers in the framework of the operation of the system for vacancy clearance put in place by Regulation No 492/2011. The promotion of targeted mobility activities and the development of measures to encourage and facilitate mobility of young workers do not originate in the regulation, which does not grant priority to any particular group.

28 Second, the Parliament disputes the Commission’s authority to open the EURES network to private entities, as envisaged in Article 3(c) of the contested decision. Such an opening changes the framework pre-established by Regulation No 492/2011. According to the Parliament, that regulation refers only to public-sector operators in the context of the system for vacancy clearance put in place by the regulation.

29 Third, the Parliament argues that the task that Article 4(3)(b) of the contested decision imposes on the European Coordination Office of developing ‘a general approach to mobility’ goes far beyond the implementing power conferred on the Commission by Regulation No 492/2011. Under Articles 18 and 19 of Regulation No 492/2011, which provisions draw a distinction between the Commission and the European Coordination Office established within the Commission, the tasks for which the European Coordination Office is responsible are circumscribed and purely technical or administrative in nature. Regulation No 492/2011 does not, it is claimed, envisage any specific planning activity on the part of the European Coordination Office.

30 Fourth, the Parliament claims that the Commission took the place of the EU legislature by introducing, in Article 7(2) and (3) of the contested decision, the concept of ‘complementary services’. First, it follows, *a contrario*, from the definition of ‘universal service’ in the first sentence of Article 7(3) of the contested decision that complementary services are not provided for in Regulation No 492/2011. Secondly, even if they were covered by that regulation, it should be noted that the regulation does not draw a distinction between different services according to whether they are obligatory or not obligatory. The Parliament also observes that complementary services, although not obligatory, are not without legal effect. It refers, in this connection, to Article 6(5) of the contested decision.

31 Fifth, the Parliament argues that, by Article 8(7) of the contested decision, which requires the Commission to consult the EURES Management Board on numerous questions, the Commission has created a quasi-comitological structure for the implementation of Regulation No 492/2011, whereas Article 38 of that regulation requires the Commission to act in close cooperation with the central public authorities of the Member States.

32 The Parliament questions whether, in general, it is appropriate for an implementing measure itself to create such an institutional framework, which affects the procedure leading to the adoption of subsequent measures, even if those measures are ‘implementing measures’ in the strictest possible sense, that is to say, specific and purely technical.

33 The Parliament submits that, in any event, some of the questions on which the EURES Management Board is to be consulted, such as strategic planning or the adoption of the EURES Charter, concern matters which are neither specific nor purely technical, but which supplement Regulation No 492/2011.

34 The Parliament argues that even supposing that the EURES Charter were to contain measures that fall within the scope of the implementing measures that the Commission could adopt under Article 38 of Regulation No 492/2011 — *quod non* — Article 10(1) of the contested decision, by requiring consultation of the EURES Management Board, adds a new procedural condition for the adoption of such measures that does not originate in Article 38 of the regulation.

35 Moreover, according to the Parliament, the necessary bodies, which are supposed to assist the Commission in the implementation of the policies covered by Regulation No 492/2011, have already been created by the EU legislature. Thus, the Advisory Committee and the Technical Committee, referred to in Articles 21 and 29 of that regulation, respectively, have that very task. It follows that there is a potential overlap between the powers of the Advisory Committee and the Technical Committee, on the one hand, and those of the EURES Management Board, derived from the contested decision, on the other. The Parliament submits that the Commission does not have the authority to supplement the institutional framework, as it arises from Regulation No 492/2011, without the intervention of the EU legislature.

36 Sixth, as regards the EURES Charter, the adoption of which is provided for in Article 10 of the contested decision, the Parliament argues, in the first place, that Article 10(1) specifies that it is to be adopted by the Commission in accordance with the procedures set out in Articles 12, 13, 19 and 20 of Regulation No 492/2011. The Commission thus arrogated implementing powers to itself and decided upon the procedure to be applied for the adoption of the charter, whereas the conferment of such implementing powers and the decision as to such a procedure falls within the competence of the EU legislature. By being interposed between Regulation No 492/2011 and the future EURES Charter, Article 10 of the contested decision has lost any implementing character within the meaning of Article 291 TFEU. According to the Parliament, the EURES Charter is to form the subject-matter of a separate measure also based on Article 38 of the regulation.

37 In the second place, as regards the content of Article 10 of the contested decision, the Parliament submits that the content of that article further defines the scope of Articles 12, 13, 19 and 20 of Regulation No 492/2011. It is apparent from Article 10(2)(d) that the EURES Charter is to contain legal obligations for EURES Members and Partners. Although under Article 12(3) of Regulation No 492/2011 ‘such information concerning living and working conditions and the state of the labour market as is likely to be of guidance to workers’ is to be provided ‘in accordance with the procedure laid down by the Commission’, Article 10(2)(d)(ii) of the contested decision specifies the content of that type of information beyond the general formulation of Regulation No 492/2011. Furthermore, the regulation is supplemented, in a similar way, by Article 10(2)(d)(iii) and (iv) of the contested decision concerning the criteria for appointment of, and the training and qualifications required for, EURES personnel.

38 The Commission contends that the contested decision is entirely compatible with Article 291 TFEU and does not go beyond the implementing power as established and delimited by Regulation No 492/2011.

### *Findings of the Court*

#### Preliminary observations

39 Under Article 291(2) TFEU, where uniform conditions for implementing legally binding Union acts are needed, those acts are to confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Article 24 TEU and Article 26 TEU, on the Council of the European Union.

40 Article 38 of Regulation No 492/2011 confers on the Commission an implementing power within the meaning of Article 291(2) TFEU. Article 38 provides that the Commission is to adopt measures pursuant to the regulation for its implementation.

41 The contested decision is based on Article 38 of Regulation No 492/2011 and, in accordance with Article 291(4) TFEU, its title contains the word ‘implementing’.

42 In contrast to the action that gave rise to the judgment in *Commission v Parliament and Council* (C-427/12, EU:C:2014:170), the present action does not concern the lawfulness of the choice made by the EU legislature when it confers an implementing power on the Commission within the meaning of Article 291(2) TFEU, instead of conferring a delegated power within the meaning of Article 290(1) TFEU. The present action concerns the lawfulness of the implementing measure, namely, the contested decision, based on Article 38 of Regulation No 492/2011, in that it is claimed that the Commission exceeded the implementing power conferred on it by Article 38 of the regulation and Article 291 TFEU.

43 In this connection, it is important to note, first, that the implementing power conferred on the Commission is delimited by both Article 291(2) TFEU and the provisions of Regulation No 492/2011. The Court has held that when an implementing power is conferred on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of the legislative act, in order to ensure that it is implemented under uniform conditions in all Member States (judgment in *Commission v Parliament and Council*, EU:C:2014:170, paragraph 39).

44 Next, it is settled case-law that, within the framework of the Commission’s implementing power, the limits of which must be determined by reference amongst other things to the essential general aims of the legislative act in question, the Commission is authorised to adopt all the measures which are necessary or appropriate for the implementation of that act, provided that they are not contrary to it (judgments in *Netherlands v Commission*, C-478/93, EU:C:1995:324, paragraphs 30 and 31; *Portugal v Commission*, C-159/96, EU:C:1998:550, paragraphs 40 and 41; *Parliament v Commission*, C-403/05, EU:C:2007:624, paragraph 51; and *Parliament and Denmark v Commission*, C-14/06 and C-295/06, EU:C:2008:176, paragraph 52).

45 Furthermore, it follows from Article 290(1) TFEU in conjunction with Article 291(2) TFEU that in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements.

46 Having regard to the foregoing, the Commission must be deemed to provide further detail in relation to the legislative act within the meaning of the case-law cited in paragraph 43 above, if the provisions of the

implementing measure adopted by it (i) comply with the essential general aims pursued by the legislative act and (ii) are necessary or appropriate for the implementation of that act without supplementing or amending it.

47 It is in the light of those principles that the single plea in law raised by the Parliament in support of its action should be examined.

Whether the contested provisions comply with the essential general aims pursued by Regulation No 492/2011

48 Under Article 1 of the contested decision, the Commission together with the Member States is to establish and operate a European network of employment services, designated 'EURES', in order to fulfil the obligations laid down in Chapter II of Regulation No 492/2011.

49 It should therefore be examined whether the contested decision complies with the essential general aims pursued by Chapter II of the regulation, entitled 'Clearance of vacancies and applications for employment'.

50 As is apparent from recitals 8 and 9 in the preamble to Regulation No 492/2011, the essential general aim pursued by Chapter II of that regulation is to 'pu[t] workers in a position to take up concrete offers of employment from other regions of the Union' by 'ensur[ing] in a general way a clearer picture of the labour market'. Such a clearer picture is to be achieved, as set out in recital 8, through 'the machinery for vacancy clearance, in particular by means of direct cooperation between the central employment services and also between the regional services, as well as by coordination of the exchange of information'.

51 The second subparagraph of Article 11(1) of Regulation No 492/2011 defines that cooperation by providing that '[t]he central employment services of the Member States shall cooperate closely with each other and with the Commission with a view to acting jointly as regards the clearing of vacancies and applications for employment within the Union and the resultant placing of workers in employment'.

52 It is apparent from recital 4 in the preamble to, and Article 2 of, the contested decision, that the decision, like Regulation No 492/2011, is intended to facilitate the cross-border geographical mobility of workers, by promoting, under a joint action framework, namely, EURES, transparency and exchange of information on the European labour markets. The objective pursued by the contested decision is accordingly consistent with the essential general aim of Regulation No 492/2011 set out in paragraph 50 of the present judgment.

53 It is true that paragraphs (b) and (d) of Article 2 of the contested decision mention, respectively, 'participation in targeted mobility activities' and 'the development of measures to encourage and facilitate mobility of young workers' among the actions to be promoted by EURES, although such actions are not expressly provided for in Regulation No 492/2011. However, such actions clearly fall within the scope of the essential general aim pursued by that regulation, which is to promote the cross-border geographical mobility of workers.

54 Furthermore, none of the other provisions of the contested decision that were identified by the Parliament in its application and that concern the composition and operation of EURES permit the inference that, having regard to the essential general aims pursued by Regulation No 492/2011, the decision is contrary to that regulation.

55 The possibility of private entities being designated as EURES Partners, envisaged in Article 3(c) of the contested decision, is linked, as is apparent from recital 7 in the preamble to that decision, to 'the emergence of a wide variety of employment service providers on the labour market' following the elimination of the monopoly of public employment services, and is intended to ensure that EURES reaches 'its full potential'. That provision falls within the scope of the objective pursued by the contested decision, as set out in paragraph 52 of the present judgment, which is consistent with the essential general aim pursued by Regulation No 492/2011.

56 The same is true, first, of the task assigned by Article 4(3)(b) of the contested decision to the European Coordination Office of '[developing] a general approach to mobility' and, secondly, of the 'complementary services', provided by EURES pursuant to Article 7(2) and (3) of that decision, which, as Article 7(3) states, fulfil 'important labour market needs'.

57 Lastly, the creation of the EURES Management Board, envisaged in Article 8 of the contested decision, and the conferment on it of a consultative role under Article 8(7), and the adoption by the Commission of the

EURES Charter envisaged in Article 10 of that decision, are intended to improve the operation of EURES and thereby support the clearance of vacancies and applications for employment in the European Union.

58 Having regard to the foregoing considerations, it must therefore be concluded that the contested decision complies with the essential general aims of Chapter II of Regulation No 492/2011.

Whether the contested provisions are necessary or appropriate for the implementation of Regulation No 492/2011 and do not supplement or amend it

59 The Parliament claims, generally, that the EU legislature intended to limit the Commission's implementing power to the strict minimum by referring, in Article 38 of Regulation No 492/2011, to [the adoption of] implementing measures 'pursuant to this Regulation for its implementation'.

60 That line of argument cannot be upheld. Article 38 of Regulation No 492/2011 must be construed in the light of Article 291 TFEU. In those circumstances, the reference to measures [for the implementation of Regulation No 492/2011] in Article 38 of that regulation, concerns the need to ensure that that regulation is implemented under uniform conditions in all Member States (see judgment in *Commission v Parliament and Council*, EU:C:2014:170, paragraph 39) but it does not affect the scope of the implementing power which the Commission has under the framework established by Chapter II of Regulation No 492/2011.

61 If the appropriateness of the contested provisions for the implementation of Chapter II of Regulation No 492/2011 is not called in question, it suffices for the purposes of assessing whether those provisions comply with the limits of the implementing power afforded to the Commission, to examine whether they supplement or amend the legislative act.

62 In this connection, it must be recalled that the second subparagraph of Article 11(1) of Regulation No 492/2011, which appears in Chapter II of that regulation, envisages close cooperation between the employment services of the Member States and the Commission 'with a view to acting jointly as regards the clearing of vacancies and applications for employment within the Union and the resultant placing of workers in employment'. Such joint action, which involves, as can be seen from recital 9 in the preamble to Regulation No 429/2011, a certain coordination of the employment policies of the Member States, is characterised by the exchange of information on problems arising in connection with the freedom of movement and employment of workers, as provided for in Article 12 of that regulation, and by the putting in place of a system for the clearing of vacancies and applications for employment, as provided for in Articles 13 to 16 of the regulation, which system also involves the exchange of information between the specialist services of the Member States and between the latter and the Commission.

63 It must be stated that since EURES was not established by Regulation No 492/2011, the Commission was made responsible not only for setting up such 'joint action', but also for developing the operating rules for that action in accordance with the indications contained for that purpose in Regulation No 492/2011.

64 It should therefore be examined, taking into account the general framework established by Regulation No 492/2011 as to the joint action envisaged therein, whether the Commission, in adopting the contested decision, and, in particular, the provisions identified in the application, exceeded its implementing power when implementing that regulation.

65 The Parliament claims, first, that the Commission exceeded its implementing power by requiring, in Article 2(b) and (d) of the contested decision, respectively, that EURES promote participation in targeted mobility activities and the development of measures to encourage and facilitate mobility of young workers.

66 That argument must be rejected.

67 The provisions invoked by the Parliament fall within the scope of the cooperation between the Commission and the Member States required by the second subparagraph of Article 11(1) of Regulation No 492/2011 and do not supplement or amend the framework established by the legislative act in that regard. As the Advocate General stated in points 51 and 53 of his Opinion, Article 2(b) and 2(d) of the contested decision provide further detail in relation to the joint action envisaged in the second subparagraph of Article 11(1) of the regulation by emphasising

specific measures, which are already pursued by the Member States at national level, and in respect of which Article 2(b) and (d) of the contested decision is merely intended to ensure the coordination.

68 Second, the Parliament claims that the opening of EURES to private entities, envisaged in Article 3(c) of the contested decision, involves an amendment to Regulation No 492/2011 and therefore goes beyond the implementing power conferred by the regulation on the Commission.

69 It is true, as stated in paragraph 45 above, that the Commission would exceed the limits of the implementing power conferred on it by Regulation No 492/2011 if it amended elements of that regulation.

70 However, Article 3(c) of the contested decision does not involve any amendment to the framework established by that regulation.

71 It must be recalled in that regard that, in accordance with Article 11(2) of Regulation No 492/2011, the Member States are to designate the specialist services which are entrusted with cooperation with each other and with the departments of the Commission as regards the clearing of vacancies and applications for employment within the European Union and the resultant placement of workers. No provision of the regulation reserves that cooperation to entities of a public nature. The reference to private service providers in the contested decision accordingly constitutes the provision of further detail in relation to the framework established by Regulation No 492/2011 that takes account, as can be seen from recital 7 to the contested decision, of the elimination of the monopoly of public employment services in the Member States.

72 The Parliament's argument regarding Article 3(c) of the contested decision must therefore also be rejected.

73 Third, the Parliament argues that the Commission exceeded the implementing power conferred on it by Regulation No 492/2011 by requiring, in Article 4(3)(b) of the contested decision, that the European Coordination Office '[develop] ... a general approach to mobility'.

74 That argument cannot be upheld either.

75 It must be recalled that Regulation No 492/2011 confers on the European Coordination Office a key role in the system for the clearing of vacancies and applications for employment envisaged therein.

76 Thus, under the first subparagraph of Article 18 of Regulation No 492/2011, the European Coordination Office is to have 'the general task of promoting vacancy clearance at Union level'. Even though that provision makes the office responsible 'in particular' for technical duties, it is clear that Regulation No 492/2011 also entrusts the European Coordination Office with important tasks to support the action of the Commission and the Member States.

77 It must be observed in that regard that, under the second subparagraph of Article 18 of Regulation No 492/2011, the European Coordination Office is to summarise the information referred to in Articles 12 and 13 of that regulation and the data arising out of the studies and research carried out pursuant to Article 11 of the regulation, so as to bring to light any useful facts about foreseeable developments on the European Union labour market. In addition, under Article 19(1)(a) of Regulation No 492/2011, the office is responsible for 'analysing the ... movements of workers'. The support tasks of the European Coordination Office should therefore enable the Member States and the Commission to adopt, taking into account all relevant information, the measures necessary for controlling the balance of the labour market envisaged in Article 17 of Regulation No 492/2011 and fall within the scope of the objective set out in recital 9 to that regulation, which is to 'direct the efforts of Member States toward coordinating their employment policies'.

78 In that context, the Commission cannot be deemed to have exceeded the limits of its implementing power by conferring on the European Coordination Office, in Article 4(3)(b) of the contested decision, the task of developing 'a general approach to mobility in accordance with the European Employment Strategy', since such a general approach may be directed merely at preparing for the adoption of the controlling measures envisaged in Article 17 of Regulation No 492/2011 and at supporting the efforts of Member States toward coordinating their employment policies, in accordance with recital 9 to that regulation, without supplementing or amending thereby the nature of the support action of the European Coordination Office as provided for in that regulation.

79 Fourth, according to the Parliament, the Commission took the place of the EU legislature by introducing, in Article 7(2) and (3) of the contested decision, the concept of ‘complementary services’.

80 That argument must also be rejected.

81 It should be recalled that Article 7 of the contested decision sets out the range of EURES Services. Article 7(3) of that decision envisages the possibility of EURES offering complementary services. It states that those services are not obligatory in the sense of Chapter II of Regulation No 492/2011, but nevertheless fulfil important labour market needs.

82 Since the employment services of the Member States do not generally confine themselves to offering only the services which are mandatory under Regulation No 492/2011, the Commission was entitled, without supplementing or amending the framework established by that regulation, to consider that any ‘complementary services’ offered by them ought to be included in the framework for the implementation of the cooperation between the Commission and the employment services of the Member States required by the second subparagraph of Article 11(1) of Regulation No 492/2011.

83 As the Advocate General stated in point 89 of his Opinion, it is essential, in order better to achieve the objective of clearing vacancies and applications for employment pursued by the provisions of Chapter II of Regulation No 492/2011, that EURES be provided with all the information available to the various national services, including that deriving from complementary services.

84 Fifth, the Parliament argues that Article 8(7) of the contested decision also shows that the Commission went beyond its task of implementing Regulation No 492/2011.

85 Article 8(1) of the contested decision states that the EURES Management Board is to assist the Commission, its European Coordination Office and the National Coordination Offices in promoting and overseeing the development of EURES. Under Article 8(7) of that decision, the Commission is to consult the EURES Management Board on questions concerning the strategic planning, development, implementation, monitoring and evaluation of the services and activities referred to in the contested decision.

86 The Commission has not exceeded its implementing power by establishing the EURES Management Board and conferring a consultative role on it.

87 It should be recalled in this connection that, having regard to the fact that EURES was not established by Regulation No 492/2011, that regulation, and, in particular, the second subparagraph of Article 11(1) of the regulation, confer on the Commission the authority to develop the operating rules for joint action by the Commission and the Member States as regards the clearing of vacancies and applications for employment within the Union and the resultant placing of workers in employment. The establishment of the EURES Management Board and the conferment of a consultative role on it by the provision contested by the Parliament neither supplement nor amend the framework established by Regulation No 492/2011 since they are intended merely to ensure that the joint action required by that regulation operates effectively without encroaching, as the Advocate General stated in point 108 of his Opinion, on the powers of the Advisory Committee and the Technical Committee established by Articles 21 and 29 of that regulation, respectively.

88 Consequently, the argument regarding Article 8(7) of the contested decision cannot be upheld either.

89 Last, the Parliament claims that the Commission exceeded its implementing power by adopting Article 10 of the contested decision.

90 That last argument must also be rejected.

91 Article 10 of the contested decision merely states that the Commission is to adopt a EURES Charter. The adoption of the Charter by the Commission will constitute an implementing act within the meaning of Article 291(2) TFEU, the legality of which will fall to be assessed, should the case arise, in a subsequent action for annulment, taking into account the limits on the implementing power afforded to the Commission.

92 None the less, it cannot be accepted that the Commission exceeded its implementing power by the mere fact of having provided for the future adoption of the EURES Charter. Article 10 of the contested decision neither supplements nor amends the framework established by Regulation No 492/2011 since Article 10 and the action stated therein are intended merely to facilitate the exchange of information within EURES, as required by Articles 12 and 13 of that regulation, and to promote its effective operation.

93 It follows from all the foregoing that the single plea in law raised by the Parliament in support of its action cannot be upheld.

94 Therefore, the action must be dismissed.

**Costs**

[...]

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

1. **Dismisses the action;**
2. **Orders the European Parliament to pay the costs.**



## **Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 291(3) thereof,

Having regard to the proposal from the Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

[...]

### Article 1

#### Subject-matter

This Regulation lays down the rules and general principles governing the mechanisms which apply where a legally binding Union act (hereinafter a 'basic act') identifies the need for uniform conditions of implementation and requires that the adoption of implementing acts by the Commission be subject to the control of Member States.

### Article 2

#### Selection of procedures

1. A basic act may provide for the application of the advisory procedure or the examination procedure, taking into account the nature or the impact of the implementing act required.

2. The examination procedure applies, in particular, for the adoption of:

- (a) implementing acts of general scope;
- (b) other implementing acts relating to:
  - (i) programmes with substantial implications;
  - (ii) the common agricultural and common fisheries policies;
  - (iii) the environment, security and safety, or protection of the health or safety, of humans, animals or plants;
  - (iv) the common commercial policy;
  - (v) taxation.

3. The advisory procedure applies, as a general rule, for the adoption of implementing acts not falling within the ambit of paragraph 2. However, the advisory procedure may apply for the adoption of the implementing acts referred to in paragraph 2 in duly justified cases.

### Article 3

#### Common provisions

1. The common provisions set out in this Article shall apply to all the procedures referred to in Articles 4 to 8.

2. The Commission shall be assisted by a committee composed of representatives of the Member States. The committee shall be chaired by a representative of the Commission. The chair shall not take part in the committee vote.

3. The chair shall submit to the committee the draft implementing act to be adopted by the Commission.

Except in duly justified cases, the chair shall convene a meeting not less than 14 days from submission of the draft implementing act and of the draft agenda to the committee. The committee shall deliver its opinion on the draft implementing act within a time limit which the chair may lay down according to the urgency of the matter. Time limits shall be proportionate and shall afford committee members early and effective opportunities to examine the draft implementing act and express their views.

4. Until the committee delivers an opinion, any committee member may suggest amendments and the chair may present amended versions of the draft implementing act.

The chair shall endeavour to find solutions which command the widest possible support within the committee. The chair shall inform the committee of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards those suggestions which have been largely supported within the committee.

5. In duly justified cases, the chair may obtain the committee's opinion by written procedure. The chair shall send the committee members the draft implementing act and shall lay down a time limit for delivery of an opinion according to the urgency of the matter. Any committee member who does not oppose the draft implementing act or who does not explicitly abstain from voting thereon before the expiry of that time limit shall be regarded as having tacitly agreed to the draft implementing act.

Unless otherwise provided in the basic act, the written procedure shall be terminated without result where, within the time limit referred to in the first subparagraph, the chair so decides or a committee member so requests. In such a case, the chair shall convene a committee meeting within a reasonable time.

6. The committee's opinion shall be recorded in the minutes. Committee members shall have the right to ask for their position to be recorded in the minutes. The chair shall send the minutes to the committee members without delay.

7. Where applicable, the control mechanism shall include referral to an appeal committee.

The appeal committee shall adopt its own rules of procedure by a simple majority of its component members, on a proposal from the Commission.

Where the appeal committee is seised, it shall meet at the earliest 14 days, except in duly justified cases, and at the latest 6 weeks, after the date of referral. Without prejudice to paragraph 3, the appeal committee shall deliver its opinion within 2 months of the date of referral.

A representative of the Commission shall chair the appeal committee.

The chair shall set the date of the appeal committee meeting in close cooperation with the members of the committee, in order to enable Member States and the Commission to ensure an appropriate level of representation. By 1 April 2011, the Commission shall convene the first meeting of the appeal committee in order to adopt its rules of procedure.

#### Article 4

##### Advisory procedure

1. Where the advisory procedure applies, the committee shall deliver its opinion, if necessary by taking a vote. If the committee takes a vote, the opinion shall be delivered by a simple majority of its component members.

2. The Commission shall decide on the draft implementing act to be adopted, taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered.

#### Article 5

## Examination procedure

1. Where the examination procedure applies, the committee shall deliver its opinion by the majority laid down in Article 16(4) and (5) of the Treaty on European Union and, where applicable, Article 238(3) TFEU, for acts to be adopted on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in those Articles.
2. Where the committee delivers a positive opinion, the Commission shall adopt the draft implementing act.
3. Without prejudice to Article 7, if the committee delivers a negative opinion, the Commission shall not adopt the draft implementing act. Where an implementing act is deemed to be necessary, the chair may either submit an amended version of the draft implementing act to the same committee within 2 months of delivery of the negative opinion, or submit the draft implementing act within 1 month of such delivery to the appeal committee for further deliberation.
4. Where no opinion is delivered, the Commission may adopt the draft implementing act, except in the cases provided for in the second subparagraph. Where the Commission does not adopt the draft implementing act, the chair may submit to the committee an amended version thereof.

Without prejudice to Article 7, the Commission shall not adopt the draft implementing act where:

- (a) that act concerns taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures;
- (b) the basic act provides that the draft implementing act may not be adopted where no opinion is delivered; or
- (c) a simple majority of the component members of the committee opposes it.

In any of the cases referred to in the second subparagraph, where an implementing act is deemed to be necessary, the chair may either submit an amended version of that act to the same committee within 2 months of the vote, or submit the draft implementing act within 1 month of the vote to the appeal committee for further deliberation.

5. By way of derogation from paragraph 4, the following procedure shall apply for the adoption of draft definitive anti-dumping or countervailing measures, where no opinion is delivered by the committee and a simple majority of its component members opposes the draft implementing act.

The Commission shall conduct consultations with the Member States. 14 days at the earliest and 1 month at the latest after the committee meeting, the Commission shall inform the committee members of the results of those consultations and submit a draft implementing act to the appeal committee. By way of derogation from Article 3(7), the appeal committee shall meet 14 days at the earliest and 1 month at the latest after the submission of the draft implementing act. The appeal committee shall deliver its opinion in accordance with Article 6. The time limits laid down in this paragraph shall be without prejudice to the need to respect the deadlines laid down in the relevant basic acts.

## Article 6

### Referral to the appeal committee

1. The appeal committee shall deliver its opinion by the majority provided for in Article 5(1).
2. Until an opinion is delivered, any member of the appeal committee may suggest amendments to the draft implementing act and the chair may decide whether or not to modify it.

The chair shall endeavour to find solutions which command the widest possible support within the appeal committee.

The chair shall inform the appeal committee of the manner in which the discussions and suggestions for amendments have been taken into account, in particular as regards suggestions for amendments which have been largely supported within the appeal committee.

3. Where the appeal committee delivers a positive opinion, the Commission shall adopt the draft implementing act.

Where no opinion is delivered, the Commission may adopt the draft implementing act.

Where the appeal committee delivers a negative opinion, the Commission shall not adopt the draft implementing act.

4. By way of derogation from paragraph 3, for the adoption of definitive multilateral safeguard measures, in the absence of a positive opinion voted by the majority provided for in Article 5(1), the Commission shall not adopt the draft measures.

5. By way of derogation from paragraph 1, until 1 September 2012, the appeal committee shall deliver its opinion on draft definitive anti-dumping or countervailing measures by a simple majority of its component members.

#### Article 7

##### Adoption of implementing acts in exceptional cases

By way of derogation from Article 5(3) and the second subparagraph of Article 5(4), the Commission may adopt a draft implementing act where it needs to be adopted without delay in order to avoid creating a significant disruption of the markets in the area of agriculture or a risk for the financial interests of the Union within the meaning of Article 325 TFEU.

In such a case, the Commission shall immediately submit the adopted implementing act to the appeal committee. Where the appeal committee delivers a negative opinion on the adopted implementing act, the Commission shall repeal that act immediately. Where the appeal committee delivers a positive opinion or no opinion is delivered, the implementing act shall remain in force.

#### Article 8

##### Immediately applicable implementing acts

1. By way of derogation from Articles 4 and 5, a basic act may provide that, on duly justified imperative grounds of urgency, this Article is to apply.

2. The Commission shall adopt an implementing act which shall apply immediately, without its prior submission to a committee, and shall remain in force for a period not exceeding 6 months unless the basic act provides otherwise.

3. At the latest 14 days after its adoption, the chair shall submit the act referred to in paragraph 2 to the relevant committee in order to obtain its opinion.

4. Where the examination procedure applies, in the event of the committee delivering a negative opinion, the Commission shall immediately repeal the implementing act adopted in accordance with paragraph 2.

5. Where the Commission adopts provisional anti-dumping or countervailing measures, the procedure provided for in this Article shall apply. The Commission shall adopt such measures after consulting or, in cases of extreme urgency, after informing the Member States. In the latter case, consultations shall take place 10 days at the latest after notification to the Member States of the measures adopted by the Commission.

#### Article 9

##### Rules of procedure

1. Each committee shall adopt by a simple majority of its component members its own rules of procedure on the proposal of its chair, on the basis of standard rules to be drawn up by the Commission following consultation with Member States. Such standard rules shall be published by the Commission in the Official Journal of the European Union.

In so far as may be necessary, existing committees shall adapt their rules of procedure to the standard rules.

2. The principles and conditions on public access to documents and the rules on data protection applicable to the Commission shall apply to the committees.

## Article 10

### Information on committee proceedings

1. The Commission shall keep a register of committee proceedings which shall contain:
  - (a) a list of committees;
  - (b) the agendas of committee meetings;
  - (c) the summary records, together with the lists of the authorities and organisations to which the persons designated by the Member States to represent them belong;
  - (d) the draft implementing acts on which the committees are asked to deliver an opinion;
  - (e) the voting results;
  - (f) the final draft implementing acts following delivery of the opinion of the committees;
  - (g) information concerning the adoption of the final draft implementing acts by the Commission; and
  - (h) statistical data on the work of the committees.
2. The Commission shall also publish an annual report on the work of the committees.
3. The European Parliament and the Council shall have access to the information referred to in paragraph 1 in accordance with the applicable rules.
4. At the same time as they are sent to the committee members, the Commission shall make available to the European Parliament and the Council the documents referred to in points (b), (d) and (f) of paragraph 1 whilst also informing them of the availability of such documents.
5. The references of all documents referred to in points (a) to (g) of paragraph 1 as well as the information referred to in paragraph 1(h) shall be made public in the register.

## Article 11

### Right of scrutiny for the European Parliament and the Council

Where a basic act is adopted under the ordinary legislative procedure, either the European Parliament or the Council may at any time indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act. In such a case, the Commission shall review the draft implementing act, taking account of the positions expressed, and shall inform the European Parliament and the Council whether it intends to maintain, amend or withdraw the draft implementing act.

## Article 12

### Repeal of Decision 1999/468/EC

Decision 1999/468/EC is hereby repealed.

The effects of Article 5a of Decision 1999/468/EC shall be maintained for the purposes of existing basic acts making reference thereto.

## Article 13

### Transitional provisions: adaptation of existing basic acts

1. Where basic acts adopted before the entry into force of this Regulation provide for the exercise of implementing powers by the Commission in accordance with Decision 1999/468/EC, the following rules shall apply:

- (a) where the basic act makes reference to Article 3 of Decision 1999/468/EC, the advisory procedure referred to in Article 4 of this Regulation shall apply;
- (b) where the basic act makes reference to Article 4 of Decision 1999/468/EC, the examination procedure referred to in Article 5 of this Regulation shall apply, with the exception of the second and third subparagraphs of Article 5(4);
- (c) where the basic act makes reference to Article 5 of Decision 1999/468/EC, the examination procedure referred to in Article 5 of this Regulation shall apply and the basic act shall be deemed to provide that, in the absence of an opinion, the Commission may not adopt the draft implementing act, as envisaged in point (b) of the second subparagraph of Article 5(4);
- (d) where the basic act makes reference to Article 6 of Decision 1999/468/EC, Article 8 of this Regulation shall apply;
- (e) where the basic act makes reference to Articles 7 and 8 of Decision 1999/468/EC, Articles 10 and 11 of this Regulation shall apply.

2. Articles 3 and 9 of this Regulation shall apply to all existing committees for the purposes of paragraph 1.

3. Article 7 of this Regulation shall apply only to existing procedures which make reference to Article 4 of Decision 1999/468/EC.

4. The transitional provisions laid down in this Article shall not prejudice the nature of the acts concerned.

## Article 14

### Transitional arrangement

This Regulation shall not affect pending procedures in which a committee has already delivered its opinion in accordance with Decision 1999/468/EC.

## Article 15

[...]

## Article 16

### Entry into force

This Regulation shall enter into force on 1 March 2011.

## LECTURE 7: OPENNESS AND TRANSPARENCY IN EU INSTITUTIONAL FUNCTIONING

The European Union consistently has been reproached rather consistently by Member States' parliaments and citizens' groups for being opaque and non-transparent. In an attempt to increase the visibility of its activities and to increase its legitimacy with those actors, the EU adopted a transparency-oriented decision-making approach. Transparency comprises two features in this respect. Firstly, it implies openness concerning decision-making processes, procedures and criteria employed in legislative or regulatory decision-making itself. Openness as such implies that the balances struck by the institutions should be open for anyone willing to understand and retrace. Secondly and complementarily, such openness also presupposes a right for individuals to obtain access to documents relevant for the general public in understanding how a specific decision has come to being. General openness and specific access to documents entitlements have been enshrined in Article 15 TFEU. In addition, Article 42 of the Charter also acknowledges a fundamental right of access to documents. In relation to access, the Council and European Parliament adopted Regulation 1049/2001, which rendered that fundamental right operational in relation to both institutions and the European Commission. The same right has later on been extended to other institutions, offices and bodies of the European Union. The Court of Justice has subsequently been called upon to interpret and apply that Regulation, which is premised on the "widest possible access" to EU-held or – authored documents. In practice, it soon turned out that the "widest possible access" does not necessarily imply full and unrestricted access to all documents; indeed, some categories of documents appear to be *prima facie* per se excluded from access. The judicial recognition of such categories in itself raises interesting and new questions regarding the scope of the widest possible access. In this lecture, we will study the access regime against the background of the post-Lisbon openness approach to EU decision-making. We will particularly outline how the Court struck a balance between openness, access and confidentiality in that regard and how that balance impacts on citizens' legitimate expectations vis-à-vis a transparent European Union.

### Materials to read:

- Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] O.J. L145/43.
- Court of Justice, 17 October 2013, Case C-280/11 P, *Council v Access Info Europe*, ECLI:EU:C:2013:671.
- Court of Justice, 3 July 2014, Case C-350/12 P, *Council v in 't Veld*, ECLI:EU:C:2014:2039.
- General Court, 7 July 2015, Case T-677/13, *Axa Versicherung AG v European Commission*, ECLI:EU:T:2015:473.
  
- A. Alemanno, "Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy", 32 *European Law Review* (2014), 72-90 (via eCampus).
- D. Curtin and P. Leino, 2016 Report to the European Parliament, *Openness, transparency and access to documents in the EU* (via eCampus).

Lecture 7 outline:

- a. Transparency: a buzzword in the wake of the Maastricht Treaty
  1. Calls for increased transparency
  2. Transparency as access to documents
  3. From Report to Recommendation to binding decision
  4. The complementary role of the European Ombudsman
- b. Enhancing transparency through access: Regulation 1049/2001
  1. The 'widest possible access' to Council, Commission and Parliament documents
  2. Widest possible in practice: exceptions
  3. Exceptions in the Court's case law: EU legislation premised on transparency – administrative and Treaty negotiations premised on confidentiality?
- c. Embedding access within a more general openness focus
  1. Access and openness: two sides of the same coin?
  2. What relationship between access and openness? Reconstructing Article 15 TFEU
  3. Communicating vessels?
  4. The importance of ex ante communication strategies
- d. Recalibrating access to documents and openness within a general transparency principle narrative
  1. More openness, less access?
  2. More openness, more access?
  3. In search for judicial clarifications and directions...

Questions for discussion:

- How do openness and access elements relate to each other in the context of Article 15 TFEU?
- Does EU law still allow the institutions to maintain, develop and structure policy areas premised on confidential decision-making?

## **Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,

Having regard to the proposal from the Commission(1),

Acting in accordance with the procedure referred to in Article 251 of the Treaty(2),

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

(5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the Treaty of Amsterdam, draw guidance from this Regulation as regards documents concerning the activities covered by those two Treaties.

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.

(7) In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules.

(8) In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation.

(9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final

Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.

(12) All rules concerning access to documents of the institutions should be in conformity with this Regulation.

(13) In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.

(14) Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.

(15) Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.

(16) This Regulation is without prejudice to existing rights of access to documents for Member States, judicial authorities or investigative bodies.

(17) In accordance with Article 255(3) of the EC Treaty, each institution lays down specific provisions regarding access to its documents in its rules of procedure. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents(3), Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents(4), European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents(5), and the rules on confidentiality of Schengen documents should therefore, if necessary, be modified or be repealed,

HAVE ADOPTED THIS REGULATION:

Article 1

Purpose

The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

Article 2

Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

### Article 3

#### Definitions

For the purpose of this Regulation:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

### Article 4

#### Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

## Article 5

### Documents in the Member States

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

## Article 6

### Applications

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

## Article 7

#### Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.
2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.
3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.
4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

#### Article 8

##### Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.
2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.
3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

#### Article 9

##### Treatment of sensitive documents

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.
2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.
3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.
4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.

## Article 10

### Access following an application

1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

## Article 11

### Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.

## Article 12

### Direct access in electronic form or through a register

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

## Article 13

### Publication in the Official Journal

1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:

(a) Commission proposals;

(b) common positions adopted by the Council in accordance with the procedures referred to in Articles 251 and 252 of the EC Treaty and the reasons underlying those common positions, as well as the European Parliament's positions in these procedures;

(c) framework decisions and decisions referred to in Article 34(2) of the EU Treaty;

(d) conventions established by the Council in accordance with Article 34(2) of the EU Treaty;

(e) conventions signed between Member States on the basis of Article 293 of the EC Treaty;

(f) international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty.

2. As far as possible, the following documents shall be published in the Official Journal:

(a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant to Article 34(2) of the EU Treaty;

(b) common positions referred to in Article 34(2) of the EU Treaty;

(c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

## Article 14

### Information

1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.

2. The Member States shall cooperate with the institutions in providing information to the citizens.

## Article 15

### Administrative practice in the institutions

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.

2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

#### Article 16

##### Reproduction of documents

This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

#### Article 17

##### Reports

1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.

2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.

#### Article 18

##### Application measures

1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.

2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community(6) with this Regulation in order to ensure the preservation and archiving of documents to the fullest extent possible.

3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

#### Article 19

##### Entry into force

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Communities.

It shall be applicable from 3 December 2001.

**Case C-280/11 P, *Council v Access Info Europe***

In Case C-280/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 31 May 2011,

**Council of the European Union**, represented by B. Driessen and C. Fekete, acting as Agents,

appellant,

supported by

**Czech Republic**, represented by M. Smolek and D. Hadroušek, acting as Agents,

**Kingdom of Spain**, represented by S. Centeno Huerta, acting as Agent,

**French Republic**, represented by G. de Bergues and N. Rouam, acting as Agents,

interveners in the appeal,

the other parties to the proceedings being:

**Access Info Europe**, established in Madrid (Spain), represented by O. Brouwer and J. Blockx, advocaten,

applicant at first instance,

supported by:

**European Parliament**, represented by A. Caiola and M. Dean, acting as Agents, with an address for service in Luxembourg,

intervener in the appeal,

**Hellenic Republic**, represented by E.-M. Mamouna and K. Boskovits, acting as Agents,

**United Kingdom of Great Britain and Northern Ireland**,

interveners at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the First Chamber, A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 21 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 16 May 2013

gives the following

## **Judgment**

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of 22 March 2011 in Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073 ('the judgment under appeal') by which the General Court of the European Union annulled the Council's decision of 26 February 2009 ('the decision at issue') refusing to let Access Info Europe ('Access Info') have access to certain information contained in a note of 26 November 2008 from the Secretariat General of the Council to the Working Party on Information, set up by the Council, concerning the proposal for a new regulation regarding public access to European Parliament, Council and Commission documents ('the requested document').

## **Legal context**

2 Recital 6 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) is worded as follows:

'Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.'

3 Under Article 1 of that regulation:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission ... documents ... in such a way as to ensure the widest possible access to documents.

...'

4 The first subparagraph of Article 4(3) of Regulation No 1049/2001 provides:

'Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

## **Background to the dispute**

5 By e-mail of 3 December 2008, Access Info applied to the Council for access to the requested document. That document contained the proposals for amendments, or for re-drafting, tabled by a number of Member States at the meeting of the Working Party on Information, referred to in paragraph 1 above, on 25 November 2008.

6 By the decision at issue, the Council granted partial access to the requested document. In particular, the Council sent Access Info a version of that document which did not make it possible to identify the Member States which had put those proposals forward.

7 The Council justified its refusal to disclose the identities of those Member States on the basis of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, on the ground that disclosure of those identities would have seriously undermined its decision-making process and there was no overriding public interest in such disclosure. Indeed, bearing in mind the preliminary nature of the discussions under way at that time, disclosure of the identities of the Member States concerned would have reduced the delegations' room for manoeuvre during the negotiations, which are a feature of the legislative procedure in the Council, and would therefore have impaired its ability to reach an agreement.

8 On 26 November 2008 – that is to say, the very day on which the requested document was created – an unedited version of the requested document was made available to the public on the internet site of the organisation Statewatch, without authorisation (‘the unauthorised disclosure’).

### **The judgment under appeal**

9 By application lodged at the Registry of the General Court on 12 June 2009, Access Info brought an action for annulment of the decision at issue, which was upheld by the judgment under appeal.

10 The General Court first set out the basic principles relating to access to documents. In particular, in paragraphs 55 to 58 of that judgment, it stated that the right of access to documents of the institutions is connected with the democratic nature of those institutions and that, since the purpose of Regulation No 1049/2001 is, in accordance with Article 1 thereof, to ensure the widest possible right of access, the exceptions to disclosure must be interpreted and applied strictly. The General Court observed that those principles are clearly of particular relevance where the Council is acting in its legislative capacity, as in that case.

11 Next, in paragraphs 59 and 60 of the judgment under appeal, the General Court stated that the mere fact that a document concerns an interest protected by an exception to disclosure is not sufficient to justify the application of that exception: such application may be justified only if access to that document could specifically and effectively undermine the protected interest. Moreover, the risk of the protected interest being undermined must not be purely hypothetical and must be reasonably foreseeable. It is up to the institution concerned to weigh the specific interest which must be protected through non-disclosure of part of the requested document – in the circumstances, the identity of the Member States which put forward the proposals – against the general interest in the entire document being made accessible.

12 Applying those principles, the General Court went on in paragraphs 68 to 80 of the judgment under appeal to examine the main reason put forward by the Council as justification for only partly disclosing the requested document, that is to say, the alleged reduction in the delegations’ room for manoeuvre within the Council as a result of the fact that disclosure of the identities of the Member States which put forward proposals would give rise to so much public pressure on those States that it would no longer be possible for a delegation from those States to submit a proposal tending towards the restriction of openness.

13 First, in paragraphs 69 to 74 of the judgment under appeal, the General Court found that it is specifically the principle of democratic legitimacy which requires those responsible for the proposals contained in the requested document to be publicly accountable for their actions, especially where that document is part of the legislative procedure. The General Court also found that the disclosure of the identities of those who put forward a proposal would not prevent the delegations from subsequently departing from that proposal. It explained that a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that aspect of proposals made in the legislative process. Moreover, according to the General Court, it cannot be presumed that all sections of public opinion are opposed to limiting the principle of transparency. Lastly, the General Court found that even the unauthorised disclosure had not had adverse effects on the Council’s decision-making process.

14 Secondly, in paragraphs 75 and 76 of the judgment under appeal, the General Court rejected the Council’s argument that it was necessary to take into consideration the preliminary nature of the discussions in order to assess the risk, in terms of undermining the decision-making process, associated with the reduction of the Member States’ room for manoeuvre. According to the General Court, the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, as that provision does not make a distinction according to the state of progress of the discussions.

15 Thirdly, in paragraphs 77 and 78 of the judgment, the General Court rejected the argument that it was necessary to take into consideration the particularly sensitive nature of the proposals made by the Member State delegations. In that regard, the General Court stated that proposals for amendments are part of the normal legislative process. As a result, they are not ‘particularly sensitive’ to the point that a fundamental interest of the European Union or of the Member States would be jeopardised if the identity of those who made the proposals were to be disclosed, especially since it was not the content of the proposals made by the Member States that was at issue, but solely the identification of the delegations who had tabled them. Furthermore, the General Court

found that it is in the very nature of democratic debate that a proposal for amendment of a draft regulation can be subject to both positive and negative comments on the part of the public and the media.

16 Fourthly, in paragraph 79 of the judgment under appeal, the General Court rejected the argument that the unusual lengthiness of the procedure for approving the new regulation on access to documents was attributable to the difficulties which the unauthorised disclosure had created for the negotiations. According to the General Court, the true position was that there were other political and legal reasons which could account for the length of the legislative process.

17 Lastly, in paragraphs 82 and 83 of the judgment under appeal, the General Court rejected the Council's argument blaming the unauthorised disclosure for the subsequent loss of detail, in particular as regards the identification of delegations, from the reports of the meetings of the Council's working parties. In that connection, the General Court stated that this change could also be explained by the fact that Access Info had brought an action contesting the decision at issue. In any event, the absence of any causal link between disclosure to the public of the names of the delegations and the serious undermining of the decision-making process was confirmed, according to the General Court, by a document which post-dated the unauthorised disclosure and which did not simply refer, without mentioning names, to the proposals to amend the legislative text, but specified the identity of the delegations, at least in the original version of that document.

18 On the basis of the above considerations, inter alia, the General Court upheld the action and annulled the decision at issue.

#### **The procedure before the Court of Justice and the forms of order sought by the parties**

19 By order of 17 October 2011, the Czech Republic and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by the Council, and the European Parliament was granted leave to intervene in support of the form of order sought by Access Info. By order of 2 February 2012, the French Republic was granted leave to intervene in support of the form of order sought by the Council.

20 The Council, the Czech Republic, the Hellenic Republic, the Kingdom of Spain and the French Republic claim that the Court should:

- set aside the judgment under appeal;
- give final judgment in the matters that are the subject of this appeal; and
- order Access Info to pay the costs both of the appeal proceedings and of the proceedings at first instance.

21 Access Info and the European Parliament contend that the Court should dismiss the appeal and order the Council to pay the costs.

#### **The appeal**

22 The Council relies, essentially, on three grounds of appeal.

##### *The first ground of appeal*

##### Arguments of the parties

23 By its first ground of appeal, the Council, supported in this regard by the Kingdom of Spain, submits that the General Court disregarded the balanced approach laid down both in primary law (Article 207(3) EC and Article 255 EC, applicable *ratione temporis*) and secondary law (recital 6 to Regulation No 1049/2001 and the first subparagraph of Article 4(3) thereof) between, on the one hand, the wider right of access to documents relating to the legislative activity of the institutions and, on the other, the need to preserve the effectiveness of the decision-making process. In particular, the General Court – inter alia in paragraph 69 of the judgment under appeal – construed the first subparagraph of Article 4(3) in such a way as to attribute undue and excessive weight to the

transparency of the decision-making process, without taking any account of the needs associated with the effectiveness of that process.

24 More specifically, the Council – supported by the Czech Republic, the Hellenic Republic and the Kingdom of Spain – argues that its legislative process is very fluid and requires a high level of flexibility on the part of Member States so that they can modify their initial position, thus maximising the chances of reaching an agreement. In order to ensure a ‘negotiating space’ and thereby preserve the effectiveness of the legislative process, it is necessary to ensure that Member States have maximum room for manoeuvre in the discussions and that they do so from the earliest stages of the procedure. That room for manoeuvre would be reduced if the identity of the delegations were disclosed too early in the procedure, in that it would have the effect of triggering pressure from public opinion, which would deprive the delegations themselves of the flexibility needed to ensure the effectiveness of the Council’s decision-making process.

25 In that connection, the Czech Republic and the Kingdom of Spain add that, in the present case, it was not necessary to name the delegations in order to attain the objective pursued by Regulation No 1049/2001. Full access to the content of the requested document would be sufficient to ensure a democratic debate on the issues which that document concerns. Moreover, the only consequence of disclosing the identity of the delegations would have been to enable pressure to be exerted, not on the Council, but on the Member States.

26 Access Info contends that, by its first ground of appeal, the Council criticises only three paragraphs of the judgment under appeal, namely, paragraphs 57 and 58, in which the General Court merely set out the relevant case-law, and paragraph 69, in which – according to Access Info, supported in that regard by the European Parliament – the General Court specifically weighed the requirements of transparency against the need to protect the decision-making process, and concluded that disclosure of the identities of the Member States concerned did not appear liable, in the case before it, to undermine the Council’s decision-making process.

#### Findings of the Court

27 In order to rule on this ground of appeal, it should be noted that, in accordance with recital 1 to Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 TEU of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 to that regulation, the public right of access to documents of the institutions is related to the democratic nature of those institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 34; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraph 68; and Case C-506/08 P *Sweden v MyTravel and Commission* [2011] ECR I-6237, paragraph 72).

28 To that end, Regulation No 1049/2001 is designed – as is stated in recital 4 and reflected in Article 1 – to confer on the public as wide a right of access as possible to documents of the institutions (*Sweden and Turco v Council*, paragraph 33; *Sweden and Others v API and Commission*, paragraph 69; and *Sweden v MyTravel and Commission*, paragraph 73).

29 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (see Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 62; *Sweden and Others v API and Commission*, paragraphs 70 and 71; and *Sweden v MyTravel and Commission*, paragraph 74).

30 Nevertheless, as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (*Sison v Council*, paragraph 63; *Sweden and Turco v Council*, paragraph 36; *Sweden and Others v API and Commission*, paragraph 73; and *Sweden v MyTravel and Commission*, paragraph 75).

31 Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon

which it is relying. Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Sweden v MyTravel and Commission*, paragraph 76 and the case-law cited).

32 Moreover, if the institution applies one of the exceptions provided for in Article 4 of Regulation 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (*Sweden and Turco v Council*, paragraph 45).

33 Moreover, the Court has also held that those considerations are clearly of particular relevance where the Council is acting in its legislative capacity, a fact reflected in recital 6 to Regulation No 1049/2001, which states that wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights (*Sweden and Turco v Council*, paragraph 46).

34 It is on the basis of those principles that the Court of Justice must examine the first ground of appeal, by which the Council claims, in essence, that the General Court did not take any account of the needs associated with the protection of its decision-making process.

35 It should be noted that, in paragraph 69 of the judgment under appeal, the General Court specifically stated that, in accordance with the case-law referred to in paragraph 30 above, public access to the entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied strictly.

36 Contrary to the assertions made by the Council, the General Court did take account of the needs associated with the effectiveness of the decision-making process: in paragraphs 69 to 83 of the judgment under appeal, it carried out a detailed examination of the arguments adduced by the Council to justify the application, in the circumstances, of the exception concerning the protection of the Council's decision-making process.

37 Thus, far from disregarding the balance between the principle of transparency and the preservation of the effectiveness of the Council's decision-making process, the General Court, in accordance with the principles set out in paragraphs 31 to 33 above, examined the substance of all the arguments put forward by the Council to justify the application, in the circumstances, of the exception referred to in the first subparagraph of Article 4(3) of Regulation 1049/2001.

38 It was not until after it had examined those arguments and found that none of them could prove that disclosure of the information relating to the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the interest protected by the exception in question that the General Court concluded, in paragraph 84 of the judgment under appeal, that the Council had infringed the first subparagraph of Article 4(3) of Regulation 1049/2001 by precluding, through the decision at issue, the disclosure of that information.

39 Moreover, to the extent that the Council's criticism could be seen as an attempt to put in question the General Court's assessment of those arguments, it must be stated that the Council does not, in support of this ground of appeal, put forward anything to refute the General Court's conclusion that the Council's arguments at first instance were not sufficiently substantiated to establish that disclosure of the information concerning the identity of the Member States in question would have given rise to a genuine risk of seriously undermining the Council's decision-making process.

40 Lastly, as regards the argument of the Czech Republic and the Kingdom of Spain that disclosure of the identity of the delegations was not necessary to attain the objective of Regulation No 1049/2001, suffice it to state that, as was pointed out in paragraph 28 above, the aim of Regulation No 1049/2001, as stated in Article 1 thereof, is to confer on the public as wide a right of access as possible to documents of the institutions. It is in the light of that principle that the General Court rightly stated in paragraph 69 of the judgment under appeal that Regulation No 1049/2001 aims to ensure public access to the entire content of Council documents, including, in this case, the

identity of those who put forward the proposals, and full access to those documents may be limited only on the basis of the exceptions to that right laid down in that regulation, which must, for their part, be based on a genuine risk that the interest which they protect might be undermined. As the General Court ruled out the existence of such a risk in the circumstances of the case, partial access to the requested document cannot be regarded as sufficient for the purposes of attaining the objective pursued by Regulation No 1049/2001.

41 In those circumstances, the first ground of appeal must be rejected as unfounded.

*The third ground of appeal*

Arguments of the parties

42 By its third ground of appeal, which it is appropriate to examine in second place and which comprises three parts, the Council alleges that the General Court committed several errors in law, which led it to conclude that the Council had not established ‘to the requisite legal and factual standard’ the risk that its decision-making process might be seriously undermined.

43 By the first part of its third ground of appeal, the Council, supported by the Hellenic Republic and the Kingdom of Spain, criticises the General Court for having required, in paragraphs 73 and 74 of the judgment under appeal, proof that the interest protected by the exception had actually been seriously undermined. According to the Council, for it to be possible to rely on the exception under the first subparagraph of Article 4(3) of Regulation 1049/2001, there need only be a risk of harm and, accordingly, an institution which receives a request for access to documents need only establish the likelihood of harm to its decision-making process as a result of the disclosure of that document.

44 For their part, Access Info and the European Parliament contend that, far from requiring the Council to provide proof of an actual adverse effect on the decision-making process, the General Court merely examined, in paragraphs 73 and 74, the argument raised by the Council itself that the Council’s decision-making process had been genuinely and specifically undermined as a result of the unauthorised disclosure.

45 By the second part of its third ground of appeal, the Council, with the backing of the Hellenic Republic, argues that, in paragraph 76 of the judgment under appeal, the General Court did not take due account of the importance of the state of progress of discussions when assessing the risk posed to the decision-making process by disclosure of the identities of the delegations. According to the Council, if the public were recognised as having the right to scrutinise all the preparatory documents throughout the entire decision-making process, delegations would be dissuaded from expressing their points of view during the initial stages of the procedure. Indeed, given the ‘peculiarities’ of the Council’s *modus operandi*, those opinions – especially when they relate to technical matters – are often exploratory in nature and do not necessarily reflect the precise and definitive position of the Member State from which those delegations come, which means that they are liable to evolve during the procedure. The effect of recognising a public right of scrutiny at that preliminary stage of the procedure would be that delegations would refrain from expressing their points of view until they had been assigned a negotiation position by their respective governments, and this would make the legislative process more rigid.

46 In response to those arguments, Access Info contends, first of all, that the Council did not explain the precise nature of the ‘peculiarities’ that purportedly distinguish its decision-making process. Secondly, it was not until the appeal that the Council raised the argument based on the allegation that the ability of the Member States’ delegations to modify their point of view during the procedure would be undermined. In any event, as the General Court found in paragraph 76 of the judgment under appeal, there is no reference in the first subparagraph of Article 4(3) of Regulation No 1049/2001 to the stage of the negotiations as a criterion to be taken into account in order to justify application of the exception to the right of access. Admittedly, that factor could be a relevant consideration when assessing the risk that the interest protected by that provision might be adversely affected. However, identifying the delegations which put forward proposals at an early stage in the discussions would not prevent those delegations from being able to change their position at a later stage. Lastly, Access Info states that it is precisely at the point when the procedure is initiated that maximum transparency is vital: by the time that discussions have already been held and compromise positions reached, transparency and public debate are no longer of any use at all.

47 By the third part of its third ground of appeal, the Council submits in essence that, contrary to the requirements laid down in paragraph 69 of *Sweden and Turco v Council*, the General Court did not take due account, in paragraphs 72 and 79 to 83 of the judgment under appeal, of the sensitive nature of the requested document when assessing the risk that full disclosure of that document would cause serious harm to the decision-making process. According to the Council, the sensitive nature of that document stems from the fact that the proposals in question concerned the provision to be made in the new regulation on access to documents regarding exceptions from the principle of transparency. Moreover, the sensitivity of those issues is confirmed by the fact that the European Union Courts have recently ruled on the interpretation of the exceptions and by the level of debate, and the pressure from public opinion, generated by those issues.

48 In support of that part of the ground of appeal, the Council puts forward a number of arguments. First of all, it claims that *Sweden and Turco v Council* allows it to rely on the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001 where the requested document is of a particularly sensitive nature. In paragraph 78 of the judgment under appeal, however, the General Court construed that provision as being applicable only where a fundamental interest of the European Union or of the Members States is involved. There is nothing in the wording of that provision or in other parts of the regulation to support that interpretation; nor is it borne out by *Sweden and Turco v Council*. Moreover, that interpretation, together with the high standard of proof required by the General Court to establish that level of harm, makes it almost impossible to rely on that provision.

49 Next, in order to emphasise once more the sensitive nature of the issues in question, the Council claims that the General Court erred in finding, in paragraph 79 of the judgment under appeal, that the unusual lengthiness of the legislative procedure in question could be accounted for by political and legal factors connected with the entry into force of the Lisbon Treaty, the European Parliament elections and the renewal of the Commission. Referring to certain changes in the drafting rules for documents from its working parties with effect from the second half of 2008 – that is to say, after the unauthorised disclosure – the Council states that in actual fact that delay was attributable, at least in part, to the decline in the candour and completeness of the discussions that followed the unauthorised disclosure, which diminished the effectiveness of the decision-making process within the Council.

50 Lastly, according to the Council, the impasse over the legislative dossier was also attributable, at least in part, to the fact that, precisely because of the unauthorised disclosure, Member States found it very difficult to move out of their initial negotiation positions. In particular, the delegations from those States which wanted to propose amendments that could be perceived by the public as restricting the right of public access were unwilling to do so. The Council claims that the General Court was wrong not to acknowledge the adverse effects on the Council's decision-making process produced by the unauthorised disclosure. First, the General Court erred in finding, in paragraph 72 of the judgment under appeal, that such an argument was unfounded because one of the proposals in question, made after the unauthorised disclosure, restricted the right of public access, whereas, contrary to the statements made by the General Court, that proposal had not been tabled by a delegation from a Member State, but originated with the Commission itself. Secondly, in paragraphs 82 and 83 of the judgment under appeal, the General Court was wrong to reject evidence provided by the Council to explain the decline in the level of detail in the reports for the legislative file, and in relation to the identification of the delegations in the working parties by name. Whereas the General Court found an explanation for this in the fact that proceedings had been brought before it, the Council maintains that, given the sensitive nature of the issues in question, that change was attributable precisely to the unauthorised disclosure. The Council illustrates the reduction in the level of detail with a reference to a report established in July 2009 from the working party in question, in which the identity of the delegations was no longer mentioned but, instead, use was made of expressions like 'a certain number of delegations' and 'other delegations'.

51 Access Info contends first of all that the General Court referred to a situation in which 'a fundamental interest of the European Union or of the Members States' is involved only as an example of a situation in which an issue might be regarded as 'particularly sensitive'. It did not state, however, that only such situations may be regarded as sensitive. Secondly, in contrast with the document at issue in *Sweden and Turco v Council*, the requested document contained, not legal opinions, but merely proposals for amendments to draft legislation. Lastly, Access Info adds that the Council failed to provide a detailed statement of reasons for its refusal, even though this is required by *Sweden and Turco v Council*.

52 As to the remainder, Access Info contends that the third part of the Council's third ground of appeal must be ruled inadmissible in that it calls into question the General Court's findings as to the sensitive nature of the requested document, as well as those relating to the reasons for the unusual lengthiness of the legislative procedure

in question. In any event, Access Info – supported in substance by the European Parliament – argues, first, that the Council’s position regarding the sensitive nature of the issues covered by the requested document is based on the fact that those issues give rise to public debate and that they are covered by the case-law of the European Union Courts. Access Info maintains, however, that the Council has failed to substantiate those assertions. Moreover, according to Access Info, the vast majority of legislative procedures concern issues that could give rise to lobbying from interest groups or to debate in the media. Yet that is precisely what transparency and democracy involve, and it does not demonstrate the sensitive nature of an issue, justifying the confidential treatment of a document such as the document requested. Furthermore, if the issues examined were so very sensitive, it would have warranted the redaction, not just of the names of the Member States, but also of the content of the proposals. Secondly, Access Info disputes the Council’s submission that the unusual delay in the legislative process in question was caused by the unauthorised disclosure. In fact, that delay could also be explained by the lack of any political agreement between the Council and the European Parliament over the revision of the regulation. Thirdly, Access Info contests the assertion that the unauthorised disclosure led to changes in the detail provided in the working party’s reports.

#### Findings of the Court

53 As regards the first part of the Council’s third ground of appeal, it must be stated that this is based on a misreading of the judgment under appeal.

54 In paragraph 59 of the judgment, the General Court rightly stated that application of the exceptions to the right of access is justified only if there is a risk that one of the protected interests might be undermined; and that risk must be reasonably foreseeable and must not be purely hypothetical.

55 In order to determine whether such a risk existed in the circumstances of the case, the General Court first of all found, in paragraphs 70 to 72 of the judgment under appeal, that the Council had not demonstrated the accuracy of the premiss on which it based its arguments, that is to say, the assumption that the public pressure generated by disclosure of the identity of the delegations would be so great that it would no longer be possible for those delegations to submit a proposal tending towards the restriction of openness. Since that was not demonstrated, the General Court rightly found that disclosure of the identity of the delegations which wished to put forward such proposals was not likely to undermine the Council’s decision-making process.

56 The General Court then examined, in paragraphs 73 and 74 of the judgment under appeal, the argument – summarised in paragraph 50 of that judgment, which is not criticised by the Council – that the unauthorised disclosure ‘had a negative effect on the sincerity and exhaustiveness of the discussions within the Council Working Party, preventing the delegations from contemplating different solutions and amendments so as to reach agreement on the most controversial questions’.

57 In paragraphs 73 and 74, the General Court confined itself to responding to that plea and concluded that, contrary to the submissions made by the Council, the unauthorised disclosure was not, in the circumstances of the case, such as to undermine the Council’s decision-making process.

58 In those circumstances, the first part of the third ground of appeal must be rejected as unfounded.

59 As regards the second part of the third ground of appeal, according to which the General Court did not take due account of the importance of the state of progress of discussions when assessing the risk posed by full disclosure of the positions of the delegations, in terms of seriously undermining the Council’s decision-making process, it must be stated that that part is also based on a misreading of the judgment under appeal.

60 In paragraph 76 of the judgment under appeal, the General Court stated that the preliminary nature of the discussions does not, in itself, justify application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. Accordingly, having ruled out the possibility that the Council’s other arguments could establish a risk of its decision-making process being undermined, the General Court rightly found that the mere fact that the request for disclosure was made at a very early stage in the legislative process was not sufficient to allow the application of that exception.

61 Consequently, the second part is unfounded.

62 Lastly, as regards the third part of the Council's third ground of appeal, it must be stated first that, when the General Court found, in paragraph 78 of the judgment under appeal, that the matters covered by the requested document were not particularly sensitive, it did not refer to *Sweden and Turco v Council*; and rightly so, given that paragraph 69 of that judgment, on which this part of the ground of appeal is based, concerns only specific documents, namely, legal opinions. In the present case, not only was the requested document created as part of the legislative process, but it does not belong to any category of documents in respect of which Regulation No 1049/2001 recognises an interest that specifically merits being protected, such as the category for legal opinions.

63 In any event, even if the General Court were wrong in finding that the criterion for establishing the particularly sensitive nature of a document is that of the risk that disclosure of the document would jeopardise a fundamental interest of the European Union or of the Member States, it must be noted that, in paragraph 77 of the judgment under appeal, it was not by reference to that criterion that, in the circumstances of the case, the General Court ruled out the possibility that the requested document was particularly sensitive. Its conclusion was based, rather, on the finding that the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever.

64 Consequently, the Council was wrong to allege that the General Court disregarded the particularly sensitive nature of the requested document.

65 Secondly, as concerns the other arguments relied on by the Council in support of the third part of its third ground of appeal, it should be recalled that, according to settled case-law of the Court of Justice, it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, *inter alia*, Case C-510/06 P *Archer Daniels Midland v Commission* [2009] ECR I-1843, paragraph 105, and the Order of 10 November 2011 in Case C-626/10 P *Agapiou Joséphidès v Commission and EACEA* [2011] ECR I-169, paragraph 107).

66 By its argument that the General Court was wrong to hold that the unusual lengthiness of the legislative procedure in question could be accounted for by political and legal factors connected with the entry into force of the Lisbon Treaty, the European Parliament elections and the renewal of the Commission, the Council, without pleading any distortion of the evidence, seeks to challenge the General Court's finding that the unusual lengthiness of the legislative procedure was attributable, not to the difficulties brought about by disclosure of the information relating to the identity of those who had made the proposals, but to those factors of a legal and political nature – as the Council itself also maintains, as can be seen from paragraph 46 of the judgment under appeal.

67 Similarly, as regards the alleged effects of the unauthorised disclosure on the Council's decision-making process, the Council, without clearly pleading any distortion of the evidence, is simply attempting to challenge assessments made at first instance. First, it challenges the assessment made by the General Court, in paragraph 72 of the judgment under appeal, of an item of evidence – that is to say, the public version of a document containing written proposals relating to the legislative procedure in question, drawn up by the delegations, namely, Document No 9716/09 of 11 May 2009 – in concluding that, contrary to the assertions made by the Council at first instance, that disclosure had not forced the delegations to avoid submitting proposals tending towards the restriction of openness. Secondly, the Council challenges the General Court's assessment, in paragraphs 82 and 83 of the judgment under appeal, of another item of evidence – namely, Document 10859/1/09 REV 1 – from which the General Court inferred that there had been a change in Council practice after the unauthorised disclosure, in that the information relating to the identity of the Member States which made comments or suggestions about the Commission's proposal was no longer included, and that that change could be explained by the fact that Access Info had brought an action contesting the lawfulness of the decision at issue.

68 Consequently, since those arguments are inadmissible, the third ground of appeal must be rejected as being in part inadmissible and in part unfounded.

#### *The second ground of appeal*

##### Arguments of the parties

69 By its second ground of appeal, the Council submits essentially that the General Court's reasoning is inconsistent with the case-law of the Court of Justice which allows the institutions to rely on general considerations in order to refuse to disclose certain categories of document. The Council maintains, as does the Hellenic Republic, that the decision at issue set out the general considerations explaining the reasons why the requested document could not be disclosed and the reasons why those considerations were in fact applicable to the requested document. Thus, the Council did not confine its examination to the nature of the document, but based its refusal on detailed explanations relating to the sensitive nature of the issues covered and on the fact that those issues formed part of preliminary discussions engaged in before the legislative procedure proper.

70 Access Info contends first that, as the second ground of appeal does not expressly refer to any particular paragraph in the judgment under appeal, it is inadmissible and ineffective. In any event, according to Access Info, supported on this point by the European Parliament, the Council did not make explicit, either in its appeal or in the decision at issue, which general presumption formed the basis for its refusal of access in the circumstances. Moreover, contrary to the requirements of the relevant case-law, there is no basis in any provision of European Union law or any general principle of law for a general presumption of confidentiality for documents such as the requested document, all the more so since that document originated from a procedure of a legislative nature.

##### Findings of the Court

71 It should be noted at the outset that, contrary to the assertions made by Access Info, this ground of appeal is admissible, given that, although the Council admittedly does not identify any specific paragraph in the judgment under appeal as containing an error of law, it is clear from the arguments in support of this ground of appeal that the Council takes issue with the General Court for not finding that it was open to the Council to rely on a presumption of confidentiality based on general considerations as justification for refusing access to the requested document.

72 As regards the substance, it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that provision, it is nevertheless open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (*Sweden and Turco v Council*, paragraph 50; Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 54; and Case C-477/10 P *Commission v Agrofert Holding* [2012] ECR, paragraph 57).

73 While, in such a case, the institution concerned would not be under an obligation to carry out a specific assessment of the content of each of those documents, it must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exceptions under Article 4 of Regulation No 1049/2001 (see, to that effect, *Sweden and Others v API and Commission*, paragraph 76).

74 In the present case, even if it were to be taken as established that the Council had argued at first instance that it was entitled to refuse access to a document, such as the requested document, by relying on a presumption based on the considerations summarised in paragraph 43 of the judgment under appeal concerning the need to protect the delegations' room for manoeuvre during preliminary discussions on the Commission's legislative proposal, it is clear, first, that, in paragraphs 70 to 79 of the judgment under appeal, the General Court examined those considerations and that, in paragraph 80, it concluded that they were not a sufficient basis for application of the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001. Secondly, the Council's attempt to challenge that assessment by the third ground of appeal was unsuccessful, that ground having been rejected.

75 Consequently, the Council cannot reasonably argue that it was entitled to refuse access to the requested document by relying on a presumption based on such considerations.

76 In view of the above, the arguments seeking to show that the General Court did not take into account the reasons why the Council had considered that those general considerations were applicable to the requested document are ineffective.

77 It follows that the second ground of appeal must be rejected as unfounded.

78 It follows from all the foregoing considerations that the appeal must be dismissed.

#### **Costs**

79 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, applicable 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. Article 140(1) of those Rules provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs.

80 Since the Council's appeal has been dismissed, it is appropriate, in accordance with the forms of order sought by Access Info, for the Council to be ordered to pay, in addition to its own costs, the costs incurred by Access Info.

81 The Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic and the European Parliament must bear their own costs.

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

1. **Dismisses the appeal;**
2. **Orders the Council of the European Union to pay the costs incurred by Access Info Europe;**
3. **Orders the Czech Republic, the Hellenic Republic, the Kingdom of Spain, the French Republic and the European Parliament to bear their own costs.**

## Case C-350/12 P, *Council v in 't Veld*

In Case C-350/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 17 July 2012,

**Council of the European Union**, represented by P. Berman, B. Driessen and C. Fekete, acting as Agents,  
applicant,

the other parties to the proceedings being:

**Sophie in 't Veld**, represented by O. Brouwer, E. Raedts and J. Blockx, advocaten,  
applicant at first instance,

supported by:

**European Parliament**, represented by N. Lorenz and N. Görlitz, acting as Agents,  
intervener in the appeal,

**European Commission**, represented by B. Smulders and P. Costa de Oliveira, acting as Agents, with an address  
for service in Luxembourg,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and  
S. Rodin, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2013,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2014,

gives the following

### **Judgment**

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of the General Court of the European Union in *In 't Veld v Council*, T-529/09, EU:T:2012:215 ('the judgment under appeal'), by which the General Court annulled in part the decision of the Council of 29 October 2009 refusing Ms in 't Veld full access to a document containing the opinion of the Council's Legal Service concerning a recommendation from the European Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for the conclusion of an international agreement to make available to the United States Treasury Department financial messaging data ('the decision at issue').

### **Legal context**

2 Recitals 2, 4 and 11 in the preamble to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) read as follows:

‘(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

...

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

...

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.’

3 Article 1 of Regulation No 1049/2001 provides:

‘The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as “the institutions”) documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

...’

4 Article 2(3) of that regulation is worded as follows:

‘This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.’

5 Article 4(1), (2) and (6) of that same regulation provides:

‘1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

...

– international relations,

...

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

– ... legal advice,

...

unless there is an overriding public interest in disclosure.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

### **Background to the dispute**

6 On 28 July 2009, Ms in 't Veld, a Member of the European Parliament, requested access, under Regulation No 1049/2001, to document 11897/09 of 9 July 2009, containing an opinion of the Council's Legal Service on the 'recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing' ('the proposed agreement').

7 By the decision at issue, the Council authorised only partial access to the document, full access being refused on the basis of the exceptions laid down in the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001, relating to the protection, respectively, of the public interest as regards international relations and of legal advice.

8 In that decision, the Council stated, first, that 'disclosure of [document 11897/09] would reveal to the public information relating to certain provisions in the [proposed agreement] ... and consequently, would negatively impact on the [European Union]'s negotiating position and would also damage the climate of confidence in the ongoing negotiations'. The Council added that 'disclosure of the document would also reveal to the ... counterpart elements pertaining to the position to be taken by the [European Union] in the negotiations which — in the case [where] the legal advice was critical — could be exploited so as to weaken the [European Union]'s negotiating position'.

9 Secondly, the Council stated that document 11897/09 contained 'legal advice, where the Legal Service analyses the legal basis and the respective competences of the [European Union] and the European Community to conclude the [proposed agreement]', and that this 'sensitive issue, which has an impact on the powers of the European Parliament in the conclusion of the [proposed agreement], has been [the] subject of divergent positions between the institutions'. In those circumstances, according to the Council, '[d]ivulcation of the contents of [document 11897/09] would undermine the protection of legal advice, since it would make known to the public an internal opinion of the Legal Service, intended only for the members of the Council within the context of the Council's preliminary discussions on the [proposed agreement]'. In addition, the Council considered 'that the protection of its internal legal advice relating to a draft international agreement ... outweighs the public interest in disclosure'.

### **The judgment under appeal and the forms of order sought**

10 On 31 December 2009, Ms in 't Veld brought an action for annulment of the decision at issue, relying on four pleas in law in support of the action.

11 The first two pleas in that action alleged infringement of the third indent of Article 4(1)(a) and the second indent of Article 4(2) of Regulation No 1049/2001. The third plea in support of that action was based on the infringement of Article 4(6) of that regulation, relating to partial access to documents of the institutions. The fourth plea alleged breach of the obligation to state reasons.

12 By the judgment under appeal, the General Court upheld, in part, the first plea of Ms in 't Veld, and the second plea in its entirety. Since those first two pleas were considered well founded, the General Court also upheld

the third plea. The fourth plea was rejected. On that basis, the General Court partially annulled the decision at issue.

13 On 24 July 2012, the Council brought the present appeal, by which, supported by the Commission, it asks the Court to set aside the judgment under appeal, give final judgment on the matters raised in the appeal and order Ms in 't Veld to pay the costs of both sets of proceedings.

14 Ms in 't Veld, supported by the European Parliament, asks the Court of Justice to dismiss the appeal and to order the Council to pay the costs.

### **The appeal**

15 By its appeal, the Council claims that the General Court infringed two provisions of Regulation No 1049/2001 restricting the right of access to documents of the institutions. The first plea is thus based on an infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest as regards international relations, and the second alleges infringement of the second indent of Article 4(2) of the regulation, which provides for an exception in respect of legal advice.

#### *The first plea, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001*

#### The judgment under appeal

16 In order to respond to the first plea in law put forward by Ms in 't Veld in support of her action for annulment, alleging infringement of the third indent of Article 4(1)(a) of Regulation No 1049/2001, the General Court noted, in paragraphs 24 and 25 of the judgment under appeal, that the decision to be adopted by an institution pursuant to that provision is of a complex and delicate nature and calls for the exercise of particular care, having regard in particular to the singularly sensitive and essential nature of the protected interest, and that, therefore, the adoption of such a decision calls for the institution concerned to have a wide margin of discretion for that purpose; the General Court's review of the legality of that decision must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.

17 In paragraph 26 of the judgment under appeal, the General Court found that the opinion to which access had been requested in the present case was, in essence, concerned with the legal basis of the Council decision authorising the opening of negotiations, on behalf of the European Union, for the conclusion of the proposed agreement. The General Court therefore considered, in paragraph 30 of the judgment under appeal, that it had to be ascertained whether the Council had shown that access to the undisclosed elements of document 11897/09 could have specifically and actually undermined the public interest concerned.

18 To that end, the General Court examined the two grounds on which the Council relied in order to establish that there was a risk of such a threat. As regards the ground that disclosure would have revealed to the public information relating to certain provisions in the proposed agreement, which would have damaged the climate of confidence in the ongoing negotiations, the General Court held, in paragraphs 35 to 39 of the judgment under appeal, that the Council had, on the basis of that ground, lawfully refused access to those passages in document 11897/09 containing the analysis of the specific content of that agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations on the conclusion of that agreement.

19 As regards the ground that disclosure of document 11897/09 would have revealed to the counterpart elements pertaining to the position to be taken by the European Union in the negotiations (in particular as regards the choice of legal basis for the proposed agreement), elements which, where the legal advice had been critical, could have been exploited so as to weaken the European Union's negotiating position, the General Court noted in paragraph 46 of the judgment under appeal that the risk involved in the disclosure of positions taken within the institutions regarding the legal basis for concluding a future international agreement was not liable in itself to establish the existence of a threat to the European Union's interest in the field of international relations.

20 In that regard, in paragraphs 47 to 50 of the judgment under appeal, the General Court noted, first of all, that the choice of the appropriate legal basis, both for internal and international European Union activity, has constitutional significance and that such a choice does not follow merely from the conviction of its author, but

must rest on objective factors which are amenable to judicial review, such as, in particular, the aim and the content of the measure. As a consequence, since that choice does not fall within the discretion of the institution, any divergence of opinions on that subject cannot be equated with a difference of opinion between the institutions as to matters which relate to the substance of the agreement. Accordingly, the mere fear of disclosing a disagreement within the institutions regarding the legal basis of a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the protected public interest in the field of international relations may be undermined.

21 Furthermore, in response to the argument put forward by the Commission in that respect, the General Court, in paragraphs 52 and 53 of the judgment under appeal, held that the disclosure of a document establishing the existence of doubts regarding the choice of the legal basis in relation to the conclusion of the proposed agreement was not liable to give rise, in itself, to a threat to the European Union's credibility as a negotiating partner in respect of that agreement. Indeed, any confusion as to the nature of the powers of the European Union could only be made worse in the absence of a prior objective debate between the institutions concerned regarding the legal basis of the action envisaged.

22 Next, in paragraph 54 of the judgment under appeal, the General Court noted that, at the material time, there was a procedure under EU law, in Article 300(6) EC, that was specifically designed to prevent complications, both at EU level and in international law, resulting from an incorrect choice of legal basis in relation to the conclusion of an international agreement binding the European Union.

23 In that regard, the General Court, in paragraphs 55 and 56 of the judgment under appeal, underlined the fact that, at the time of the adoption of the decision at issue, the existence of different views concerning the legal basis of the proposed agreement was within the public domain, owing, *inter alia*, to the fact that a Parliament resolution of 17 September 2009 relating to the proposed agreement established the existence of such different views.

24 Lastly, in paragraph 57 of the judgment under appeal, the General Court noted that, in invoking the exception based on the protection of the public interest as regards international relations, the Council also made reference to the fact that the opinion of its Legal Service touched on certain points of the draft negotiating directives, knowledge of which could have been exploited by the other party to those negotiations. The General Court held that that consideration did indeed establish a risk that the European Union's interest in the field of international relations might be undermined, but that it justified the exception in question only with respect to those elements of document 11897/09 that related to the content of the negotiating directives.

25 In paragraphs 58 to 60 of the judgment under appeal, the General Court concluded from the foregoing considerations that, with the exception of those elements of document 11897/09 concerning the specific content of the proposed agreement or the negotiating directives which could reveal the strategic objectives pursued by the European Union in the negotiations on that agreement, the Council had not shown that the disclosure of other aspects of that document would specifically and actually have undermined the public interest in the field of international relations.

26 Consequently, the General Court upheld in part the first plea in law put forward by Ms in 't Veld in support of her action for annulment.

#### Arguments of the parties

27 The first ground of appeal raised by the Council alleges infringement, by the judgment under appeal, of the third indent of Article 4(1)(a) of Regulation No 1049/2001, and is in two parts.

28 By the first part of this plea, the Council, supported by the Commission, submits that the General Court misinterpreted that provision by considering that a disagreement as to the choice of the legal basis of the EU act regarding the conclusion of an international agreement is not capable of undermining the European Union's interest in the field of international relations.

29 According to the Council, since the legal basis of an EU act determines the decision-making procedure that applies, it necessarily affects the balance of powers between the institutions as well. Disputes concerning the applicable legal basis therefore remain, by their very nature, of very great political significance and are potentially highly contentious.

30 Referring to *Commission v Council*, 22/70 (EU:C:1971:32) and to Opinion 1/75 (EU:C:1975:145) and Opinion 2/00 (EU:C:2001:664), the Council maintains that the issue of the legal basis of an EU act concerning the conclusion of an international agreement is vitally important for the European Union's position in the negotiations on such an agreement, since uncertainty as to the determination of the legal basis of such an agreement has a negative impact on those negotiations.

31 The European Union's negotiating partners could exploit the differences of opinion between the institutions to the European Union's disadvantage. Moreover, any doubts as to the legal capacity of an institution to conduct negotiations would also have an impact on the European Union's credibility and effectiveness in international negotiations, and would adversely affect its ability to bring them to a successful conclusion.

32 As regards the reference to Article 300(6) EC, in the Council's submission this is wholly irrelevant. First, no institution had availed itself of this possibility in the present case. Secondly, the availability of that procedure does not in any way mitigate the harm caused by disclosing legal advice relating to a dispute about a legal basis.

33 In addition, the Parliament resolution of 17 September 2009 referred to by the General Court, which was adopted a few months after document 11897/09 was drawn up, had revealed the substance of divergent opinions unlawfully, since that information had never been disclosed by the Council under Regulation No 1049/2001. In those circumstances, the General Court was wrong to justify its decision on the basis, in particular, that the information had been made public by the European Parliament; to conclude otherwise would condone the disclosure of information in contravention of Articles 6 to 8 of that regulation. In any event, that resolution merely noted the existence of a difference of views between the institutions, which did not imply that the full content of the opinion in question had been put in the public domain.

34 By contrast, Ms in 't Veld, supported by the European Parliament, submits that the Council's arguments are based on a misreading of the judgment under appeal, in so far as the General Court did not consider that disagreement as to the legal basis of an international agreement could never undermine the public interest in the field of international relations. In fact the General Court merely stated that such a disagreement is not, in itself, a sufficient basis for concluding that there is a threat to that interest.

35 That error in the premiss of the Council's reasoning rendered its arguments in support of the first part of the first plea ineffective.

36 In any event, according to Ms in 't Veld, those arguments are unfounded. Whilst the decision of an institution to proceed on an incorrect basis could actually undermine the European Union's international relations, the fact remains that the disclosure of an opinion of that institution as to the legal basis of negotiations does not affect this.

37 Ms in 't Veld adds that the choice of legal basis is a purely internal issue, so that it is doubtful that the European Union's negotiating partners could use uncertainties as to its choice in order to obtain a better deal. On the contrary, the negotiating partners of the European Union in principle have an interest in ensuring that the proposed international agreement is concluded on a lawful basis, so as to reduce to a minimum the risk of any future challenge to that agreement, including on the grounds of lack of competence of the institutions to represent the parties to it. Likewise, the European Union's credibility in negotiations can be undermined only by the choice of a wrong legal basis and not by the debate on that choice.

38 Lastly, as regards the Parliament resolution of 17 September 2009, the General Court had referred to it only in so far as it confirmed not the content but the existence of differences of opinion between the Council and the European Parliament on the choice of an adequate legal basis for the purpose of conducting such negotiations, which was public knowledge and which also appeared in the decision at issue itself.

39 By the second part of its first ground of appeal, the Council, supported by the Commission, submits that where the institutions rely on one of the exceptions laid down in Article 4(1) of Regulation No 1049/2001 in order to justify a decision relating to access to a document, they have a wide margin of discretion; therefore the Court's review of the legality of such a decision should be limited.

40 However, in the present case, the General Court had undertaken a full review of the decision at issue. In particular, in paragraph 58 of the judgment under appeal, it had explicitly concluded that 'the Council has not shown how, specifically and actually, wider access to [document 11897/09] would have undermined the public

interest in the field of international relations'. According to the Council, that phrase, and in particular the words 'specifically and actually', demonstrate that the General Court did not just check whether the facts had been accurately stated and whether there had been a manifest error of assessment of the facts, but rather required the Council to prove that the disclosure of that document would lead to harm.

41 Ms in 't Veld, supported by the European Parliament, contends, in opposition to that argument, that it is the case-law of the Court of Justice that requires the institution concerned to provide proof that the disclosure of a document to which access has been refused would specifically and actually undermine one of the interests protected by Article 4 of Regulation No 1049/2001. The General Court had confined itself to examining the two arguments raised by the Council and by the Commission to justify the non-disclosure of document 11897/09 without infringing the Council's discretion, given that the arguments of those institutions referred to manifest errors of assessment which the General Court is empowered to review in the context of a limited review. The General Court had not, therefore, assessed the specific content of the proposed agreement or the negotiating directives, and therefore did not replace the Council's assessment with its own.

#### Findings of the Court

42 As regards the first part of the first plea put forward by the Council in support of its appeal, it must be held that that part of the plea is based on a misreading of the judgment under appeal.

43 Contrary to what may be inferred from the Council's and the Commission's reasoning, the General Court did not in any way rule out the possibility that the disclosure of a disagreement between institutions as to the choice of legal basis empowering an institution to conclude an international agreement on behalf of the European Union might undermine the protection of the interest protected by the third indent of Article 4(1)(a) of Regulation No 1049/2001.

44 On the contrary, the General Court merely stated, in paragraph 46 of the judgment under appeal, first of all, that the risk involved in disclosing positions taken within the institutions with regard to that choice does not in itself establish the existence of a threat to the European Union's interest in the field of international relations. It went on to point out, in paragraph 50 of that judgment, that the mere fear of disclosure of the existence of divergent opinions within the institutions regarding the appropriate legal basis on which to adopt a decision authorising the opening of negotiations on behalf of the European Union is not a sufficient basis for concluding that the public interest in the field of international relations may be undermined. Lastly, in paragraph 52 of that judgment, it ruled out the possibility that the existence of a legal debate as to the extent of the powers of the institutions with regard to the international activity of the European Union might give rise to a presumption of the existence of a threat to the credibility of the European Union in the negotiations for an international agreement.

45 Such an interpretation of the third indent of Article 4(1)(a) of Regulation No 1049/2001 is not incorrect in law.

46 It must be noted in that regard that Regulation No 1049/2001 is designed — as is stated in recital 4 and reflected in Article 1 — to confer on the public as wide a right of access as possible to documents of the institutions (*Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, paragraph 28 and the case-law cited).

47 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11, Article 4 of Regulation No 1049/2001 provides for a number of exceptions enabling the institutions to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (*Council v Access Info Europe*, EU:C:2013:671, paragraph 29 and the case-law cited).

48 Nevertheless, as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (*Council v Access Info Europe*, EU:C:2013:671, paragraph 30 and the case-law cited).

49 As is apparent from the judgment under appeal, document 11897/09 contains an opinion of the Council's Legal Service, issued in the context of the adoption of the Council's decision authorising the opening of negotiations, on behalf of the European Union, in respect of the proposed agreement.

50 Ms in 't Veld does not dispute, moreover, that the exception to the right of access linked to the protection of the public interest as regards the European Union's international relations is capable of applying to such a document.

51 However, the mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of Regulation No 1049/2001 is not sufficient to justify the application of that provision (see, to that effect, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 116).

52 Indeed, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (*Council v Access Info Europe*, EU:C:2013:671, paragraph 31 and the case-law cited).

53 Moreover, if the institution applies one of the exceptions provided for in Article 4(2) and (3) of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (*Council v Access Info Europe*, EU:C:2013:671, paragraph 32 and the case-law cited).

54 However, as is evident from paragraph 7 of the judgment under appeal, the Council did not provide anything in the decision at issue to demonstrate how disclosure of document 11897/09 would risk specifically and actually undermining the interest protected by the third indent of Article 4(1)(a) of Regulation No 1049/2001.

55 Furthermore, the arguments put forward by the Council do not establish that the General Court's reasoning in relation to the interpretation of that provision is incorrect in law.

56 In the first place, the case-law invoked by the Council does not reveal any general rule under which disclosure of the existence of a divergence of views among the institutions as to the legal basis on which one of them is empowered to open negotiations to conclude an international agreement and, therefore, the determination of the appropriate EU act for that purpose, would in itself undermine the public interest as regards the European Union's international relations.

57 First of all, in *Commission v Council* (EU:C:1971:32, paragraph 86), the Court held that to have suggested to third countries, at an advanced stage of the negotiations in respect of an international agreement, that there was now a new distribution of powers within the European Union could jeopardise the successful outcome of those negotiations. That does not correspond at all to the situation in which there is disclosure, at most, of a divergence of opinion between institutions as to the legal basis of a decision authorising the negotiation of an international agreement. Nor does it mean that the decision in question could, on that basis, be invalidated.

58 Next, in Opinion 1/75 (EU:C:1975:145), the Court referred to the negative international repercussions that might flow from a possible decision of the Court to the effect that an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty. Lastly, in Opinion 2/00 (EU:C:2001:664, paragraphs 5 and 6), the Court emphasised that to proceed on an incorrect legal basis is liable to invalidate the act concluding the agreement, and that that is liable to create complications both at EU level and in international law. The Court's considerations in the context of those Opinions are set in the context of an examination of the objective of the procedure laid down in Article 300(6) EC (now Article 218(11) TFEU). In the present case, not only did the parties not avail themselves of that procedure for prior referral to the Court of Justice before the conclusion of the proposed agreement, but in any case the risk that the Council's decision on the opening of negotiations might be the subject of a judicial decision declaring it to be incompatible with the Treaties was not contemplated.

59 In the second place, the General Court's reference in paragraph 54 of the judgment under appeal to the procedure laid down under Article 300(6) EC is merely descriptive. Such a reference must clearly be understood as an indication that it is the Treaty itself which lays down a judicial procedure concerning the legal issues that

may be linked to the legal basis of a decision concerning the conclusion of an international agreement, a procedure which precedes the signing of the agreement and which is public, thereby ruling out any presumption that a discussion that is made public, concerning the correct legal basis for such a decision, can automatically specifically and actually undermine the public interest as regards international relations.

60 Lastly, in third place, in its assessment of the existence of a risk of a threat to that interest, the General Court was fully entitled, in paragraph 55 of the judgment under appeal, to take into consideration the fact that the main content of document 11897/09 had been made public in a Parliament resolution. In the context of that assessment, which concerns the risk that disclosure of a document would lead to harm to the interest protected under Article 4 of Regulation No 1049/2001, the fact that the earlier disclosure was not in accordance with that regulation is not relevant; the inferences to be drawn from such unlawfulness may have to be drawn in the context of other legal remedies provided for by the Treaties.

61 Having regard to the foregoing, it must be concluded that the first part of the first plea put forward by the Council in support of its appeal is unfounded.

62 By the second part of that plea, the Council submits that the General Court wrongly carried out a full review of the legality of the decision at issue, when it should have confined itself to a limited review, as is clear from the case-law of the Court of Justice.

63 It must be noted in that regard that while it is true that, as regards the scope of the judicial review of the legality of a decision of an institution refusing public access to a document on the basis of one of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001, that institution must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. The review by the Courts of the European Union of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (*Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 34).

64 However, where the institution concerned refuses access to a document the disclosure of which would undermine one of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, that institution remains obliged, as noted in paragraph 52 of the present judgment, to explain how disclosure of that document could specifically and actually undermine the interest protected by an exception provided for in that provision, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.

65 In paragraph 58 of the judgment under appeal, the General Court found that, with the exception of those elements of document 11897/09 which concern the specific content of the proposed agreement or the negotiating directives, which could reveal the strategic objectives pursued by the European Union in the negotiations concerning that agreement, the Council had not shown how, specifically and actually, wider access to that document would have undermined the public interest in the field of international relations.

66 To that end, the General Court confined itself to verifying the statement of reasons for the decision at issue in that regard. After having pointed out, in paragraph 41 of the judgment under appeal, that the Council was maintaining that that decision referred to the risk associated with the disclosure of those elements of the analysis relating to the legal basis of the proposed agreement, even if that was not explicitly apparent from that decision, the General Court, on the basis of that consideration, then confined itself to declaring, in paragraphs 46 to 50 of that judgment, that that statement of reasons for the decision at issue was insufficient in law, since merely noting the existence of that risk did not in itself satisfy the requirement whereby the institution concerned must establish, specifically and actually, the existence of a threat to the European Union's interest in the field of international relations. The General Court ruled in that regard that, since the choice of the legal basis rests on objective factors and does not fall within the discretion of the institution, any divergence of opinion on that subject cannot be equated with a difference of opinion between the institutions as to matters which relate to the substance of the agreement, and which might have been liable to damage the interests of the European Union in the field of international relations.

67 By contrast, in paragraphs 57 and 58 of the judgment under appeal, the General Court considered that the statement of reasons put forward by the Council in support of the decision at issue was sufficient in itself as

regards the elements of document 11897/09 concerning the specific content of the proposed agreement or the negotiating directives, and concluded in paragraph 59 of that judgment that the Council had established the risk of a threat to the public interest in the field of international relations with regard to those elements only.

68 It follows from the foregoing that the General Court confined itself to reviewing the statement of reasons underpinning the decision at issue and did not, therefore, infringe the Council's discretion.

69 In the light of those considerations, the second part of the first plea put forward by the Council in support of its appeal is also unfounded; accordingly this plea must be rejected in its entirety.

*The second plea, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001*

The judgment under appeal

70 In the light of its finding following examination of the first plea in law put forward by Ms in 't Veld in support of her action for annulment, the General Court limited its examination of the second plea, alleging infringement of the second indent of Article 4(2) of Regulation No 1049/2001, to the undisclosed parts of document 11897/09 only, and excluded those dealing with the specific content of the proposed agreement or the negotiating directives.

71 In paragraphs 69 and 70 of the judgment under appeal, first of all, the General Court held that the grounds of the decision at issue, according to which the Council and its Legal Service could be deterred from asking for and providing written opinions relating to sensitive issues if those opinions subsequently had to be disclosed, were not substantiated by any specific, detailed evidence which could establish in the present case the existence of a reasonably foreseeable and not purely hypothetical threat to the Council's interest in receiving frank, objective and comprehensive legal advice.

72 In paragraph 71 of the judgment under appeal, the General Court also held that, since the possibility that the public interest in the field of international relations could be undermined was provided for by a separate exception, covered by the third indent of Article 4(1)(a) of Regulation No 1049/2001, the mere fact that the legal advice contained in document 11897/09 concerned the field of the international relations of the European Union was not in itself sufficient for the application of the exception laid down in the second indent of Article 4(2) of that regulation.

73 In paragraphs 72 to 74 of the judgment under appeal, the General Court went on to note that, although it may be conceded that where international negotiations are still ongoing, enhanced protection is necessary in respect of the documents of the institution involved in those negotiations, in order to rule out any threat to the interests of the European Union during the process of those negotiations, that consideration has already been taken into account by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001. In the context of the exception provided for in the second indent of Article 4(2) of that regulation, the Council cannot legitimately rely on the general consideration that a threat to a protected public interest may be presumed in a sensitive area, in particular concerning legal advice given during the negotiation process for an international agreement. Nor may a specific and foreseeable threat to the interest in question be established by a mere fear of disclosing to EU citizens differences of opinion between the institutions regarding the legal basis for the international activity of the European Union and, thus, of creating doubts as to the lawfulness of that activity.

74 Regarding the Council's argument concerning the risk of a threat to the ability of its Legal Service to defend, in court proceedings, a position on which it had issued a negative opinion, the General Court considered, in paragraph 78 of the judgment under appeal, that an argument of such a general nature could not justify an exception to the transparency required by Regulation No 1049/2001.

75 Lastly, according to the General Court, it was for the Council to balance the particular interest to be protected by non-disclosure of document 11897/09 against any overriding public interest justifying disclosure.

76 In that regard, the General Court, in paragraphs 81 to 95 of the judgment under appeal, noted that the requirements for transparency are greater where the Council is acting in its legislative capacity. Yet, initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of

the executive. However, the General Court also added that application of the principle of the transparency of the decision-making process of the European Union could not be ruled out in international affairs, especially where a decision authorising the opening of negotiations involves an international agreement which may have an impact on an area of the European Union's legislative activity, such as the proposed agreement which concerns, in essence, the processing and exchange of information in the context of police cooperation, which may also affect the protection of personal data. In that regard, the fact that document 11897/09 concerns an area potentially covered by the exception referred to in the third indent of Article 4(1)(a) of Regulation No 1049/2001, relating to the protection of the public interest in the field of international relations, is irrelevant for the purposes of an assessment of the application of the separate exception, relating to the protection of legal advice, provided for in the second indent of Article 4(2) of that regulation. Moreover, the fact that the procedure for concluding the proposed agreement was still ongoing at the time of the adoption of the decision at issue is not conclusive in ascertaining whether, despite that risk, there exists any overriding public interest justifying disclosure. Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end.

77 On the basis of those considerations, the General Court upheld the second plea in law put forward by Ms in 't Veld in support of her action for annulment.

#### Arguments of the parties

78 The second ground of appeal raised by the Council alleges infringement of the second indent of Article 4(2) of Regulation No 1049/2001, and is in two parts.

79 By the first part of this plea, the Council, supported by the Commission, claims that the General Court failed to consider the specific nature of the subject-matter dealt with in the legal opinion contained in document 11897/09 and erroneously applied the 'specific and actual harm' standard.

80 In particular, the General Court had overlooked the specific circumstances of the present case, in particular the fact that the international negotiations on a sensitive matter relating to cooperation in the fight against terrorism were ongoing at the material time, and that the institutions were in disagreement regarding the choice of the legal basis of the proposed agreement. The fact that the General Court failed to take into consideration, for the purposes of the exception in the second indent of Article 4(2) of Regulation No 1049/2001, the subject-matter dealt with in the legal opinion was inconsistent with the case-law of the Court of Justice, according to which the area of activity to which a document relates and its sensitive nature are relevant for the purposes of applying the relative exceptions provided for in Article 4(2) and (3) of that regulation.

81 According to the Council, the General Court's insistence, in paragraph 73 of the judgment under appeal, on the fact that the interests related to the negotiation of the international agreement had already been taken into account 'by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001' is based on the false premiss that an institution cannot rely on the same factual elements in order to justify the application of different exceptions under Article 4 of that regulation, since that premiss is supported neither by the wording of the regulation itself nor by the relevant case-law, the Council citing in support of its view *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 55, and *Commission v Éditions Odile Jacob* EU:C:2012:393, paragraphs 113 to 115.

82 The Council adds in that regard that the General Court committed an error of law by requiring it to establish the existence of specific and actual harm to the protection of legal advice and to submit specific, detailed evidence proving the existence of that harm.

83 In any event, the Council had explained, in the decision at issue, how, in the present case, public access to document 11897/09 was likely to undermine the interest protected by the exception in the second indent of Article 4(2) of Regulation No 1049/2001. In particular, there was a real risk that the European Parliament might seek to use elements in the legal opinion in the political exchanges between the institutions in order to influence the pending negotiations. Moreover, the negotiations had still been pending at the material time, while the Court of Justice had never ruled in favour of disclosure of a legal opinion in such circumstances.

84 Lastly, the Council submits that the General Court's view, in paragraph 101 of the judgment under appeal, that 'the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end', is inconsistent with the case-law of the Court of Justice, which admits that internal documents including legal opinions benefit from a higher level of protection while the relevant procedure is pending. It is also contrary to the wording of the second subparagraph of Article 4(3) of Regulation No 1049/2001, which provides for a specific exception regarding the protection of internal documents relating to a matter where the decision has not been taken by the institution.

85 According to Ms in 't Veld, supported by the European Parliament, the General Court in fact confined itself to considering whether the fact that the legal advice related to the European Union's international relations should have changed its analysis, and concluded in paragraph 71 of the judgment under appeal that this circumstance was not 'in itself' sufficient to justify a refusal based on the protection of legal advice.

86 In addition, the General Court's statement in paragraph 88 of the judgment under appeal that 'public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations' did not mean that legal advice in relation to the legal basis of those negotiations is 'particularly sensitive'. In fact, the judgment under appeal already allowed the Council to redact information from the opinion containing 'strategic elements of the negotiations' because it allowed the Council to redact 'those passages in the requested document containing the analysis of the specific content of the [proposed] agreement which could have revealed the strategic objectives pursued by the European Union in the negotiations'. The part of the judgment which concerns the exception relating to legal advice therefore discussed only the remainder of document 11897/09. The Council's arguments are therefore unfounded.

87 As to the General Court's alleged error in the application of the 'specific and actual harm' standard, Ms in 't Veld refers back to her arguments in that regard which were set out in the second part of the first plea.

88 Lastly, with regard to the alleged existence of exceptional circumstances in the present case, Ms in 't Veld maintains, in response to the Council's arguments, that, first, as regards the fact that disclosure should be refused on the ground that the legal advice related to an internal discussion in the Council on the commencement of the negotiations, that is not relevant, since all legal advice constitutes internal discussions on the topic on which they are prepared. Secondly, as regards the fact that the advice relates to the 'sensitive matter' of terrorism and terrorist-financing, the Council had not explained why this would be relevant for the purposes of justifying the restriction of access to an opinion concerning the legal basis for concluding an international agreement such as the proposed agreement. To the extent that the opinion describes the content of that agreement and the strategic objectives of the European Union, the General Court had decided that the Council was not obliged to disclose them. As to the other parts of the opinion — that is those concerning the legal basis on which to conclude the proposed agreement — their possibly sensitive nature would not depend on the subject-matter of the agreement itself. Thirdly, as regards the fact that the negotiations on that agreement were still ongoing, the General Court had rightly explained that if citizens were precluded from gaining access to internal documents of the institutions on the ground that the decision-making process had not been concluded, they would never be able to participate in that process. Furthermore, the Council's reference in that context to Article 4(3) of Regulation No 1049/2001 was irrelevant, since that exception had not been invoked in the decision at issue. Fourthly, in the light of the argument that disclosure of the document would increase the chances that the European Parliament 'might seek to use elements in the legal opinion in the political exchanges between the institutions in order to influence the pending negotiations', Ms in 't Veld notes that, as a Member of that Parliament, she had already been able to take cognisance of the content of document 11897/09 even before the decision at issue was adopted, and therefore, if she had wanted to use those elements in the negotiations with the Council, she could already have done so.

89 By the second part of its second plea, the Council, supported by the Commission, claims that the General Court made an error of law in applying, in the context of the present case, case-law of the Court of Justice according to which it is necessary, in the balancing exercise required by the last phrase of Article 4(2) of Regulation No 1049/2001, to take account of the fact that a legal opinion has been issued in the context of a legislative procedure (*Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374). The General Court's reasoning was based on the premiss that the same level of transparency should apply to the European Union's decision-making process during the negotiation of an international agreement affecting the European Union's legislative activity as applies to the legislative process of the European Union itself, which would amount

to an unwarranted extension of the judgment in *Sweden and Turco v Council* (EU:C:2008:374) beyond the legislative sphere.

90 In fact, there is an important distinction between cases where the European Union is acting in its legislative capacity and those where it is acting in its executive capacity in conducting international relations. Regulation No 1049/2001 itself recognised the special protection to be accorded to international relations, the confidentiality of which is protected by an exception set out in the third indent of Article 4(1)(a), a provision in respect of which the legislator had not, however, foreseen a balancing of the competing interests.

91 Although issues of democratic accountability and EU citizens' participation do arise in relation to the conclusion of an international agreement and its subsequent implementation by means of EU legislative acts, the Council maintains that that cannot be the case during the preceding negotiation phase, in so far as it is impossible to inform EU citizens at large without simultaneously informing the international partners with whom the European Union is negotiating.

92 Against that argument, Ms in 't Veld notes that the General Court allowed the Council to redact the passages in document 11897/09 discussing the specific content of the proposed agreement which could have revealed the strategic objectives of the European Union; therefore those arguments could not be relevant for the discussion of the legal basis of the agreement, as no 'strategic elements' derived from that.

93 In addition, the fact that the legal advice related to international relations and that Article 4(1) of Regulation No 1049/2001 contains a special 'mandatory' exception protecting the European Union's international relations does not remove the need to take into account the possibility of an overriding public interest in the context of Article 4(2) of that regulation. It is precisely because of the impact of the proposed agreement on the legislative activity of the European Union — that is the impact it has on rules that are binding on all EU citizens — that the need to confer greater legitimacy on the institutions and the increased confidence of citizens in them constitute an overriding interest.

94 Lastly, as regards the point raised by the Council that, in the context of ongoing negotiations, it is impossible to inform citizens at large without simultaneously informing the international partners with whom the European Union is negotiating, Ms in 't Veld states that, while that may be a relevant consideration for the refusal of public access to that part of document 11897/09 concerning the strategic objectives and negotiating tactics, that would not be the case as regards the remainder of that document, which concerns only the question of the legal basis.

#### Findings of the Court

95 As a preliminary point, it should be borne in mind that, according to the case-law of the Court, as regards the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001, the examination to be undertaken by the Council when it is asked to disclose a document must necessarily be carried out in three stages, corresponding to the three criteria in that provision (*Sweden and Turco v Council*, EU:C:2008:374, paragraph 37).

96 Accordingly, the Council must first satisfy itself that the document which it is asked to disclose does indeed relate to legal advice. Secondly, it must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical. Thirdly and lastly, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined (see, to that effect, *Sweden and Turco v Council*, EU:C:2008:374, paragraphs 38 to 44).

97 By the first part of its second ground of appeal, the Council, in the first place, claims that the General Court failed to take account, when assessing the risk that the disclosure of document 11897/09 would undermine the interest protected by the second indent of Article 4(2) of Regulation No 1049/2001, of the fact that the content of that document was particularly sensitive, since it concerned ongoing international negotiations on a matter relating to cooperation in the fight against terrorism.

98 It is sufficient to note in that regard that the General Court did in fact take that point into consideration in paragraph 71 of the judgment under appeal, but ruled that that fact, in itself, was not sufficient for the application of the relevant exception to the right of access, since the possibility that the public interest in the field of international relations could be undermined is provided for by a separate exception.

99 That interpretation is not wrong in law.

100 First, it is true that an EU institution, when assessing a request for access to documents which it holds, may take into account more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 (see, to that effect, *Commission v Éditions Odile Jacob* EU:C:2012:393, paragraph 113, and *Commission v Agrofert Holding* EU:C:2012:394, paragraph 55).

101 However, by its arguments, the Council is really seeking to justify the application of a single ground for refusal — the protection of the public interest as regards international relations — by invoking to that end two different exceptions set out in Article 4 of Regulation No 1049/2001. Yet even on the assumption that identical facts could justify the application of two different exceptions, where — as in the present case — an applicant has unsuccessfully relied on the exception expressly laid down for the protection of international relations, that applicant cannot then be justified in referring to the same facts in order to establish a presumption that an exception protecting another interest — such as legal advice — should apply, without explaining how the disclosure of those documents could specifically and actually undermine that other interest.

102 Secondly, the General Court itself acknowledged in paragraph 88 of the judgment under appeal that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations. In that regard, the Council's complaint that the General Court failed to draw the appropriate conclusions from that consideration has no basis in fact, since it is precisely on the basis of that consideration that the General Court, in paragraphs 35 to 39 of the judgment under appeal, considered that access to that part of document 11897/09 which contained the strategic elements of the negotiations could legitimately be refused on the basis of the exception set out in the third indent of Article 4(1)(a) of Regulation No 1049/2001.

103 In the second place, the Council claims that the General Court erroneously applied the 'specific and actual harm' standard.

104 In that regard, it is sufficient to note that, in the light of the case-law mentioned in paragraph 52 of the present judgment, the General Court correctly observed in paragraph 69 of the judgment under appeal that the risk that the disclosure of document 11897/09 could specifically and actually undermine an institution's interest in seeking and receiving frank, objective and comprehensive advice must be reasonably foreseeable and not purely hypothetical.

105 In order to provide the necessary explanations to establish the existence of such a risk, it is necessary, contrary to the Council's and Commission's assertions, to carry out the examination described in paragraph 96 of the present judgment, even if the document to which access is sought does not concern a legislative procedure.

106 Admittedly the Court emphasised, in paragraph 46 of the judgment in *Sweden and Turco v Council* (EU:C:2008:374), that the considerations, whereby it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming, as noted in recital 2 in the preamble to Regulation No 1049/2001, from increased openness, in that this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, are of particular relevance where the Council is acting in its legislative capacity.

107 However, the Court of Justice has also stated that the non-legislative activity of the institutions does not fall outside the scope of Regulation No 1049/2001. Suffice it to note in that respect that Article 2(3) of that regulation states that the latter applies to all documents held by an institution, that is to say, drawn up or received by it and in its possession, in all areas of EU activity (see, to that effect, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraphs 87, 88 and 109).

108 In the third place, the Council claims that, contrary to the criticism levelled at it by the General Court, as set out in the judgment under appeal, it had explained why, in the light of the circumstances of the case, public access to document 11897/09 was likely to undermine the interest protected by the exception in Article 4 of Regulation No 1049/2001.

109 As regards, on the one hand, the Council's arguments as to the existence of a real risk of harm to the international negotiations, in that the European Parliament would seek to use the information contained in the legal opinion in order to influence the ongoing negotiations and to challenge the legality of the Council's decision on the conclusion of the proposed agreement, suffice it to note that that criticism overlooks the fact that the General Court decided that the Council was justified in refusing access to those parts of document 11897/09 that related to the specific content of the proposed agreement and the strategic objectives which the European Union pursued in the negotiations. However the Council did not provide any evidence to establish how the disclosure of the remainder of that document would have given rise to such risks.

110 On the other hand, as regards the Council's argument that the General Court failed to take account of the fact that the negotiations were ongoing at the time of the request for access to document 11897/09, it must be noted that the General Court did in fact explicitly examine that consideration in paragraphs 72 and 73 of the judgment under appeal, and concluded that it had already been taken into account by the recognition of the wide discretion given to the institutions in applying the exception under the third indent of Article 4(1)(a) of Regulation No 1049/2001.

111 In the light of the foregoing considerations, the first part of the second plea raised by the Council in support of its appeal must be rejected.

112 Given that the Council has, in the context of the first part of its second ground of appeal, unsuccessfully challenged the General Court's reasoning in the judgment under appeal — on the basis of which the General Court held, in paragraph 102 of that judgment, that the matters invoked in the decision at issue did not prove that the disclosure of document 11897/09 would have undermined the protection of legal advice —, there is no need to examine the second part of that plea, since the arguments set out are ineffective. That part of the plea relates to the General Court's alternative grounds, according to which the Council had in any event failed to ascertain whether there was an overriding public interest justifying fuller disclosure of document 11897/09 in accordance with the second indent of Article 4(2) of Regulation No 1049/2001.

113 It follows from all of the foregoing considerations that the second plea must also be rejected; accordingly the appeal must be dismissed in its entirety.

#### **Costs**

114 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

115 Under Article 138(1) of the Rules of Procedure, which applies to the procedure on an appeal by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 140(1) of the Rules of Procedure provides that the institutions which have intervened in the proceedings are to bear their own costs.

116 Since the Council has been unsuccessful and Ms in 't Veld has applied for costs, the Council must be ordered to pay the costs. The European Parliament and the Commission shall bear their own costs.

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

1. **Dismisses the appeal;**
2. **Orders the Council of the European Union to pay the costs;**
3. **Orders the European Parliament and the European Commission to bear their own costs.**



## Case T-677/13, *Axa Versicherung AG v European Commission*

In Case T-677/13,

**Axa Versicherung AG**, established in Cologne (Germany), represented by C. Bahr, S. Dethof and A. Malec, lawyers,

applicant,

v

**European Commission**, represented by F. Clotuche-Duvieusart and H. Krämer, acting as Agents, assisted by R. Van der Hout and A. Köhler, lawyers,

defendant,

supported by

**Saint-Gobain Sekurit Deutschland GmbH & Co. KG**, established in Aachen (Germany), represented by B. Meyring and E. Venot, lawyers,

intervener,

APPLICATION for annulment of Commission Decision 2012/817 and 2012/3021 Gestdem of 29 October 2013, refusing two requests for access to documents in the file of Case COMP/39.125 (Carglass),

THE GENERAL COURT (Third Chamber),

[...]

gives the following

### **Judgment**

#### **Background to the dispute**

1 By decision C(2008) 6815 final of 12 November 2008 relating to a proceeding pursuant to Article [101 TFEU] and Article 53 of the EEA Agreement (COMP/39.125 — Carglass) ('the Carglass decision'), the Commission of the European Communities found that a number of undertakings had participated in a set of agreements or concerted practices in the automotive glass sector and imposed fines on them totalling some EUR 1.383 billion.

2 The undertakings concerned and addressees of the Carglass decision include AGC Flat Glass Europe SA (since renamed AGC Glass Europe SA), AGC Automotive Europe SA and AGC Automotive Germany GmbH (since renamed AGC Glass Germany GmbH) (together 'AGC'), as well as Saint-Gobain Glass France SA, Saint-Gobain Sekurit France SA and Saint-Gobain Sekurit Deutschland GmbH & Co. KG (together 'SG').

3 By letter of 16 February 2012, registered under reference Gestdem 2012/817, the applicant, Axa Versicherung AG, which is active in particular in the motor insurance sector in Germany, submitted to the Commission a request for access to the complete version of the table of contents in the file of Case COMP/39.125, under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43; 'the first request'). The applicant based this first request on the need to support an action for damages lodged on 31 January 2012 before the Landgericht Düsseldorf (Regional Court of Düsseldorf, Germany) against AGC, in the course of which SG was subsequently joined as a third party. By decision of 7 March 2012, the Commission granted the applicant partial access to the requested document, stating that the other parts of the document could not be

disclosed to it since they were covered by certain exceptions to the right of access to documents laid down in Article 4 of Regulation No 1049/2001 ('the decision of 7 March 2012').

4 By letter of 18 June 2012, registered under the reference Gestdem 2012/3021, the applicant submitted to the Commission a further request for access relating to the complete version of a set of documents included in the file of Case COMP/39.125 ('the second request'). That request was refused by decision of 3 August 2012.

5 By letters of 23 March and 17 August 2012, the applicant submitted to the Commission two confirmatory applications for access to the documents in question. By decision Gestdem 2012/817 and 2012/3021 of 29 October 2013 ('the contested decision'), the Commission granted more extensive access to the table of contents in the file of Case COMP/39.125, which it had not done in its decision of 7 March 2012, and refused the two confirmatory applications as to the remainder.

6 In reaching that conclusion, the Commission found, in the first place, that the documents covered by the applicant's two requests formed part of the file in the proceeding resulting in the Carglass decision, that several actions for annulment had been brought before the General Court against that decision and that those actions were still pending. In addition, it stated that actions for annulment were also pending before the General Court against decisions of its Hearing Officer relating to the publication of a final non-confidential version of the Carglass decision (point 1 of the contested decision).

7 In the second place, the Commission clarified the scope of the applicant's two requests. It essentially found that the first request concerned the complete version of the table of contents in the file of Case COMP/39.125 and, in particular, three categories of information which had not previously been disclosed to the applicant by the decision of 7 March 2012, that is, first, references to correspondence exchanged in the context of that case with undertakings that had submitted an application under the Commission Notice on immunity from fines and reduction of fines in cartel cases of 8 December 2006 (OJ 2006 C 298, p. 17; 'the leniency programme'), since such information could not be inferred from the provisional non-confidential version of the Carglass decision or had not been disclosed in the actions for annulment brought against that decision; secondly, the names of natural persons, third-party undertakings and law firms that had participated in the proceeding; and thirdly, some non-public, potentially sensitive, commercial information (points 2.1 and 2.3 of the contested decision). As regards the second request, the Commission stated that it concerned a large set of documents included in the file of Case COMP/39.125. It also pointed out that, at an earlier stage of the proceeding, the Commission's services had divided the documents at issue into four separate categories, having regard to how the applicant had classified the documents, namely correspondence exchanged with the addressees of the Carglass decision (category A); correspondence exchanged with third parties (category B); documents seized in the course of the inspections carried out during the proceedings (category C); and the internal documents of the Commission (category D) (points 2.2 and 2.3 of the contested decision).

8 In the third place, the Commission noted that a number of reasons had led it to refuse the second request (points 3 and 4 of the contested decision). First of all, it submitted, in essence, that in view of the provisions specific to proceedings pursuant to the competition rules set out in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) and in Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18), the documents included in the file of proceedings pursuant to the competition rules were covered by a general presumption of inaccessibility under Regulation No 1049/2001 (point 4.1 of the contested decision). Next, it stated that in the present case, it should be presumed, in a general way, that all of the documents covered by the second request fell within the exceptions to the right of access to documents laid down in the third indent of Article 4(2) of Regulation No 1049/2001, relating to the protection of the purpose of inspections, investigations and audits, and the first indent of Article 4(2) of that regulation, relating to the protection of commercial interests (point 4.2 of the contested decision). Lastly, the Commission argued that all of the documents in category D also fell within the exception laid down in the second subparagraph of Article 4(3) of that regulation, relating to the protection of opinions for the internal use of the institution concerned (point 4.2 of the contested decision).

9 In the fourth place, the Commission decided to give the applicant additional access to the table of contents in the file of Case COMP/39.125 (points 3 and 5 of the contested decision). It stated that it could disclose information to the applicant from which the identity of the law firms that had represented the undertakings party to the proceeding could be ascertained, since such information was already in the public domain. However, it maintained that the other information to which it had refused the applicant access in its decision of 7 March 2012

could still not be disclosed, be it references to correspondence exchanged with the undertakings that had submitted an application under the leniency programme in the context of the proceeding (point 5.1 of the contested decision), the names of natural persons (point 5.2 of the contested decision) and third-party undertakings (point 5.3 of the contested decision) which were involved in the proceeding, or various items of commercially sensitive information (point 5.4 of the contested decision).

10 In the fifth and last place, the Commission indicated that it could not grant the applicant partial access to the documents in question, aside from the table of contents of the file (point 6 of the contested decision). It also stated that it was unable to identify any overriding public interest within the meaning of Regulation No 1049/2001 which might justify disclosure notwithstanding the applicability of some of the exceptions laid down in Article 4(2) and (3) thereof (point 7 of the contested decision).

#### **Procedure and forms of order sought by the parties**

11 By application lodged at the Court Registry on 19 December 2013, the applicant brought the present action.

12 Following delivery of the judgment of the Court of Justice of 27 February 2014 in *Commission v EnBW* (C-365/12 P, ECR, EU:C:2014:112), the General Court asked the parties to submit written observations on the possible effect of that judgment on the present case. The parties complied with that request within the time allowed.

13 By document lodged at the Court Registry on 28 April 2014, Saint-Gobain Sekurit Deutschland GmbH & Co. KG ('SGSD') applied for leave to intervene in the action in support of the form of order sought by the Commission. The parties did not raise any objections in that regard.

14 By order of the President of the Third Chamber of the General Court of 27 June 2014, SGSD was granted leave to intervene.

15 The Court also asked the Commission to produce the full version of the table of contents in the file of Case COMP/39.125, by order of 24 June 2014, and on 25 June 2014 put written questions to the parties. The parties did what was required.

16 After deciding, pursuant to Article 47(1) of the Rules of Procedure of the General Court of 2 May 1991, that a second exchange of pleadings was not necessary, the Court authorised the parties to supplement the documents, following a reasoned request from the applicant for leave to submit more detailed submissions on the judgment in *Commission v EnBW*, cited in paragraph 12 above (EU:C:2014:112).

17 Acting upon a report of the Judge-Rapporteur, the President of the Third Chamber of the General Court decided to open the oral part of the procedure.

18 At the hearing held on 11 February 2015, the parties presented their oral arguments and answered the oral questions put by the Court.

[...]

#### **Law**

22 In support of its action, the applicant relies on five pleas in law, alleging, in essence:

– first, infringement of Articles 2 and 4 of Regulation No 1049/2001 in so far as the Commission failed to comply with its obligation to carry out an individual and specific examination of the documents covered by the second request;

– secondly, infringement of the first and third indents of Article 4(2) and of the second subparagraph of Article 4(3) of Regulation No 1049/2001 in so far as the Commission misinterpreted and misapplied the exceptions to the right of access to documents and the notion of overriding public interest set out in those provisions when examining the second request;

- thirdly, infringement of Article 4(6) of Regulation No 1049/2001 in so far as the Commission wrongly refused to grant the applicant partial access to the documents covered by the second request;
- fourthly, infringement of the first and third indents of Article 4(2), of the second subparagraph of Article 4(3) and of Article 4(1)(b) of Regulation No 1049/2001 in so far as the Commission wrongly refused to disclose to the applicant the whole of the document covered by the first request; and
- fifthly, that the statement of reasons was inadequate.

23 In the light of their content, the first, second and third pleas should be considered together, alongside the fifth plea in so far as it concerns the second request (see, by analogy, judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraphs 33 and 34), followed by the fourth plea and the fifth plea in so far as it concerns the first request.

*A – The first, second and third pleas in law, as well as the fifth plea in law in so far as it concerns the second request*

24 By its first plea, the applicant contends, in essence, that the Commission erred in law by considering, based on rigid and abstract reasoning that could be invoked to refuse all requests for access to documents relating to a proceeding pursuant to the competition rules, that all of the documents covered by the second request were caught by a general presumption of inaccessibility under Regulation No 1049/2001 and, consequently, by refusing the request without first carrying out an individual and specific examination of the requested documents.

25 By its second plea, the applicant submits, in essence, that the Commission misinterpreted and misapplied the three exceptions to the right of access to documents relied on in the contested decision, which is argued in relation to all of the documents covered by the second request or in relation to the categories of documents artificially identified by the Commission's services (see paragraph 7 above). Neither the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 concerning the protection of commercial interests, nor that provided for in the third indent of Article 4(2) thereof concerning the protection of the purpose of inspections, investigations and audits, nor that set out in the second subparagraph of Article 4(3) thereof concerning the protection of the internal opinions of the institutions, can be relied on in this case. In any event, the Commission committed an error of law or of assessment by failing to take account of the overriding public interest in allowing the victims of anticompetitive practices to exercise their right to compensation and, after striking a balance between this overriding public interest and the interest protected by each of the three exceptions in question, to disclose to the applicant the documents in the file of Case COMP/39.125 which it needed so that it could actually exercise its right.

26 By its third plea, the applicant claims that the Commission infringed Article 4(6) of Regulation No 1049/2001 as well as the principle of proportionality by refusing it access to the documents or parts of documents covered by the second request which were not capable of falling within the exceptions on which the Commission relied in the contested decision.

27 By its fifth plea, the applicant asserts, in particular, that the Commission failed to comply with the requirement to state reasons set out in Article 296 TFEU by refusing the second request based on general and abstract reasoning applied to all of the documents or categories of documents in question, instead of taking their specific content into account.

28 In response to the written questions put by the Court following the judgment in *Commission v EnBW*, cited in paragraph 12 above (EU:C:2014:112), and in its reply, the applicant essentially argued that this judgment did not affect the substance of its various pleas.

29 The Commission, supported by SGSD, disputes all of those arguments.

30 It is appropriate to examine, first of all, the different arguments put forward by the applicant challenging the Commission's finding that it should be presumed, in a general way, that the documents covered by the second request fell within some of the exceptions to the right of access to documents established by Regulation No 1049/2001 and, secondly, the arguments objecting to the Commission's finding that there was no overriding public interest in disclosure of the documents.

1. *The general presumption and the exceptions applied by the Commission*

31 Pursuant to Article 15(3) TFEU, all citizens of the European Union and all natural or legal persons residing or having their registered office in a Member State have a right of access to documents of the European Union's institutions.

32 On that basis, Regulation No 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the European Union's institutions, subject to — as is apparent from, inter alia, the system of exceptions laid down in Article 4 thereof — certain limits based on reasons of public or private interest (judgments of 29 June 2010 in *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, ECR, EU:C:2010:376, paragraph 51, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 61).

33 In particular, under the first and third indents of Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where its disclosure would undermine the protection of the commercial interests of a specific natural or legal person or the purpose of inspections, investigations and audits, unless there is an overriding public interest in such disclosure.

34 That system of exceptions is based on a balancing of the different interests at stake, that is to say the interests which would be favoured by disclosure of the requested document or documents and those which would be jeopardised by such disclosure (judgments of 14 November 2013 in *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, ECR, EU:C:2013:738, paragraph 42, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 63).

35 Since such exceptions derogate from the principle of the widest possible public access to documents of the European Union's institutions, they must be interpreted and applied strictly (judgments of 17 October 2013 in *Council v Access Info Europe*, C-280/11 P, ECR, EU:C:2013:671, paragraph 30, and 3 July 2014 *Council v in't Veld*, C-350/12 P, ECR, EU:C:2014:2039, paragraph 48).

36 Consequently, in order to justify a refusal to grant access to a document disclosure of which has been requested, it is not sufficient, in principle, for the requested document to be covered by an activity mentioned in Article 4(2) of Regulation No 1049/2001. As a rule, the institution to which the request is addressed must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by the exception or exceptions relied on (judgments of 1 July 2008 in *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, ECR, EU:C:2008:374, paragraph 49, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 64). Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (judgments in *Sweden and Turco v Council*, paragraph 43, and *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraph 31).

37 However, it is open to the institution concerned to base its decisions on general presumptions which apply to certain categories of documents, as considerations of a similar kind are likely to apply to requests relating to documents of the same nature (judgments in *Commission v Technische Glaswerke Ilmenau*, cited in paragraph 32 above, EU:C:2010:376, paragraph 54, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 65).

38 Thus, where the request relates to a set of documents of a given kind, it is open to the institution concerned to base its decision on a general presumption that their disclosure would, in principle, undermine the protection of one or other of the interests listed in Article 4 of Regulation No 1049/2001, enabling it to deal with a global request accordingly (judgments in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraphs 47 and 48, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraphs 67 and 68).

39 In particular, in the case of requests relating to a set of documents included in the file of a proceeding pursuant to the competition rules, the EU judiciary has held, first of all, that the Commission was entitled to presume, without carrying out an individual and specific examination of each of those documents, that their disclosure would, in principle, undermine the protection of the purpose of inspections and investigations as well as the protection of the commercial interests of the undertakings party to the proceeding, which are closely linked in such a context (see, to that effect, judgments in *Commission v EnBW*, cited in paragraph 12 above,

EU:C:2014:112, paragraphs 79 to 93, and 13 September 2013 *Netherlands v Commission*, T-380/08, ECR, EU:T:2013:480, paragraphs 30 to 42).

40 In the light of the reasons underpinning this case-law (see paragraphs 37 and 38 above), the application of a presumption of this kind is not restricted to requests seeking access to ‘all’ of the documents included in the file of a proceeding pursuant to the competition rules, or even to requests relating to a ‘general and undifferentiated’ set of documents within such a proceeding, as the applicant claimed in its reply. On the contrary, as the Commission and SGSD correctly pointed out in the rejoinder and the statement in intervention, this presumption can also be applied to requests relating to a more specific set of documents in the file, identified by reference to their common characteristics or the fact they fall within one or more general categories (see, to that effect, judgment of 28 June 2012 in *Commission v Éditions Odile Jacob*, C-404/10 P, ECR, EU:C:2012:393, paragraphs 10 and 123), as the applicant claims to have done in this case. All the same, the identification carried out by the applicant is very relative, since the interested party simply divided all of the documents referred to in the table of contents of the file into three categories, depending on whether it considered them to be ‘relevant’, ‘possibly relevant’ or ‘irrelevant’, and appended the numbers ‘1’, ‘2’ or ‘3’ beside the appropriate references according to that categorisation.

41 The EU judiciary has also held that the Commission is entitled to apply such a general presumption provided that the proceeding concerned cannot be regarded as closed, either because it has not yet resulted in the adoption of a decision, or because actions for annulment were brought against that decision and are still pending when the Commission receives the request for access to the documents included in the corresponding file and takes a decision thereon (see, to that effect, judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraphs 70, 98 and 99, and *Netherlands v Commission*, cited in paragraph 39 above, EU:T:2013:480, paragraph 43).

42 Lastly, the Court of Justice has found that the possibility for the Commission to apply a general presumption in order to deal with a request for access relating to a set of documents means that the documents in question fall outside the scope of the obligation to disclose their content, in full or even in part (see, to that effect, judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 134, and 7 October 2014 *Schenker v Commission*, T-534/11, ECR, EU:T:2014:854, paragraph 108).

43 In the present case, first and foremost, it is common ground that the second request related to a set of documents in the file of Case COMP/39.125. In response to the written questions put by the Court, the applicant made clear that this request related to two categories of documents, namely 2 425 documents it considered to be ‘relevant’ as well as 1 523 documents it considered to be ‘possibly relevant’ for the purpose of its action for damages against AGC and SG, thus totalling 3 948 documents. The Commission stated, without being contradicted, that this represented approximately 90% of the documents in the file at issue.

44 In addition, all of these 3 948 documents clearly related to an inspection and investigation within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. They were drawn up or collected by the Commission during the investigation, which included inspections, conducted in Case COMP/39.125 in order to gather information and evidence so that the Commission could determine whether or not the EU rules on competition had been infringed. Furthermore, in the light of the objective of that proceeding, these documents were likely to contain commercially sensitive information relating to the strategy and activities of the parties, as well as their business dealings with third parties (see, to that effect, judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 79, and *Netherlands v Commission*, cited in paragraph 39 above, EU:T:2013:480, paragraph 34).

45 Lastly, it is not disputed that, both when the applicant submitted the second request to the Commission and when the Commission took a decision thereon, there were several actions for annulment of the Carglass decision pending before the General Court. These actions subsequently gave rise to judgments of 27 March 2014 in *Saint-Gobain Glass France and Others v Commission* (T-56/09 and T-73/09, ECR, EU:T:2014:160); 10 October 2014 *Soliver v Commission* (T-68/09, ECR, EU:T:2014:867); and 17 December 2014 *Pilkington Group and Others v Commission* (T-72/09, EU:T:2014:1094).

46 In view of this information, mentioned in points 1 and 2.2 to 2.3 of the contested decision, the Commission was able to find, without failing to comply with its obligation to state reasons and without committing an error of law or of assessment, that the 3 948 documents to which the applicant’s second request related were all covered by a general presumption that their disclosure would, in principle, undermine the exception relating to the

protection of the purpose of inspections and investigations laid down in the third indent of Article 4(2) of Regulation No 1049/2001.

47 Having regard to the case-law mentioned in paragraph 42 above, the Commission also found, without causing the contested decision to be vitiated by an inadequate statement of reasons and without committing an error of law or of appreciation, that it could not grant even partial access to the 3 948 documents in question.

48 None of the other arguments put forward by the applicant in the context of these pleas is capable of calling that finding into question.

49 In particular, first of all, the applicant has no grounds for taking issue with the Commission for having drawn up artificial categories of documents and having applied abstract and interchangeable reasoning to them.

50 It is true that, when describing the scope of the second request, the Commission stated that its services had found, at an earlier and provisional stage of dealing with the request, that the 3 948 documents concerned fell within four different categories, based on the applicants' own classification (point 2.2 of the contested decision).

51 However, when it subsequently assessed that request, the Commission did not reproduce the categories previously identified by its services, but instead considered, in essence, that the general presumption which it had decided to rely on covered all of the categories of documents to which the request related, all of the documents in each of those categories and each of those documents in their entirety.

52 In any event, it made no difference whether the 3 948 documents in question fell within one or other of the categories drawn up by the Commission's services, since the case-law allowed that institution to base itself, as it did in the contested decision, on a single general presumption applicable to all of the documents, regarded for the purpose of applying the presumption as falling within a single category (see, to that effect and by analogy, judgments in *Commission v Technische Glaswerke Ilmenau*, cited in paragraph 32 above, EU:C:2010:376, paragraph 61, and *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 64), without first carrying out an individual and specific examination of each document.

53 Secondly, the applicant's complaints relating to the specific reasoning that the Commission dedicated to the risks associated with the possible disclosure of the documents collected under the leniency programme (sixth subparagraph of point 4.1 and eighth to tenth subparagraphs of point 4.2 of the contested decision) are ineffective in the context of these pleas.

54 In order to deal with the second request (relating to a set of 3 948 documents included in the file of Case COMP/39.125), and without prejudice to the handling of the first request (relating only to the table of contents in the file), the Commission was able to regard those documents as being covered by the general presumption referred to in paragraphs 46 and 52 above, irrespective of any specific considerations relating to the nature or content of the documents collected under the leniency programme (judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 97).

55 Thirdly, the arguments put forward by the applicant to challenge the Commission's basing its refusal to grant the second request cumulatively on the need not to undermine the protection of the commercial interests of third parties (twelfth subparagraph of point 4.2 of the contested decision) and, as regards its internal documents, on the need not to undermine the protection of opinions for internal use (eleventh and twelfth subparagraphs of point 4.2 of the contested decision) are ineffective.

56 It is true that an EU institution may, when assessing a request for access to documents held by it, take into account more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 (see, to that effect, judgment in *Commission v Éditions Odile Jacob*, cited in paragraph 40 above, EU:C:2012:393, paragraphs 113 and 114), as the Commission did in the present case.

57 However, possible errors of law or of assessment committed by the Commission when applying the exceptions relating to the protection of commercial interests as well as the protection of opinions for the Commission's internal use have no bearing in the present case on the lawfulness of the contested decision, since that decision does not seem to be unlawful in so far as it presumed, in a general way, that all of the documents in

question were fully covered by the exception relating to the protection of the purpose of inspections and investigations, as held in paragraph 46 above.

58 Fourthly, the new arguments put forward in the reply, based on the Commission's proposal COM (2013) 404 final of 11 June 2013 for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, are irrelevant, on the assumption that they are admissible, which the Commission disputes. Irrespective of any considerations relating to the status and scope of this proposal when the Commission adopted the contested decision, the decision clearly states that the provisions set out in the proposal are without prejudice to the rules on the right of access to documents provided for in Regulation No 1049/2001, as the Commission correctly points out.

## 2. *The rebuttal of the general presumption and the overriding public interest invoked by the applicant*

59 The application of a general presumption does not rule out the possibility of demonstrating that a specific document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest in disclosure of the document in question by virtue of Article 4(2) of Regulation No 1049/2001 (judgments in *Commission v Technische Glaswerke Ilmenau*, cited in paragraph 32 above, EU:C:2010:376, paragraph 62, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 100). To that end, it is for the applicant to rely on specific circumstances to show that disclosure of the document concerned is justified (judgment in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 94).

60 However, the requirement to ascertain whether the general presumption in question actually applies cannot be interpreted as meaning that the Commission has to examine individually all the documents to which access is requested. Such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request in an equally global manner (judgments in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 68, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 101).

61 In the present case, it should be noted, in the first place, that the applicant did not argue in its action, nor does it claim to have argued before the Commission, that a specific individual document, within the set of documents to which the second request related, was not covered by the general presumption described in paragraphs 46 and 52 above.

62 After essentially disputing the very principle of applying such a presumption in its application, in its reply the applicant merely contended that the presumption should be regarded as rebutted in respect of all of the documents in question for two reasons. First, the applicant asserted that it had not merely contemplated an action for damages, but had already brought such an action before the Landgericht Düsseldorf. Secondly, it submitted that the requested documents dated from more than five years before and were therefore too old to warrant protection.

63 The first of these claims is not decisive, as SGSD points out. Although the judgment in *Commission v EnBW*, cited in paragraph 12 above (EU:C:2014:112, paragraphs 103 and 106), was delivered in a case in which the person requesting access to documents intended to bring an action for damages but had not yet done so, while the applicant in this case has already brought its action, this fact in itself does not mean that the general presumption invoked by the Commission does not apply to one or other of the documents in question in this case. As regards the second claim, which is very general in nature, it should be recalled that Article 4(7) of Regulation No 1049/2001 provides that the exceptions laid down in that regulation may apply for a period of thirty years and possibly beyond that period if necessary. The fact that the documents requested by the applicant are more than five years old is not, in itself, capable of rebutting the general presumption invoked by the Commission either (see, to that effect, judgment in *Commission v Éditions Odile Jacob*, cited in paragraph 40 above, EU:C:2012:393, paragraphs 124 and 125).

64 In the absence of other evidence in the action capable of rebutting the general presumption on which the contested decision is based, the applicant cannot claim that the Commission ought to have carried out a specific and individual examination of the documents it requested (see, to that effect, judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 128).

65 In the second place, the applicant none the less asserts that the Commission committed an error of law or of assessment by failing to take account of the overriding public interest in allowing the victims of anticompetitive practices to exercise their right to compensation and, after the specific balancing of interests to be carried out in the present case between this overriding public interest and the interest protected by each of the exceptions relied on in the contested decision, to disclose to the applicant the documents in the file of Case COMP/39.125 which it needed so that it could actually exercise its right. In its reply, the applicant also states, in essence, that it did everything in its power to demonstrate the need to secure the 3 948 documents identified in the second request and, at the very least, the 2 425 documents among them deemed to be ‘relevant’, in the light of the information in its possession and, in particular, the non-confidential version of the table of contents which the Commission disclosed in response to the first request.

66 It should be observed that all persons are entitled to claim compensation for the loss caused to them by a breach of the EU rules on competition. Such a right strengthens the working of those rules, since it discourages cartels and other, often covert, practices capable of restricting or distorting competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (judgments of 20 September 2001 in *Courage and Crehan*, C-453/99, ECR, EU:C:2001:465, paragraphs 26 and 27, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 104).

67 Nevertheless, such general considerations are not, as such, capable of prevailing over the reasons justifying a refusal to grant access to the documents in the file of a proceeding pursuant to the competition rules based on the fact that the documents are covered, in their entirety, by a general presumption that their disclosure would in principle undermine, in particular, the protection of the purpose of inspections and investigations (judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 105).

68 In order to ensure the effective implementation of the right to compensation, there is no need for every document in the file of such a proceeding to be disclosed to the person requesting access to it under Regulation No 1049/2001 with a view to bringing an action for damages, as it is highly unlikely that the action will need to be based on all the evidence in the file relating to that proceeding (judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 106; also see, to that effect, judgment of 6 June 2013 in *Donau Chemie and Others*, C-536/11, ECR, EU:C:2013:366, paragraph 33). The same is true where the person requesting access to the documents in the file has already brought an action for damages, since it remains highly unlikely that the action will need to be based on the entire file, as the Commission pointed out in its rejoinder.

69 It follows that any person seeking compensation for the loss he considers was caused to him by a breach of the EU rules on competition must establish that it is necessary for him to be granted access to documents in the Commission’s file, so that the Commission can weigh up, on a case-by-case basis, the respective interests in favour of disclosure of such documents and in favour of the protection of those documents, taking into account all the relevant factors in the case (judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 107, and *Schenker v Commission*, cited in paragraph 42 above, EU:T:2014:854, paragraph 95).

70 Otherwise, the interest in obtaining compensation for the loss suffered as a result of a breach of the EU rules on competition cannot constitute an overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001 (judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 108, and *Schenker v Commission*, cited in paragraph 42 above, EU:T:2014:854, paragraph 96).

71 In this case, as the applicant pointed out particularly in its reply and answers to the written questions of the Court, in its second request it identified 3 948 ‘relevant’ or ‘possibly relevant’ documents in the context of its action before the Landgericht Düsseldorf, appending the numbers ‘1’ or ‘2’ respectively beside the references to these documents included in the non-confidential version of the table of contents of the file which the Commission had disclosed to it in response to the first request. Moreover, it made specific reference in the introduction to the request to eight ‘relevant’ or ‘possibly relevant’ documents among the 3 948 documents covered by the second request.

72 However, in successive documents, it merely made general claims that these documents ‘were of interest to it’ and that it ‘had to inspect them to be able to substantiate [its] claim for damages’ since they ‘clearly contain[ed] information on the agreements and price increases agreed upon by the participants in the cartel [which was found to exist and was subject to penalties in the Carglass decision]’ and ‘it [was] necessary [for it] to have sight of that information to be able to prove and quantify the actual loss it [had] suffered’.

73 By contrast, as the Commission correctly points out, the applicant did not explain why it needed these documents, even if only by setting out the specific factual or legal arguments which securing those documents might help it substantiate before the national court required to rule on its claims.

74 None of the other arguments put forward by the applicant is capable of calling that assessment into question.

75 The contention that it was impossible for the applicant to be any more specific than it had already been, given that the Commission had granted it only partial access to the table of contents of the file at the outset, is unconvincing in this case. Except for references to the ‘leniency documents’ produced by some of the parties to the proceeding and to the internal documents of the Commission, which were deleted en bloc, the Commission merely removed from the references to other documents in the file included in the table of contents specific information which, in its opinion, constituted personal data or commercially sensitive information. The Court considers that, in view of this targeted selection, the non-confidential version of the references to the documents in the file other than the ‘leniency documents’ and the internal documents of the Commission which were in the applicant’s possession when it submitted the second request permitted the interested party to put forward more specific and detailed reasons than those it had given to the Commission (see paragraphs 40 and 71 to 72 above) and, in this case, the reasons why it thought that one or other of the documents was necessary for the exercise of its right to compensation, for example by setting out, as indicated above, the specific factual or legal arguments which securing those documents might help it substantiate before the national court required to rule on its claims.

76 Furthermore, it is indeed apparent from the contested decision that, ‘in [its] confirmatory application [, the applicant] not[ed] ... that there [were] no appropriate rules under German civil procedure law permitting the documents [in question] to be requested “*inter partes*”’ (third subparagraph of point 7 of the contested decision). However, this claim, which was last repeated at the hearing, was never expanded on, far less proven, by the applicant in the course of its action. The Court of Justice has already held that the need to access a set of documents included in the file of a proceeding pursuant to the competition rules could not be regarded as established where the requesting party stated that it was utterly dependent on the documents but did not demonstrate, at the very least, that it had no other way of obtaining that evidence (judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 132; also see, to that effect, judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraphs 32 and 44).

77 In those circumstances, it cannot be considered, in this instance, that the Commission committed an error of law or of assessment by finding that, first, ‘on balance, the interest in the effective implementation of the competition rules was, in the present case, better served by maintaining the confidentiality of the documents in question’; secondly, ‘there [was] no overriding public interest in their disclosure within the meaning of Regulation No 1049/2001’; and thirdly, ‘in the present case, the prevailing interest [was] the protection of the purpose of investigations, as set out in the third indent of Article 4(2)’ of that regulation (sixth and seventh subparagraphs of point 7 of the contested decision).

78 Having regard to all of the preceding considerations, the present pleas in law must be dismissed in their entirety.

*B – The fourth plea in law and the fifth plea in law in so far as it concerns the applicant’s first request*

79 By its fourth plea in law, the applicant contends, in essence, that the Commission wrongly refused to give it access to the complete version of the only document covered by the first request, namely the table of contents in the file of Case COMP/39.125.

80 In the first place, it claims that the very general and, in part, speculative explanations furnished by the Commission in the contested decision and in the decision of 7 March 2012 as regards the need not to jeopardise the effectiveness of its leniency programme and not to undermine the protection of the commercial interests of undertakings that have submitted an application under the programme in the context of Case COMP/39.125, as well as the protection of the purpose of inspections and investigations, do not, in themselves, justify a complete and absolute refusal to grant the applicant access to the references to the ‘leniency documents’ included in the table of contents.

81 In the second place, the applicant argues that the Commission wrongly refused access to information relating to the identity of natural persons included in the table of contents by invoking, in the abstract, the need not to

undermine the protection of personal data, instead of explaining, individually and specifically, the reasons preventing each item of information in question from being disclosed. In any event, the applicant contends that it sufficiently demonstrated why it needed access to this information in order to exercise its right to compensation, in accordance with the public interest in victims of anticompetitive practices being able to secure compensation for their loss.

82 In the third place, the Commission was wrong to refuse it access, without any individual and specific examination, to the names of third-party undertakings ‘operating in the lift and escalator sector’ mentioned in the table of contents, even though such a reference was clearly irrelevant and disclosure of that information was unlikely to undermine the commercial interests of the persons involved.

83 In the fourth and last place, the Commission was wrong to refuse it access, on general and abstract grounds, to information relating to vehicle models, the names of car manufacturers and other commercially sensitive information included in the table of contents, even though such information was absolutely essential to enable it to exercise its right to compensation and even though this interest should prevail, on balance, over the other interests at stake.

84 By its fifth plea, the applicant asserts, in essence, that the Commission failed to comply with the requirement to state reasons set out in Article 296 TFEU by refusing the first request based on general reasoning that failed to take account of the specific content of the document in question, as demonstrated by the statement of reasons used to refuse disclosure of the names of third-party undertakings included in the table of contents.

85 The Commission, supported by SGSD, disputes all of those arguments.

86 It is appropriate to examine, first of all, the applicant’s arguments relating to the different types of information included in the table of contents to which the Commission refused to give the applicant access, namely, first, references to the ‘leniency documents’ (point 5.1 of the contested decision); secondly, the names of natural persons (point 5.2 of the contested decision); thirdly, the names of third-party undertakings (point 5.3 of the contested decision); and fourthly, other commercially sensitive information (point 5.4 of the contested decision). By contrast, it is not necessary to review the merits of the contested decision in so far as it refused to disclose to the applicant the references to internal documents of the Commission since, notwithstanding the heading of its fourth plea (see paragraph 22 above), the applicant does not rely on any specific arguments in that regard. The arguments relating to the existence of an overriding public interest, which the applicant expressly relies on only in relation to some of the types of information in question, will be examined thereafter.

1. *The general presumptions and the exceptions applied by the Commission*

a) *The refusal to grant access to references to the ‘leniency documents’*

87 In point 5.1 of the contested decision, the Commission stated that ‘[i]t is not possible, at this stage, to disclose the description of the leniency documents’ included in the table of contents ‘for the same reasons as those set forth in point 4.2 above, since the references to those documents provide information on their content which has to be treated as confidential’. In doing so, it referred to the reasoning which previously led it to refuse the applicant access to the set of documents to which the second request related, on the ground that this set of documents was covered by a general presumption that its disclosure would undermine the protection of the commercial interests of third parties and the purpose of inspections and investigations (see paragraph 8 above).

88 In so far as the Commission submits, in its defence, that ‘leaving aside the applicability of [this] general presumption, [it] also explained in detail, in [the] decision [...] of 7 March 2012 and in [the contested decision], that the exceptions laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001 applied’, it should be noted from the outset that this assertion is only partially correct.

89 No such examination is in any way apparent from the contested decision. On the contrary, after considering the case-law of the Court of Justice acknowledging that it was open to the Commission to apply general presumptions in order to deal with requests relating to sets of documents contained in merger or State aid files (first to fourth subparagraphs of point 4.2 of the contested decision), the Commission merely explained why, in its opinion, that case-law also applied to files involving anticompetitive practices (fifth to twelfth subparagraphs of point 4.2 of the contested decision) and, in particular, to ‘leniency documents’ contained therein (eighth to tenth

subparagraphs of point 4.2 of the contested decision) and, moreover, was capable of being applied to references to such documents included in the table of contents of those files (point 5.1 of the contested decision).

90 In those circumstances, the reasons for the decision of 7 March 2012, in which the Commission's services explained in more detail why, in their opinion and at that provisional stage of dealing with the first request, such references should not be disclosed, may only be taken into account for the purpose of assessing the lawfulness of the contested decision in so far as they clarify the reasoning actually relied on, in the end, by that institution (see, to that effect, judgment of 6 April 2000 in *Kuijjer v Council*, T-188/98, ECR, EU:T:2000:101, paragraph 44), reasoning which is based, as the Court has just pointed out, on a general presumption.

91 In view of the arguments put forward by the applicant to challenge this reasoning, it is necessary, in the first place, to decide whether the Commission was fully entitled to refuse access to the information in question by applying a general presumption, as it did in the contested decision. Only if the answer is in the affirmative will it be necessary, in the second place, to consider whether Commission was right to apply the general presumption on which it relied in this case.

#### The merits of applying a general presumption

92 Where an institution is asked to disclose a document, it must assess in each individual case whether that document falls within the exceptions, set out in Article 4 of Regulation No 1049/2001, to the right of public access to documents of the institutions (judgment in *Sweden and Turco v Council*, cited in paragraph 36 above, EU:C:2008:374, paragraph 35).

93 Since those exceptions must be interpreted and applied strictly, the institution to which the request is addressed must, in order to justify a refusal to grant access to the document in question, provide explanations as to how access to that document could specifically and actually undermine the interest protected by one or other of the exceptions laid down in Article 4 of Regulation No 1049/2001. Moreover, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (see the case-law cited in paragraphs 35 and 36 above).

94 In the course of such an exercise, it is open to the institution concerned to base its decision on a general presumption, even though the request at issue covers only a single document. However, in that kind of situation, where the application of a general presumption is not intended to make it possible to deal with a global request in global manner, the Court of Justice has held that it is a matter for the institution seeking to apply the presumption to establish whether the general considerations normally applicable to a particular type of document are in fact applicable to the document which it has been asked to disclose (judgment in *Sweden and Turco v Council*, cited in paragraph 36 above, EU:C:2008:374, paragraphs 50 and 57; also see, to that effect, judgment in *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraphs 72 and 73).

95 In the present case, it follows that, in contrast to what the applicant submits in its application, it was open to the Commission to rely on a general presumption in order to decide, in point 5.1 of the contested decision, to refuse the first request not in its entirety, but in so far as it related to a category of information which, in its opinion, fell within the exceptions listed in the first and third indents of Article 4(2) of Regulation No 1049/2001.

96 However, the Commission is not entitled to claim, as it does in its defence, that 'the table of contents forms part of the file in the case [COMP/39.125] and is therefore covered by the general presumption' of 'inaccessibility' recognised by the judgment in *Commission v EnBW*, cited in paragraph 12 above (EU:C:2014:112).

97 The Court of Justice did not hold in that judgment that 'the entire' file of a proceeding pursuant to the competition rules is covered by a 'general presumption of inaccessibility', as the Commission itself states in its response to the applicant's first group of pleas (see paragraph 40 above), but only that an institution to which a request is addressed relating to 'a set' of documents included in such a file may apply a general presumption in order to deal with that global request appropriately. Furthermore, the case-law of the Court of Justice makes it clear that the institutions of the European Union were recognised as having the right to apply such a general presumption to enable them to deal with requests covering not just one document, but a set of documents (judgment in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraphs 47 and 48).

98 The applicant's first request covered not a set of documents, but a single document. In addition, the Commission does not claim that this request was the result of action taken to split artificially a request covering a set of documents into as many individual requests. Moreover, it would have no grounds for doing so in the present case (see paragraphs 3 to 5 above).

The merits of applying the general presumption invoked in the present case

99 As the Court has just pointed out (see paragraph 94 above), since the Commission chose to apply a general presumption in order to refuse the applicant's first request in so far as it related to references to the 'leniency documents' included in the only document covered by the request, it was for the Commission to base its decision on general considerations capable of being regarded as normally applicable to that section of the table of contents of the file of a proceeding pursuant to the competition rules and to check that those considerations were in fact applicable in this instance.

100 This requirement does not necessarily mean that the Commission had to carry out a specific assessment of the document in question (judgment in *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraph 73). Moreover, the obligation imposed on the Commission to check that the general presumption on which it intends to rely in order to deal with a request relating to a set of documents actually applies cannot be interpreted as meaning that it must examine individually all of the documents to which access is requested (see paragraph 60 above).

101 However, it was still necessary for the Commission to substantiate its refusal to give access to the requisite factual and legal standard, on the basis of a reasonably foreseeable risk of specific and actual harm to one or more of the interests protected by the exceptions laid down in Article 4(2) of Regulation No 1049/2001 (see, to that effect, judgments in *Sweden and Turco v Council*, cited in paragraph 36 above, EU:C:2008:374, paragraphs 49 and 50, and *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraphs 31, 36 to 38, 54 and 74).

102 In the present case, it is appropriate, in the first place, to make five observations in this respect.

103 First, it is common ground that, in the context of the first request, as reiterated in the confirmatory application of 23 March 2012, the applicant did not seek access to the 'leniency documents' included in the file of Case COMP/39.125 in the strict sense. It only sought disclosure of the references to these documents which appeared in the complete version of the table of contents of the file, but not in the non-confidential version sent by the Commission on 7 March 2012 (see paragraphs 3, 5 and 7 above). It is apparent from reviewing the complete version of this document, which was sent in response to the measure of inquiry ordered by the Court (see paragraph 15 above), that there are essentially two types of references. The first type covers the dates on which the undertakings that submitted an application under the leniency programme sent the 'leniency documents' at issue to the Commission, while the second type covers the respective headings of the documents.

104 Secondly, the Commission refused to disclose not only all of these references as a whole, but also each reference in its entirety. The way in which it dealt with this category of references therefore differs from its handling of the references to other types of documents included in the table of contents which form the subject-matter of these pleas (see paragraph 86 above). In respect of those references, the Commission simply removed, in a targeted manner, specific information on the ground that, in its opinion, such information constituted personal data (such as the names of natural persons) or commercially sensitive information (such as the names of third-party undertakings or references to vehicle models), granting access to the remainder of the references (see paragraph 75 above).

105 Thirdly, it is apparent from reading point 5.1 of the contested decision in conjunction with point 4.2 to which it refers that the complete removal of references to the 'leniency documents' from the non-confidential version of the table of contents of the file in Case COMP/39.125, which was sent to the applicant, is driven by general considerations according to which disclosure of such references 'could jeopardise the effectiveness' of the Commission's leniency programme. In the contested decision, the Commission states that (i) undertakings which have submitted an application under its leniency programme expect the information they provide to the Commission in connection with their application to be treated as confidential; (ii) these expectations are worthy of protection; and, (iii) the effectiveness of leniency programmes, which are useful tools to detect and prevent

infringements of the competition rules, could be jeopardised if the information at issue was made public (eighth to tenth subparagraphs of point 4.2 of the contested decision).

106 Fourthly, the Commission clarifies the meaning and extent of these general considerations in its defence, referring back to the earlier analysis conducted by its services in the decision of 7 March 2012. It explains that (i) ‘because of the description of the correspondence from the leniency applicants, disclosure of the table of contents would automatically reveal the nature and extent of [their] involvement’; (ii) ‘some keywords in the table of contents already disclose the identity and cooperation of natural persons both before and during the administrative procedure’; (iii) ‘the description and dates of some of the documents mentioned in the table of contents already gives an indication of their content, particularly information concerning the commercial dealings of the leniency applicants, pricing, cost structures, market shares or other commercially sensitive information’; and (iv) ‘the interest ... of the leniency applicants in protecting the confidentiality of all information to their detriment’ is ‘particularly worthy of protection’. The Commission concludes that ‘disclosure of such information is contrary to the protection of the commercial interests of the leniency applicants’ and that the ‘serious harm’ that such disclosure is likely to ‘cause’ to those interests might ‘deter them from cooperating in future investigations’, even though ‘the level of detail in the table of contents [may not] obviously be the same as in the [leniency] documents’ in the strict sense.

107 Fifthly, it is apparent from the structure of point 4.2 of the contested decision as a whole that these general considerations led the Commission to presume, in a general way, that disclosing references to the ‘leniency documents’ included in the table of contents requested by the applicant would, in the long run, undermine both the protection of the purpose of its inspections and investigations and the protection of the commercial interests of the parties to the proceeding.

108 In order to contest the merits of these grounds, the applicant essentially claims, in paragraphs 128 to 141 of the application, that the Commission argued its case as if the first request related to the ‘leniency documents’ in the strict sense rather than mere references to such documents included in a table of contents, and that the general and speculative considerations relied on in the contested decision as to the need not to jeopardise the leniency programme did not justify the complete refusal to grant access to the references which is under challenge here.

109 It is appropriate, in the second place, to note that this line of argument is in part well founded.

110 First, it must be stated that neither the wording of point 5.1 of the contested decision, nor that of point 4.2 to which it refers, nor even that of the decision of 7 March 2012, considered in isolation or as a whole, justifies the completeness of the refusal set out in the contested decision.

111 Indeed, in point 5.1 of the contested decision, the Commission merely states that ‘the references [to the leniency] documents [included in the table of contents of the file in Case COMP/39.125] provide information on the content of these documents which must be treated as confidential’. In the eighth and ninth subparagraphs of point 4.2, the Commission sets out the considerations that led it to presume, in a general way, that disclosure of the ‘leniency documents’ included in the file of some proceedings pursuant to the competition rules ‘could jeopardise the effectiveness’ of its leniency programme and, in consequence, undermine the protection of the commercial interests of the parties to these proceedings as well as the protection of the purpose of its inspections and investigations (see paragraphs 87 and 105 above).

112 As the Commission confirms in its defence, by relying on the decision of 7 March 2012, the combination of these two sets of considerations is to be interpreted, as the applicant did in its application, as meaning that it was appropriate, in the present case, to presume, in a general way, that disclosure of the references to the ‘leniency documents’ included in the table of contents could jeopardise the effectiveness of the Commission’s leniency programme and, in consequence, undermine the commercial interests of the parties to the proceeding concerned as well as the purpose of the inspections and investigations connected to that proceeding, since — and in so far as — such disclosure would reveal to a third party ‘confidential information’ contained in the references or in the ‘leniency documents’ to which the references related. Specifically, the Commission considered information on the cooperation of undertakings which had submitted an application under the leniency programme and commercially sensitive data collected by its services in that context to be confidential (see paragraphs 106 and 107 above).

113 Even if it is conceded that the Commission could (i) treat the different types of documents in the file classified as ‘leniency documents’ in the contested decision in the same way, in the light of their nature or content, and (ii) presume, in a general way, that disclosure of these documents could jeopardise the effectiveness of its leniency programme and, in consequence, undermine the protection of the commercial interests of third parties as well as the protection of the purpose of its inspections and investigations, such reasoning only justifies, according to the very wording of the contested decision, a refusal to disclose that is limited to ‘information on the content of these documents which must be treated as confidential’.

114 However, it does not justify removing en bloc all of the references containing such confidential information, including their most neutral or insignificant aspects, in contrast to the precise selection made by the Commission as regards the other types of references included in the table of contents which form the subject-matter of these pleas (see paragraph 104 above).

115 In other words, the general considerations relied on by the Commission may not be regarded, according to the very wording of the contested decision, as normally and actually applicable to all of the references in question. Therefore, they are not capable of justifying a complete refusal to disclose, but rather, at best, a partial refusal based on Article 4(6) of Regulation No 1049/2001 limited to what is necessary and proportionate in order to protect information which is deserving of protection (see, to that effect and by analogy, judgments of 6 December 2001 in *Council v Hautala*, C-353/99 P, ECR, EU:C:2001:661, paragraphs 27 to 29, and 25 April 2007 *WWF European Policy Programme v Council*, T-264/04, ECR, EU:T:2007:114, paragraph 50).

116 This assessment is not called into question by the fact that the general presumption on which the Commission may rely in order to deal with, in a global way, requests relating to a set of documents in the file of a proceeding pursuant to the competition rules means that these documents fall outside the scope of any obligation to disclose their content, even in part (see paragraph 42 above). It is clearly apparent from the case-law that it is where an institution applies a general presumption to deal with a request relating to a set of documents, not a single document, that this is the consequence of taking such action (judgments in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 134, and *Commission v Éditions Odile Jacob*, cited in paragraph 40 above, EU:C:2012:393, paragraph 133). By contrast, it is not apparent from the case-law that, whilst attaching this consequence to the application of a general presumption in the specific case at hand, the Court of Justice sought to call into question the case-law of a more general scope considered in paragraph 115 above. Moreover, the Court of Justice has held that, even in this specific situation, the institution concerned is obliged to disclose all or part of the documents covered by the request where it finds that the characteristics of the corresponding proceeding so permit (judgment in *LPN and Finland v Commission*, cited in paragraph 34 above, EU:C:2013:738, paragraph 67). Lastly, in the light of the requirement to limit refusals to grant access to what is necessary and proportionate in order to protect information which is deserving of protection, there is even less reason to accept a general refusal to disclose in the circumstances of this case, because it makes the effective exercise of the right to compensation which the applicant enjoys under the Treaty in practice impossible or at the very least excessively difficult (see paragraphs 130 to 134 below).

117 Secondly, the absolute nature of the Commission’s refusal to disclose the references in question to the applicant does not seem to be substantiated to any higher factual and legal standard than the completeness of such refusal, in the light of the considerations on which the refusal is based.

118 It is true that the Commission was able to take the view, in essence, that disclosure of these references ‘could undermine’ the effectiveness of its leniency programme, in the same way as disclosure of the ‘leniency documents’ in the strict sense, in so far as such disclosure may result in third parties becoming aware of commercially sensitive information or confidential information relating to the cooperation of the parties contained in the documents. As the EU judiciary has already held, leniency programmes are useful tools to uncover and bring an end to infringements of the competition rules, thereby contributing to the effective application of Articles 101 and 102 TFEU. Furthermore, the effectiveness of these programmes could be compromised if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages. The view can reasonably be taken that the prospect of such disclosure would deter persons involved in an infringement of the competition rules from having recourse to such programmes (judgments of 14 June 2011 in *Pfleiderer*, C-360/09, ECR, EU:C:2011:389, paragraph 26, and *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 42). Although this case-law concerns leniency programmes established by national competition authorities, the same reasoning may be applied, by analogy, to the leniency programme of the Commission (see, to that effect, judgment of *Netherlands v Commission*, cited in paragraph 39 above,

EU:T:2013:480, paragraph 41, and opinion of Advocate General Villalón in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2013:643, paragraphs 68 and 69), as the Commission indeed argued in its defence.

119 However, it is also apparent from the case-law that, although such considerations may justify a refusal to grant access to certain documents included in the file of a proceeding pursuant to the competition rules, they do not necessarily mean that access may be systematically refused, since any request for access to the documents at issue must be assessed on a case-by-case basis, taking into account all the relevant factors in the case (see judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 43 and the case-law cited).

120 Given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union, the mere argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those actions may undermine the effectiveness of the leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence (see judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 46 and the case-law cited; also see, to that effect, opinion of Advocate General Villalón in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2013:643, paragraphs 70 to 74).

121 On the contrary, the fact that such a refusal is liable to prevent those actions from being brought, by giving the undertakings concerned, who may have already benefited from immunity, at the very least partial, from pecuniary penalties, an opportunity also to circumvent their obligation to compensate for the harm resulting from the infringement of Article 101 TFEU, to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused (judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 47; also see, to that effect, opinion of Advocate General Villalón in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2013:643, paragraph 78).

122 Consequently, it is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the leniency programme in question that non-disclosure of that document may be justified (judgment in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraph 48; also see, to that effect, opinion of Advocate General Villalón in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2013:643, paragraph 77).

123 This is why it is settled case-law that, where the Commission or the national courts are called upon to take a decision, in legal and procedural frameworks that are admittedly different, on whether to grant access to documents collected in the context of the implementation of a leniency programme which are included in the file of a proceeding pursuant to the competition rules, they must refrain from taking an inflexible and absolute stance liable to undermine either the effective application of the competition rules by the public authorities entrusted with ensuring their observance or the effective exercise of individuals' rights flowing from these rules. They must therefore weigh up, on a case-by-case basis, the different interests in favour of disclosure and in favour of the protection of the documents in question. In striking that balance, they are required to take into account all the relevant factors in the case and, in particular, the interest of the requesting party in securing access to the documents he seeks to have disclosed for the purpose of supporting his action for damages, in view of the other possibilities that may be open to him and the actual harmful consequences which may result from such access having regard to the public interest or the legitimate interests of other parties (see, to that effect, judgments in *Donau Chemie and Others*, cited in paragraph 68 above, EU:C:2013:366, paragraphs 30 to 34 and 44 to 45, and *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraph 107).

124 Such considerations are even more relevant where, as in the present case, a person who considers himself to be a victim of an infringement of the competition rules and who has already brought an action for damages before a national court asks the Commission for access not to the 'leniency documents' included in the file of the proceeding which resulted in the decision finding that such an infringement had been committed, but only to the references to those documents contained in the table of contents of the file. If the mere argument that there is a risk that the effectiveness of a leniency programme might be undermined does not constitute a sufficient basis for a general and absolute refusal to grant access to the 'leniency documents' included in the file, quite apart from the actual harmful consequences which may result from disclosure of the documents, far less can it be used to justify a complete and absolute refusal to disclose mere references to those documents to the person seeking access to them for the purpose of supporting an action for damages.

125 In the present case, the refusal is based, as the applicant correctly points out, on general and speculative considerations according to which disclosure of the references in question ‘could jeopardise’ the effectiveness of the Commission’s leniency programme and, in consequence, undermine the protection of the commercial interests of the parties to the proceeding as well as the protection of the purpose of inspections and investigations connected to that proceeding (see paragraphs 105 and 106 above).

126 However, these general and speculative considerations do not prove, in the present case, to the requisite factual and legal standard that there is a reasonably foreseeable risk of specific and actual harm to the interests invoked by the Commission, warranting an absolute refusal to disclose the dates, headings and other references to the ‘leniency documents’ included in the table of contents, quite apart from any confidential information they may contain or reveal.

127 In short, such a refusal negates the effect of the principle that the exceptions to the right of access to documents must be interpreted and applied strictly, so as to ensure that all documents or document extracts not covered by the exceptions laid down in Regulation No 1049/2001 may be disclosed to the persons seeking access to them (see, to that effect and by analogy, judgment in *Council v Access Info Europe*, cited in paragraph 35 above, EU:C:2013:671, paragraph 40), unless prevented by an overriding public interest.

128 Thirdly, in so far as both parties rely on the decision of 7 March 2012, respectively, to object to and to justify the refusal to disclose references to the ‘leniency documents’ included in the table of contents of the file in Case COMP/39.125, it should be noted that the reasoning set out in that decision and reiterated by the Commission in its defence (see paragraphs 106 and 112 above) provides no more justification for the general and absolute refusal given to the applicant in the present case than the reasoning set out in the contested decision.

129 In particular, although the Commission relies on considerations capable of forming the basis for a complete refusal to grant access to references to some types of ‘leniency documents’ listed in the table of contents, such as references to ‘statements’ received by the Commission from undertakings that have submitted an application under the leniency programme (see, to that effect, opinion of 16 December 2010 of Advocate General Mazák in *Pfleiderer*, cited in paragraph 118 above, EU:C:2010:782, paragraphs 44 and 47), the decision of 7 March 2012 does not justify a refusal covering references to all of those documents.

130 Furthermore, it is apparent from the file that when the applicant submitted the first request to the Commission (16 February 2012) and when the Commission took a final decision in that regard (29 October 2013), the applicant was only in possession of a provisional non-confidential version of the Carglass decision.

131 Although the Commission adopted that decision on 12 November 2008, it has only ever published a provisional non-confidential version of it, which the applicant annexed to its application. It was only between December 2011 and August 2012 that the ‘Competition’ Directorate-General and the Hearing Officer of the Commission respectively ruled on the content of the final non-confidential version of the decision by means of a series of measures the most recent of which went on to form the subject-matter of two actions for annulment before the General Court (Cases T-462/12, *Pilkington Group v Commission*, and T-465/12, *AGC Glass Europe and Others v Commission*) and an application for interim measures resulting in an order of the President of the General Court (order of 11 March 2013 in *Pilkington Group v Commission*, T-462/12 R, ECR, EU:T:2013:119) followed by, on appeal, an order of the Vice-President of the Court of Justice (order of 10 September 2013 in *Commission v Pilkington Group*, C-278/13 P(R), ECR, EU:C:2013:558), as the Commission recalled in its defence. However, in the light of these disputes, the final non-confidential version of the Carglass decision had not yet been published when the Commission dealt with the applicant’s two requests or, moreover, when the applicant brought the present action.

132 It is not possible for the applicant to identify specifically the ‘leniency documents’ included in the file in Case COMP/39.125 from the provisional non-confidential version of the Carglass decision. Although the applicant relies on information contained in these documents, the details enabling a link to be established between this information and the document or documents from which it was extracted and permitting the documents to be identified individually were largely deleted.

133 In those circumstances, it cannot be considered that the general and absolute refusal to disclose set out in the contested decision could be justified by the considerations relied on by the Commission’s services in the decision of 7 March 2012, according to which:

‘In order to reconcile the legitimate interest in the transparency of its administrative procedures and the interest in preserving the attractiveness of the leniency programme, the Commission publishes a non-confidential version of its final decisions, in which it identifies all of the cartel participants and sets out the constituent elements of this infringement of the competition rules.

For reasons which will be explained below, information concerning correspondence from parties that have submitted an application under the leniency programme or correspondence exchanged with them ... which is included in the table of contents and which has not yet been disclosed by way of a published decision ... is covered by [the exceptions laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001].

...

In those circumstances, the provision of information on correspondence exchanged within the framework of the leniency programme other than the information contained in the public version of the [Carglass] decision ... would undermine the protection of commercial interests.

...

In the provisional public version of the [Carglass] decision, the Commission already disclosed some of the information set out in the table of contents (in particular, the identity of the undertakings that had submitted an application under the leniency programme and the date of the decision granting their application). Before doing so, it weighed up the importance of such disclosure against the possible adverse consequences of such disclosure on the effective implementation of the leniency programme (and, therefore, on the application of Article 101 TFEU). All other references concerning this kind of correspondence were, however, expunged from the annexed table of contents, because any further identification [of the] documents [in question] could undermine the “purpose of the Commission’s investigations” and the “commercial interests” of the parties to the proceeding’ (penultimate and final subparagraph of point 1.1, final subparagraph of point 1.2, and penultimate subparagraph of point 1.3 of the decision of 7 March 2012).

134 On the contrary, in so far as the contested decision and the decision of 7 March 2012, by referring to the provisional non-confidential version of the Carglass decision, made it in practice impossible or at the very least excessively difficult to identify the ‘leniency documents’ listed in the table of contents requested by the applicant, in contrast to the way in which the references to other documents included in the file were dealt with (see paragraphs 75, 104 and 114 above), they did not provide a means for the applicant either to form an opinion on the possible need to have these documents in order to support its action for damages before the Landgericht Düsseldorf or, *a fortiori*, to explain the reasons for such a need. The case-law makes compliance with this requirement a precondition not only for disclosure of such documents and their production in legal proceedings in the context of actions for damages brought before the national courts (see paragraph 69 above), but also the recognition by the Commission of an overriding public interest where it receives a request under Regulation No 1049/2001 (see paragraph 70 above). In doing so, the contested decision, in practice, prevents the applicant from actually exercising the right to compensation it enjoys under the Treaty.

135 Fourthly, moreover, in so far as the Commission relied on, at the hearing, the need to protect its leniency programme and the documents relating to it in all cases, in view of the key role played by that programme in detecting infringements of the competition rules, as acknowledged by Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1), it is necessary to make two observations. The case-law recognises the value of this programme, but at the same time points out that the public interest in preserving its effectiveness cannot be considered to take precedence, in a general and absolute way, over the other public and private interests at stake, which are also worthy of protection and must be reconciled with it on a case-by-case basis (see paragraphs 118 to 123 above). In addition, recital 20 in the preamble to, and Article 6(2) of, Directive 2014/104 expressly state that this directive is without prejudice to the rules on public access to documents laid down in Regulation No 1049/2001, as the Commission moreover noted in its rejoinder (see paragraph 58 above).

136 It follows from all of the foregoing considerations that the contested decision is not substantiated to the requisite legal standard in so far as it finds that it is possible to presume, in a global, complete and absolute way, that allowing the applicant access to references to the ‘leniency documents’ in the table of contents of the file in

Case COMP/39.125 would undermine the interests protected by the exceptions laid down in the first and third indents of Article 4(2) of Regulation No 1049/2001.

b) The refusal to grant access to information relating to the identity of natural persons

137 In point 5.2 of the contested decision, the Commission stated that information relating to the identity of natural persons included in the table of contents could not be disclosed to the applicant. In order to reach that conclusion, it found, first of all, that this information constituted personal data within the meaning of Article 4(1)(b) of Regulation No 1049/2001 and Articles 2(a) and 8(b) of Regulation EC No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1). The Commission then considered that the applicant had not proven why it was necessary for the data to be transferred to it and that there was reason to believe that their disclosure could undermine the legitimate interests of the persons to whom they related.

138 Article 4(1)(b) of Regulation No 1049/2001 provides that the institutions are to refuse access to a document if its disclosure would undermine the protection of the privacy or integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data.

139 That provision, which establishes a specific and reinforced system of protection for persons whose personal data could, in certain cases, be disclosed to the public, requires that any undermining of their privacy and integrity must always be examined and assessed in conformity, in particular, with Regulation No 45/2001 (judgment of 29 June 2010 in *Commission v Bavarian Lager*, C-28/08 P, ECR, EU:C:2010:378, paragraphs 59 and 60).

140 Article 2 of Regulation No 45/2001 states that personal data is to mean any information relating to an identified or identifiable natural person and that processing of personal data is to mean any operation performed upon personal data, including retrieval and disclosure by transmission, dissemination or otherwise making available.

141 Article 8(b) of Regulation No 45/2001 provides, in particular, that personal data is only to be transferred to a recipient if the recipient establishes the necessity of such transfer and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. This provision applies to all requests based on Regulation No 1049/2001 seeking to obtain access to documents including personal data (judgments in *Commission v Bavarian Lager*, cited in paragraph 139 above, EU:C:2010:378, paragraph 63, and 2 October 2014 *Strack v Commission*, C-127/13 P, ECR, EU:C:2014:2250, paragraph 101).

142 In the present case, the applicant does not call in question the Commission's finding that information relating to the identity of certain natural persons included in the table of contents constituted personal data. Nor does it deny that its request seeking disclosure of this information constituted processing of personal data. Its only criticism is of the reasoning adopted by the Commission to refuse disclosure of the information to it. In essence, the applicant complains that the Commission came to that conclusion based on general reasoning relating to the protection of privacy, instead of explaining in detail the individual reasons why each item of information could not be disclosed to it.

143 However, the Commission was, in the first place, fully entitled to require the applicant to establish the necessity for the personal data in question to be transferred, in accordance with Article 8(b) of Regulation No 45/2001. Where the person who requests access to documents containing personal data does not provide any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred, the Commission is not able to weigh up the various interests at stake (see, to that effect, judgments in *Commission v Bavarian Lager*, cited in paragraph 139 above, EU:C:2010:378, paragraphs 77 and 78, and *Strack v Commission*, cited in paragraph 141 above, EU:C:2014:2250, paragraph 107).

144 In the second place, the Commission was able to find, in the light of the arguments specifically put forward by the applicant, that such necessity had not been proven in this case.

145 It is apparent from the contested decision that the applicant had justified the necessity for the data in question to be transferred to it by the fact that 'the information provided on the names of the natural persons "... [was] too limited to enable [the applicant] to exercise its rights"'. The applicant does not dispute this finding of the

Commission in its action. On the contrary, the applicant continues to maintain before the Court that, first, it ‘needs this information’; secondly, ‘if the names of the persons concerned are not included in the table of contents, too, its right of access will be considerably weakened, because this is the only way it can identify the important documents’; and thirdly, ‘[e]ven if [it] has to demonstrate the necessity of providing the names of the natural persons (*quod non* ...), this condition is in any event satisfied’ since it has ‘sufficiently demonstrated that it need[ed] this information to be able to secure compensation for the loss caused to it’.

146 Presented with general and abstract reasons in this regard, the Commission was able to confine itself to finding, in a global manner, that it ‘saw no reason justifying public disclosure of the data [in question]’ and that ‘the necessity for the personal data at issue to be transferred ... was not proven’ (see, by analogy, judgment in *Commission v EnBW*, cited in paragraph 12 above, EU:C:2014:112, paragraphs 105 and 132).

147 The arguments challenging the refusal to grant access to information relating to the identity of natural persons must therefore be rejected.

c) The refusal to grant access to the names of third-party undertakings

148 In point 5.3 of the contested decision, the Commission found that the names of different categories of undertakings ‘operating in the lift and escalator sector’ or which had business dealings with the undertakings to which the Carglass decision was addressed could not be made known to the applicant because disclosure of their identity and, therefore, their involvement in the proceeding or their business dealings with the parties to the proceeding could damage their reputation and undermine their commercial interests.

149 It is obvious that, notwithstanding the clerical mistake in the contested decision, there could be no reasonable doubt that the Commission intended to refer, as it did in its defence without being challenged in that respect, to the names of undertakings operating not only in the lift and escalator sector, but also in the carglass sector, which is the only sector mentioned in Case COMP/39.125. It is therefore not possible to find that the statement of reasons was inadequate.

150 As to the substance, it should be recalled, first of all, that the Commission was able, without committing an error of law, to refuse the applicant’s first request in so far as it related to the category of information in question by relying on a general presumption (see paragraph 94 above).

151 Next, it must be considered that, by referring to the ‘reputation’ and ‘commercial interests’ of the different categories of undertakings concerned in order to refuse to disclose their names to the applicant, the Commission essentially sought to rely, in particular, on the general presumption that disclosure of the identity of these legal persons could, in principle, undermine the protection of the commercial interests of third parties guaranteed by the first indent of Article 4(2) of Regulation No 1049/2001, as the Commission noted in its defence without being challenged in that respect.

152 Lastly, the applicant does not properly challenge the application of this general presumption.

153 It merely objects to the actual possibility for the Commission to apply such a presumption. It is apparent from the case-law cited in paragraphs 39 and 44 above that the Commission, which is required to collect, in the context of proceedings pursuant to the competition rules, commercially sensitive information relating to the strategy and activities of the parties to the proceeding as well as their business dealings with third parties, is entitled to do so.

154 Furthermore, the applicant submits that the business dealings which may come to light as a result of disclosing the identity of the legal persons mentioned in the table of contents date from more than five years ago and are therefore too ‘old’ to be regarded as covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001. This argument, besides being too general to be capable of rebutting the general presumption invoked by the Commission, is not conclusive. Admittedly, it has been held that information falling within the ambit of commercial secrecy or confidential information which is five or more years old must be treated as historic unless, by way of exception, it is proven that such information still constitutes an essential element of the commercial position of the undertaking to which it relates (see order of 22 February 2005 in *Hynix Semiconductor v Council*, T-383/03, ECR, EU:T:2005:57, paragraph 60 and the case-law cited). It has also been held, more generally, that the negative effects liable to follow upon the disclosure of commercially sensitive

information become less significant the older the information is (see, to that effect, order of 19 June 1996 in *NMH Stahlwerke and Others v Commission*, T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, EU:T:1996:85, paragraphs 24 and 32). However, that does not prevent such information continuing to be covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, as is apparent from the case-law cited in paragraph 63 above.

155 The arguments challenging the refusal to grant access to the names of third-party undertakings must therefore be rejected, without it being necessary to consider whether these references should also be regarded as personal data, as the Commission submits in its defence, notwithstanding the fact that there are no considerations to that effect in either the contested decision or the decision of 7 March 2012, which invokes this ground for refusal only in relation to the names of natural persons included in the table of contents.

d) The refusal to grant access to other commercially sensitive information

156 In point 5.4 of the contested decision, the Commission stated that there was commercially sensitive information in the table of contents, including the names of car manufacturers and references to vehicle models. It also observed that actions for annulment specifically relating to the question whether some of this information should continue to be treated as confidential or whether, on the contrary, it could be included in the final non-confidential version of the Carglass decision had been brought before the General Court by a number of the undertakings to which the decision was addressed. For these reasons, it concluded that it could not, 'at this stage, disclose information which might remain confidential following the judgments of the General Court'.

157 In the first place, although the statement of reasons for the contested decision is relatively concise, it is none the less sufficiently detailed to have enabled the applicant to understand its content and the General Court to review its legality.

158 In the second place, as to the substance, the applicant does not properly challenge the reasoning which led the Commission to find that the information in question was covered by the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001.

159 The applicant simply states that the actions invoked by the Commission concern whether the information in question should be made accessible to the general public, while its own action concerns whether such information should be disclosed to a person who considers himself to have been harmed by the infringement established in the Carglass decision, and that a balance must be struck between the interests at stake in different ways in these two situations. This argument is essentially tantamount to claiming that an overriding public interest should prevail over the exception relied on by the Commission to refuse disclosure of the data concerned. Consequently, it is no different from the alternative argument put forward in this regard, as the applicant moreover admits in its application. It will therefore be examined in that context (see paragraphs 162 et seq. below).

160 The applicant's argument challenging the general presumption which the Commission's services invoked, in the decision of 7 March 2012, as an additional basis for refusing to disclose the information in question is devoid of purpose. In the contested decision, the Commission did not reproduce this general presumption, according to which disclosure of the information would, in principle, undermine the protection of the commercial interests of the parties to the proceeding, in contrast to the submissions made in its defence. On the contrary, the Commission merely refused disclosure 'at this stage', in view of the actions pending before the General Court.

161 The arguments challenging the refusal to grant access to other commercially sensitive information cannot therefore succeed.

## 2. *The overriding public interest invoked by the applicant*

162 In its arguments challenging the refusal to grant access to information relating to the names of natural persons and to other commercially sensitive information, the applicant submits that the Commission was wrong not to take account of the overriding public interest in allowing the victims of anticompetitive practices to exercise their right to compensation and was also wrong not to give precedence to this interest over the interests protected by the exceptions relied on in the contested decision in order to refuse to disclose such information to it, even though such information was necessary for the effective exercise of its right to compensation.

163 It is apparent from the case-law cited in paragraphs 66 to 70 above that such general considerations are not, as such, capable of prevailing over the reasons justifying a refusal to grant access to the documents in the file of a proceeding pursuant to the competition rules. It follows that any person seeking compensation for the loss he considers was caused to him by a breach of the EU rules on competition must establish that it is necessary for him to be granted access to these documents, so that the Commission can weigh up, on a case-by-case basis, the respective interests at stake. Otherwise, the interest in obtaining compensation for the loss suffered as a result of a breach of the EU rules on competition cannot constitute an overriding public interest within the meaning of Article 4(2) of Regulation No 1049/2001.

164 In the present case, the applicant asserts, in a general and abstract way, that it is necessary for him to have access to all of the names of natural persons mentioned in the table of contents and all of the commercial information contained in that document so that he can exercise his right to compensation.

165 By contrast, the applicant does not put forward in the present action, nor does it claim to have adduced in the request or confirmatory application previously submitted to the Commission, specific evidence proving that it needed particular information, for example by setting out the specific factual or legal arguments which securing such information might help it substantiate before the national court required to rule on its claims.

166 Accordingly, the arguments based on the existence of an overriding public interest must be rejected, as the Commission rightly points out.

167 Having regard to all of the preceding considerations, the present pleas in law must be upheld in so far as they relate to the refusal to grant the applicant access to the references to the ‘leniency documents’ included in the table of contents of the file in Case COMP/39.125 and must be rejected as to the remainder.

168 Consequently, the contested decision must be annulled to that extent.

#### **Costs**

[...]

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Commission Decision 2012/817 and 2012/3021 Gestdem of 29 October 2013, refusing two requests for access to documents in the file of Case COMP/39.125 (Carglass) in so far as it refuses to grant Axa Versicherung AG access to references to the ‘leniency documents’ included in the table of contents of that file;**
2. **Dismisses the remainder of the action;**
3. **Orders Axa Versicherung and the European Commission each to bear their own costs;**
4. **Orders Saint-Gobain Sekurit Deutschland GmbH & Co. KG to bear its own costs.**

## LECTURE 8: FUNDAMENTAL RIGHTS PROTECTION IN POST-LISBON EU LAW

Fundamental rights have played a consistent and important part in the EU's institutional setup. Indeed, the Court of Justice has recognised their importance as unwritten general principles of EU law, inspired by national constitutional traditions and the ECHR. In 2000, this commitment was complemented by a written yet non-binding Charter of Fundamental Rights, which was declared binding by virtue of Article 6 TEU upon the entry into force of the Lisbon Treaty. The importance attached to fundamental rights did not imply, however, that their application was free from legal problems. Two parallel issues can be discerned in that regard. Firstly, the scope and applicability of different human rights instruments (national, international and supranational) to EU action or inaction has remained unclear for a long time. Is the ECHR applicable to EU legislation or decisions? Can a national constitutional court resist against EU initiatives for incompatibility with national fundamental rights? The Court of Justice has intervened quickly in this regard, maintaining that the EU legal order is an autonomous legal order, which operates in accordance with its own logic. As such, EU fundamental rights should be taken as the starting point when falling within the scope of EU law. In practice, this posture remains problematic in particular cases, as this lecture will highlight, even with a written Charter in place. Secondly, the actual streamlining of EU and ECHR fundamental rights has given rise to on-going debates on the accession of the EU to the ECHR Treaty system. Whereas the Council of Europe (the ECHR's home institution) rendered such accession possible and Article 6(2) TEU mandates it, the Court of Justice advised against it in the current format, as sufficient guarantees to maintain the autonomy of the EU legal order have to be in place. As a result, EU and ECHR fundamental rights continue to operate in parallel. The purpose of this lecture will be to outline the fundamental rights instruments in EU law and to analyse how they interact. At the same time, we will focus on how EU law enables and restrains simultaneously a better streamlining of EU and ECHR law. That will allow us critically to assess the interaction between legal rules and political realities of today's EU institutional functioning.

### Materials to read:

- Charter of Fundamental Rights of the European Union, 26 October 2012, [2012] *O.J.* C 326/391 (see Lecture 1).
- Court of Justice, 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.
- Court of Justice, 17 December 2015, Case C-419/14, *Webmindlicences kft*, ECLI:EU:C:2015:832.
- Court of Justice, 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454.
  
- *Optional reading:* Court of Justice, 26 February 2013, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107 (via eCampus).
- X., "The EU's accession to the ECHR – a "NO" from the ECJ!", 52 *Common Market Law Review* (2015), 1-16 (via eCampus).
- L. Storgaard, "EU law autonomy versus European Fundamental Rights protection – On Opinion 2/13 on EU accession to the ECHR", 15 *Human Rights Law Review* (2015), 485-521 (via eCampus).

Lecture 8 outline:

- a. The origins of fundamental rights protection in the European Union
  1. From nothing...
  2. To EU general principles
  3. Inspired by the ECHR and national constitutional traditions
    - i. National courts as supplementary watchdogs: *Solange*...
    - ii. The *Bosphorus* equivalence test
  4. Fundamental rights in the Court's case law
- b. The emergence of a Charter of Fundamental Rights
  1. Non-binding nature
  2. Relationship to the ECHR
  3. Binding force in the wake of the Lisbon Treaty
- c. Scope of application problems of the Charter of Fundamental Rights
  1. The scope of the Charter coalesces with the scope of EU law: *Fransson*
  2. Stricter EU standards compared to ECHR or national standards? *Melloni*
  3. Applicability to horizontal situations (cf. lecture 2)
  4. Are all rights equal?
- d. The EU's accession to the ECHR
  1. From dream to almost reality: accession steps
  2. The Court's Opinion 2/13
  3. Future steps to be taken
- e. Future outlook on fundamental rights' protection in post-Lisbon EU law
  1. Coherence through confusion?
  2. Why does accession to the ECHR remain problematic?
  3. Safeguarding autonomy in an era of cooperation...

Questions for discussion:

- Which legal provisions or doctrines call in favour of the autonomy EU law in relation to fundamental rights? Which ones call against it? Draft a table of key features of the EU legal order that allows you to retrace the reasoning of the Court in Opinion 2/13. Do you agree with that position? On what legal grounds would you contest it?
- Give two examples of situations falling outside and two of situations falling within the scope of EU law, applying the *Fransson* analysis. Do you find those criteria to work in practice? Would you rather propose more refined and predictable legal criteria to make that assessment? If so, how would you phrase them?

## Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*

In Case C-617/10,

REQUEST for a preliminary ruling under Article 267 TFEU from the Haparanda tingsrätt (Sweden), made by decision of 23 December 2010, received at the Court on 27 December 2010, in the proceedings

**Åklagaren**

v

**Hans Åkerberg Fransson,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič, G. Arestis, J. Malenovský, Presidents of Chambers, A. Borg Barthet, J.-C. Bonichot, C. Toader, J.-J. Kasel and M. Safjan (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: C. Strömholm, Administrator,

[...]

after hearing the Opinion of the Advocate General at the sitting on 12 June 2012,

gives the following

### **Judgment**

1 This request for a preliminary ruling concerns the interpretation of the *ne bis in idem* principle in European Union law.

2 The request has been made in the context of a dispute between the Åklagaren (Public Prosecutor's Office) and Mr Åkerberg Fransson concerning proceedings brought by the Public Prosecutor's Office for serious tax offences.

### **Legal context**

#### *European Convention for the Protection of Human Rights and Fundamental Freedoms*

3 In Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in Strasbourg on 22 November 1984 ('Protocol No 7 to the ECHR'), Article 4, headed 'Right not to be tried or punished twice', provides as follows:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950; “the ECHR”].’

*European Union law*

Charter of Fundamental Rights of the European Union

4 Article 50 of the Charter of Fundamental Rights of the European Union (‘the Charter’), which is headed ‘Right not to be tried or punished twice in criminal proceedings for the same criminal offence’, reads as follows:

‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’

5 Article 51 defines the Charter’s field of application in the following terms:

‘1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

*Sixth Directive 77/388/EEC*

6 Article 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; ‘the Sixth Directive’), in the version resulting from Article 28h thereof, states:

‘...

4. (a) Every taxable person shall submit a return by a deadline to be determined by Member States. ...

...

8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion ...

...?’

*Swedish law*

7 Paragraph 2 of Law 1971:69 on tax offences (skattebrottslagen (1971:69); ‘the skattebrottslagen’) is worded as follows:

‘Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years’ imprisonment for tax offences.’

8 Paragraph 4 of the skattebrottslagen states:

‘If an offence within the meaning of Paragraph 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months’ imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave.'

9 Law 1990:324 on tax assessment (taxeringslagen (1990:324); 'the taxeringslagen') provides, in Paragraph 1 of Chapter 5:

'If, during the procedure, the taxable person has provided false information, other than orally, for the purposes of the tax assessment, a special charge (tax surcharge) shall be levied. The same shall apply if the taxable person has provided such information in legal proceedings relating to taxation and the information has not been accepted following a substantive examination.

Information shall be regarded as false if it is clear that information provided by the taxable person is inaccurate or that the taxable person has omitted information for the purposes of the tax assessment which he was required to provide. However, information shall not be regarded as false if the information, together with other information provided, constitutes a sufficient basis for a correct decision. Information also shall not be regarded as false if the information is so unreasonable that it manifestly cannot form the basis for a decision.'

10 Paragraph 4 of Chapter 5 of the taxeringslagen states:

'If false information has been provided, the tax surcharge shall be 40% of the tax referred to in points 1 to 5 of the first subparagraph of Paragraph 1 of Chapter 1 which, if the false information had been accepted, would not have been charged to the taxable person or his spouse. With regard to value added tax, the tax surcharge shall be 20% of the tax which would have been wrongly credited to the taxable person.

The tax surcharge shall be calculated at 10% or, with regard to value added tax, 5% where the false information was corrected or could have been corrected with the aid of confirming documents which are normally available to the Skatteverket [(Tax Board)] and which were available to the Skatteverket before the end of November of the tax year.'

11 Paragraph 14 of Chapter 5 of the taxeringslagen states:

'The taxable person shall be exempted wholly or partially from special charges if errors or omissions become evident which are excusable or if it would be otherwise unreasonable to levy the charge at the full amount. If the taxable person is exempted partially from the charge, it shall be reduced to a half or a quarter.

...

In assessing whether it would be otherwise unreasonable to levy the charge at the full amount, particular regard shall be had to whether:

...

3. errors or omissions have also resulted in the taxable person becoming liable for offences under the skattebrottslagen ... or becoming the subject of forfeiture of proceeds of criminal activity within the meaning of Paragraph 1b of Chapter 36 of the Criminal Code (brottsbalken).'

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

12 Mr Åkerberg Fransson was summoned to appear before the Haparanda tingsrätt (Haparanda District Court) on 9 June 2009, in particular on charges of serious tax offences. He was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax ('VAT'), amounting to SEK 319 143 for 2004, of which SEK 60 000 was in respect of VAT, and to SEK 307 633 for 2005, of which SEK 87 550 was in respect of VAT. Mr Åkerberg Fransson was also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue

amounting to SEK 35 690 and SEK 35 862 respectively. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

13 By decision of 24 May 2007, the Skatteverket had ordered Mr Åkerberg Fransson to pay, for the 2004 tax year, a tax surcharge of SEK 35 542 in respect of income from his economic activity, of SEK 4 872 in respect of VAT and of SEK 7 138 in respect of employers' contributions. By the same decision it had also imposed for the 2005 tax year a tax surcharge of SEK 54 240 in respect of income from his economic activity, of SEK 3 255 in respect of VAT and of SEK 7 172 in respect of employers' contributions. Interest was payable on those penalties. Proceedings challenging the penalties were not brought before the administrative courts, the period prescribed for this purpose expiring on 31 December 2010 in relation to the 2004 tax year and on 31 December 2011 in relation to the 2005 tax year. The decision imposing the penalties was based on the same acts of providing false information as those relied upon by the Public Prosecutor's Office in the criminal proceedings.

14 Before the referring court, the question arises as to whether the charges brought against Mr Åkerberg Fransson must be dismissed on the ground that he has already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter would be infringed.

15 It is in those circumstances that the Haparanda tingsrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Under Swedish law there must be clear support in the [ECHR] or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the [Charter]. Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

2. Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

3. Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

4. Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle ..., to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

5. The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest ... If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would not come under the *ne bis in idem* principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?'

#### **Jurisdiction of the Court**

16 The Swedish, Czech and Danish Governments, Ireland, the Netherlands Government and the European Commission dispute the admissibility of the questions referred for a preliminary ruling. In their submission, the Court would have jurisdiction to answer them only if the tax penalties imposed on Mr Åkerberg Fransson and the

criminal proceedings brought against him that are the subject-matter of the main proceedings arose from implementation of European Union law. However, that is not so in the case of either the national legislation on whose basis the tax penalties were ordered to be paid or the national legislation upon which the criminal proceedings are founded. In accordance with Article 51(1) of the Charter, those penalties and proceedings therefore do not come under the *ne bis in idem* principle secured by Article 50 of the Charter.

17 It is to be recalled in respect of those submissions that the Charter's field of application so far as concerns action of the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law.

18 That article of the Charter thus confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union.

19 The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see *inter alia*, to this effect, Case C-260/89 *ERT* [1991] I-2925, paragraph 42; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15; Case C-309/96 *Annibaldi* [2007] ECR I-7493, paragraph 13; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 34; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 72; and Case C-27/11 *Vinkov* [2012] ECR, paragraph 58).

20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 32). According to those explanations, 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 *Currà and Others* [2012] ECR, paragraph 26).

23 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see *Dereci and Others*, paragraph 71).

24 In the case in point, it is to be noted at the outset that the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT.

25 In relation to VAT, it follows, first, from Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which reproduce *inter alia* the provisions of Article 2 of the Sixth Directive and of Article 22(4) and (8) of that directive in the version resulting from Article 28h thereof, and second, from Article 4(3) TEU that every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT

due on its territory and for preventing evasion (see Case C-132/06 *Commission v Italy* [2008] ECR I-5457, paragraphs 37 and 46).

26 Furthermore, Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests (see, to this effect, Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, paragraphs 40 to 42). Given that the European Union's own resources include, as provided in Article 2(1) of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17), revenue from application of a uniform rate to the harmonised VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (see, to this effect, Case C-539/09 *Commission v Germany* [2011] ECR I-11235, paragraph 72).

27 It follows that tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.

28 The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

29 That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR, paragraph 60).

30 For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU.

31 It follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred and to provide all the guidance as to interpretation needed in order for the referring court to determine whether the national legislation is compatible with the *ne bis in idem* principle laid down in Article 50 of the Charter.

### **Consideration of the questions referred**

#### *Questions 2, 3 and 4*

32 By these questions, to which it is appropriate to give a joint reply, the Haparanda tingsrätt asks the Court, in essence, whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

33 Application of the *ne bis in idem* principle laid down in Article 50 of the Charter to a prosecution for tax evasion such as that which is the subject of the main proceedings presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature.

34 In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in

so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties (see, to this effect, Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraph 24; Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 19; and Case C-91/02 *Hannl-Hofstetter* [2003] ECR I-12077, paragraph 17). These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.

35 Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 *Bonda* [2012] ECR, paragraph 37).

36 It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive (see, to this effect, inter alia *Commission v Greece*, paragraph 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62; Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565 paragraph 65).

37 It follows from the foregoing considerations that the answer to the second, third and fourth questions is that the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.

#### *Question 5*

38 By its fifth question, the Haparanda tingsrätt asks the Court, in essence, whether national legislation which allows the same court to impose tax penalties in combination with criminal penalties in the event of tax evasion is compatible with the *ne bis in idem* principle guaranteed by Article 50 of the Charter.

39 It should be recalled at the outset that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 30 and the case-law cited).

40 The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to this effect, inter alia *Paint Graphos*, paragraph 31 and the case-law cited).

41 Here, it is apparent from the order for reference that the national legislation to which the Haparanda tingsrätt makes reference is not the legislation applicable to the dispute in the main proceedings and currently does not exist in Swedish law.

42 The fifth question must therefore be declared inadmissible, as the function entrusted to the Court within the framework of Article 267 TFEU is to contribute to the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, *Paint Graphos*, paragraph 32 and the case-law cited)

#### *Question 1*

43 By its first question, the Haparanda tingsrätt asks the Court, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them.

44 As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (see, to this effect, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 62).

45 As regards, next, the conclusions to be drawn by a national court from a conflict between provisions of domestic law and rights guaranteed by the Charter, it is settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means (Case 106/77 *Simmmenthal* [1978] ECR 629, paragraphs 21 and 24; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 81; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43).

46 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (*Melki and Abdeli*, paragraph 44 and the case-law cited).

47 Furthermore, in accordance with Article 267 TFEU, a national court hearing a case concerning European Union law the meaning or scope of which is not clear to it may or, in certain circumstances, must refer to the Court questions on the interpretation of the provision of European Union law at issue (see, to this effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415).

48 It follows that European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

49 In the light of the foregoing considerations, the answer to the first question is:

- European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law;
- European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

#### **Costs**

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **The *ne bis in idem* principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.**

2. **European Union law does not govern the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.**

**European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.**



## Case C-419/14, *Webmindlicences kft*

In Case C-419/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Közigazgatási és Munkaügyi bíróság (Administrative and Labour Court, Budapest, Hungary), made by decision of 3 September 2014, received at the Court on 8 September 2014, in the proceedings

**WebMindLicenses Kft.**

v

**Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság,**

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Second Chamber, acting as President of the Third Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, C. Toader, E. Jarašiūnas (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: M. Wathelet,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2015,

after considering the observations submitted on behalf of:

- WebMindLicenses Kft., by Z. Várszegi and C. Dékány, ügyvédek,
- Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság, by D. Bajusz, ügyvéd,
- the Hungarian Government, by M.Z. Fehér and G. Koós, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, A. Cunha and R. Campos Laires, acting as Agents,
- the European Commission, by M. Owsiany-Hornung and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2015,

gives the following

### **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Articles 2(1)(c), 24(1), 43 and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’), of Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1), of Article 4(3) TEU and Articles 49 TFEU, 56 TFEU and 325 TFEU, and of Articles 7, 8, 41, 47, 48, 51 and 52 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request has been made in proceedings between WebMindLicenses Kft. (‘WML’) and the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság (National Tax and Customs Authority, Principal Directorate of Taxes and Customs for Major Taxpayers; ‘the National Tax and Customs Authority’) concerning a decision by

the latter ordering the payment of various sums in tax relating to the tax years 2009 to 2011 as well as of a fine and of penalties for late payment.

## **Legal context**

### *EU law*

3 Under Article 2(1)(c) of the VAT Directive, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to value added tax (VAT).

4 The second subparagraph of Article 9(1) of the VAT Directive states:

‘Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as “economic activity”. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.’

5 Article 24(1) of the VAT Directive specifies that ‘[s]upply of services’ is to mean any transaction which does not constitute a supply of goods.

6 In the version of the VAT Directive in force from 1 January 2007 until 31 December 2009, Article 43 provided:

‘The place of supply of services shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied, or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.’

7 In the version of the VAT Directive resulting from Council Directive 2008/8/EC of 12 February 2008 amending the VAT Directive as regards the place of supply of services (OJ 2008 L 44, p. 11), in force from 1 January 2010, Article 45 provides:

‘The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.’

8 Article 56 of the VAT Directive, in the version in force from 1 January 2007 to 31 December 2009, provided:

‘1. The place of supply of the following services to customers established outside the Community, or to taxable persons established in the Community but not in the same country as the supplier, shall be the place where the customer has established his business or has a fixed establishment for which the service is supplied, or, in the absence of such a place, the place where he has his permanent address or usually resides:

...

(k) electronically supplied services, such as those referred to in Annex II;

...’

9 Annex II, headed ‘Indicative list of the electronically supplied services referred to in point (k) of Article 56(1)’, mentions inter alia ‘[w]ebsite supply, web-hosting, distance maintenance of programmes and equipment’ and ‘supply of images, text and information and making available of databases’.

10 Article 59 of the VAT Directive as amended by Directive 2008/8 provides:

‘The place of supply of the following services to a non-taxable person who is established or has his permanent address or usually resides outside the Community, shall be the place where that person is established, has his permanent address or usually resides:

...

(k) electronically supplied services, in particular those referred to in Annex II.

...’

11 Article 250(1) of the VAT Directive states:

‘Every taxable person shall submit a VAT return setting out all the information needed to calculate the tax that has become chargeable and the deductions to be made including, in so far as is necessary for the establishment of the basis of assessment, the total value of the transactions relating to such tax and deductions and the value of any exempt transactions.’

12 Article 273 of the VAT Directive provides:

‘Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

...’

13 Recital 7 in the preamble to Regulation No 904/2010 states:

‘For the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed. They must therefore not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State.’

14 As set out in Article 1 of Regulation No 904/2010:

‘1. This Regulation lays down the conditions under which the competent authorities in the Member States responsible for the application of the laws on VAT are to cooperate with each other and with the Commission to ensure compliance with those laws.

To that end, it lays down rules and procedures to enable the competent authorities of the Member States to cooperate and to exchange with each other any information that may help to effect a correct assessment of VAT, monitor the correct application of VAT, particularly on intra-Community transactions, and combat VAT fraud. In particular, it lays down rules and procedures for Member States to collect and exchange such information by electronic means.

...’

#### *Hungarian law*

15 Paragraph 37 of Law No CXXVII of 2007 on value added tax (az általános forgalmi adóról szóló 2007. évi CXXVII. törvény) provides:

‘(1) In the case of supplies of services to a taxable person, the place of supply of services shall be the place where the customer is established for the purpose of engaging in an economic activity or, in the absence of such economic establishment, the place where he has his permanent address or usually resides.

(2) In the case of supplies of services to a non-taxable person, the place of supply of services shall be the place where the supplier is established for the purpose of engaging in an economic activity or, in the absence of such economic establishment, the place where he has his permanent address or usually resides.'

16 Paragraph 46 of that law states:

'(1) For the services referred to in this Paragraph, the place of supply of services shall be the place where, in this context, the non-taxable customer is established or, in the absence of establishment, the place where he has his permanent address or usually resides, provided that this is outside the territory of the Community.

(2) The services to which this Paragraph applies are as follows:

...

(k) electronically supplied services.

...'

17 Paragraph 50(4) to (6) of Law No CXL of 2004 laying down general rules on administrative authorities' procedures and services (a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól szóló 2004. évi CXL. törvény) provides:

'(4) In the context of the administrative procedure, it is possible to use evidence that is such as to facilitate clarification of the facts. Evidence shall include: statements of the parties, documents, witness evidence, site inspection reports, experts' reports, records made at the time of the administrative check and physical evidence.

(5) The administrative authority shall freely choose the means of proof to be used. The law may require the administrative authority to base its decision on exclusively one means of proof; furthermore, a legislative or regulatory provision may, for certain cases, require a particular means of proof to be used or the opinion of a given body to be sought.

(6) The administrative authority shall assess the evidence separately and as a whole and shall establish the facts in the light of the conviction that it has come to on that basis.'

18 As set out in Paragraph 51 of Law No CXXII of 2010 on the National Tax and Customs Authority (a Nemzeti Adó- és Vámhivatalról szóló 2010. évi CXXII. törvény):

'(1) The Principal Directorate for Criminal Matters of [the National Tax and Customs Authority] and the intermediate-level services of the Principal Directorate for Criminal Matters ('the authorised services') may, within the framework laid down by this Law, secretly gather information for the purpose of averting, preventing, detecting or interrupting the commission of a criminal offence falling within the scope of the investigatory powers of [the Tax and Customs Authority] under the law on criminal procedure, of establishing the identity of the perpetrator, of arresting him, of locating his place of residence and of obtaining evidence, including for the purpose of protecting persons involved in the criminal procedure, persons belonging to the authority responsible for the procedure and persons cooperating with the judicial process.

(2) The measures taken on the basis of subparagraph 1 above and the data relating to natural persons, legal persons and organisations with no legal personality concerned by those measures shall not be disclosed.

(3) The authorised services and, so far as concerns the data obtained and the data gathering measure itself, the public prosecutor and the judge may be informed of the content of the data put on file, without special authorisation, in the course of the gathering of that information.'

19 Paragraph 97(4) to (6) of Law No XCII of 2003 on the taxation system (az adózás rendjéről szóló 2003. évi XCII. törvény) states:

‘(4) In the course of the inspection, it shall be the duty of the tax authority to establish and prove the facts unless, by virtue of legislation, the burden of proof lies with the taxpayer.

(5) Means of proof and evidence shall include: documents, experts’ reports, statements by the taxpayer, his representative, his employees or other taxpayers, witness evidence, site visits, test purchases, secret test purchases, trial production, on-the-spot inventories, data of other taxpayers, findings of related checks that have been ordered, the content of information communicated, and electronic data or information that comes from the registers of other authorities or is publicly available.

(6) When establishing the facts, the tax authority shall have a duty also to seek facts favourable to the taxpayer. Except where estimates are made, an unproved fact or circumstance shall not be assessed to the taxpayer’s disadvantage.’

### **The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling**

20 WML is a commercial company registered in Hungary which was set up in 2009 and whose entire capital is held by its manager. By a contract of 1 September 2009, it acquired free of charge from Hypodest Patent Development Company, an undertaking established in Portugal, know-how enabling a website to be operated through which erotic interactive audiovisual services in which individuals throughout the world took part in real time were supplied (‘WML’s know-how’). On the same day it made that know-how available, by a licensing agreement, to Lalib — Gestão e Investimentos Lda (‘Lalib’), a company established in Madeira (Portugal).

21 Following a tax inspection of WML relating to part of 2009 and to 2010 and 2011, the first-tier tax authority, by decision of 8 October 2013, made various adjustments and required WML to pay various sums, including 10 293 457 000 Hungarian forints (HUF) in VAT, HUF 7 940 528 000 by way of a fine and HUF 2 985 262 000 by way of penalties for late payment, on the ground that, according to the evidence that it had gathered, the transfer of WML’s know-how to Lalib did not correspond to a genuine economic transaction as the know-how was in reality exploited by WML, so that the view was to be taken that the exploitation of that know-how had taken place on Hungarian territory.

22 That decision was amended in part by the National Tax and Customs Authority, which, however, also took the view that WML’s know-how had not actually been exploited by and for Lalib and that, accordingly, by concluding the licensing agreement with it, WML had committed an abuse of rights aimed at circumventing Hungarian tax law, which was less advantageous than Portuguese tax law. In support of that conclusion, it was noted in particular that WML had never intended to transfer to Lalib the use of the profits from exploiting WML’s know-how, that there were close personal ties between the proprietor of the know-how and the subcontractors actually operating the website concerned, and that the Portuguese company was irrationally managed, was deliberately run at a loss and had no operating capability of its own.

23 WML brought an action against the decision of the National Tax and Customs Authority, complaining that it had used evidence obtained without WML’s knowledge by means of intercepting telecommunications and seizing emails in the course of a parallel criminal procedure which was not open to WML.

24 WML further submitted that there were commercial, technical and legal reasons for Lalib’s involvement in the exploitation of WML’s know-how. The services at issue, accessible through the internet in return for payment, could not have been supplied from Hungary during the period under examination as at the time membership of a bank card system was impossible in that country for such services. WML did not have the staff, technical competence, assets, contract portfolio or international connections enabling it to operate the website concerned. It was Lalib, the owner of the domain names, which, as the supplier of content, bore civil and criminal liability for the services offered. Therefore, according to WML, the conclusion of the licensing agreement with Lalib did not have a tax objective and VAT was properly paid in Portugal. Nor did it enjoy a real tax advantage as the difference between the rates of VAT in Hungary and Portugal was small at the time.

25 Making reference to the judgments in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544) and *Newey* (C-653/11, EU:C:2013:409), the referring court states that it is unsure, in the light of the particular nature of the services at issue offered on the internet, as to the circumstances which should be taken into account in assessing, for the purpose of determining the place of supply of services, whether the contractual construction used arises from an abusive practice.

26 The referring court is also uncertain whether it is to be inferred from the objectives of the VAT Directive that the tax authorities may gather evidence obtained in the context of a criminal procedure, including by secret means, and use it as the basis for an administrative decision. In this connection, referring to the judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105), it raises the question of what limits the Charter places on the institutional and procedural autonomy of the Member States.

27 The referring court states, furthermore, that the main proceedings also raise the question of how a Member State's tax authorities must proceed, in the context of cross-border administrative cooperation, in a situation where VAT has already been paid in another Member State.

28 In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Under Articles 2(1)(c), 24(1) and 43 of [the VAT Directive], in order to identify the person supplying the service for the purposes of VAT, when examining whether the transaction is fictitious, has no real financial or commercial content and is intended only to secure a tax advantage, is it relevant for the purposes of interpretation that, in the circumstances of the main proceedings, the manager and 100% owner of the commercial company which grants the licence is the natural person who created the know-how transferred by means of the licensing agreement?

(2) If the answer to question 1 is in the affirmative, when applying Articles 2(1)(c), 24(1) and 43 of the VAT Directive and assessing whether there is an abusive practice, is it relevant that this natural person exercises or may exercise influence informally over the running of the commercial company which acquired the licence and over the decisions of that company? For the purposes of that interpretation, might it be relevant that the creator of the know-how participates or may participate directly or indirectly, by advising professionally or offering advice on the development and exploitation of the know-how, in taking business decisions relating to the supply of the service based on that know-how?

(3) In the circumstances of the main proceedings and in the light of the considerations set out in question 2, in order to identify the person supplying the service for the purposes of VAT is it relevant, in addition to the analysis of the underlying contractual transaction, that the creator of the know-how, as a natural person, exercises influence, or decisive influence, or issues directions regarding the way in which the service based on that know-how is supplied?

(4) If the answer to question 3 is in the affirmative, when determining the extent of that influence and those directions, what circumstances can be taken into account, or, more specifically, on the basis of what criteria may it be found that a decisive influence is exercised over the supply of the service and that the real financial content of the underlying transaction was for the benefit of the undertaking granting the licence?

(5) In the circumstances of the main proceedings, in considering whether a tax advantage has been gained, is it relevant when analysing the relations between the traders and the persons involved in the transaction that the taxable persons who took part in the contested contractual transaction, which is intended to avoid tax, are legal persons, when the tax authority of a Member State attributes the adoption of strategic and operational decisions on exploitation to a natural person? If so, must account be taken of the Member State in which that natural person took those decisions? In circumstances such as those obtaining in the present case, if it can be found that the contractual position of the parties is not decisive, is it relevant for the purpose of interpretation that subcontractors carry out the management of the technical instruments, staff and financial transactions necessary for the supply of the internet-based service at issue here?

(6) If it can be established that the terms of the licensing agreement do not reflect real financial content, do the reclassification of the contractual terms and the restoration of the situation which would have obtained if the transaction involving the abusive practice had not taken place imply that the tax authority of the Member State may make a different decision as to the Member State of supply and, therefore, the place where the tax is payable, even though the company which acquired the licence paid the tax payable in the Member State where it is established and in accordance with the legal requirements laid down in that Member State?

(7) Must Articles 49 TFEU and 56 TFEU be interpreted as meaning that a contractual arrangement such as that at issue in the main proceedings, under which a company which is a taxable person in a Member State makes available by means of a licensing agreement the know-how and operating right for the supply of services providing adult content through interactive internet-based communication technology to an undertaking which is a taxable person in another Member State, in circumstances where the burden of VAT of the Member State of residence of the company which acquired the licence is more advantageous as regards the service transferred, is contrary to those articles and may represent an abuse of freedom of establishment and the freedom to supply services?

(8) In circumstances such as those obtaining in the present case, what significance must be attached to the tax advantage which may be presumed to arise and to the commercial considerations taken into account by the company which grants the licence? In that connection and more specifically, is it relevant for the purposes of interpretation that the 100% owner and manager of the commercial company which grants the licence is the natural person who originally created the know-how?

(9) In analysing abusive conduct may circumstances such as those of the main proceedings, for instance the technical and infrastructure data relating to the setting up and performance of the service which is the subject of the transaction at issue and the preparation and staff available to the company which grants the licence to supply the service in question, be taken into account and, if so, what significance do they have?

(10) In the situation analysed in the present case, must Articles 2(1)(c), 24(1), 43 and 273 of the VAT Directive, in conjunction with Article 4(3) TEU and Article 325 TFEU, be interpreted as meaning that, in the interests of the proper observance of the obligation of the Member States of the European Union to collect the total amount of VAT effectively and exactly and prevent the loss to the public coffers entailed by tax evasion and avoidance across the borders of the Member States, in the case of a transaction for the supply of services and in order to identify the person supplying the service, the tax authority of the Member State, at the evidence-gathering stage of the administrative tax procedure and in order to clarify the facts, is entitled to admit data, information and evidence, and, therefore, records of intercepted communication, obtained without the knowledge of the taxable person by the investigating body of the tax authority in the context of a criminal procedure and to use them as a basis for its assessment of the tax implications, and that, for its part, the administrative court hearing the action brought against the administrative decision of the tax authority of the Member State is entitled to carry out an assessment of those matters as evidence, while examining the legality of that evidence?

(11) In the situation analysed in the present case, must Articles 2(1)(c), 24(1), 43 and 273 of the VAT Directive, in conjunction with Article 4(3) TEU and Article 325 TFEU, be interpreted as meaning that, in the interests of the proper observance of the obligation of the Member States of the European Union to collect the total amount of VAT effectively and exactly and compliance with the obligation of the Member States to guarantee observance of the obligations imposed on the taxable person, the discretion with regard to the means available to the tax authority of the Member State includes the option for it to use evidence obtained initially for the purpose of criminal proceedings to prevent tax avoidance, including where national law itself does not allow the obtaining of information without the knowledge of the person concerned in the context of an administrative procedure to prevent tax avoidance, or subjects it in the context of criminal proceedings to guarantees which are not provided for in the administrative tax proceedings, recognising at the same time the right of the administrative authority to act in accordance with the principle of the freedom of evidence?

(12) Does Article 8(2) of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (“the ECHR”)], in conjunction with Article 52(2) of the Charter, prevent recognition that the tax authority of the Member State has the authority described in questions 10 and 11, or, in the circumstances of the present case, can it be considered justified, in order to combat tax avoidance, to use in the context of an administrative tax procedure conclusions drawn from information obtained without the knowledge of the person concerned, with a view to the effective collection of tax and for the sake of the “financial well-being of the country”?

(13) If the answer to questions 10 to 12 is that the tax authority of the Member State may use such evidence in the administrative procedure, is the tax authority of the Member State required, in order to guarantee the effectiveness of the right to good administration and the rights of the defence pursuant to Articles 7, 8, 41 and 48 of the Charter, in conjunction with Article 51(1) of the Charter, to hear the taxable person in the course of the administrative procedure, to guarantee him access to the conclusions suggested by the information obtained without his knowledge and to respect the purpose for which the data appearing in the evidence were obtained, or,

in that context, does the fact that the information collected without the knowledge of the person concerned is intended solely for an investigation of a criminal nature prevent from the outset the use of such evidence?

(14) In the event that evidence is obtained and used in breach of Articles 7, 8, 41 and 48 of the Charter, in conjunction with Article 47 of the Charter, is the right to an effective remedy satisfied by national legislation under which the challenging in judicial proceedings of the procedural legality of decisions given in tax matters can succeed and result in the setting aside of the decision only if, according to the circumstances of the case, there is the possibility in practice that the contested decision would have been different if the procedural error had not occurred and if, moreover, that defect affected the substantive legal position of the applicant, or do the procedural errors made in that way have to be taken into account in a wider context, regardless of the influence that the procedural error which infringes the Charter has on the outcome of the proceedings?

(15) Does the effectiveness of Article 47 of the Charter require that, in a procedural situation such as the present, the administrative court hearing the action against the administrative decision of the tax authority of the Member State may review the legality of the obtaining of evidence collected for the purpose of criminal proceedings without the knowledge of the person concerned in the context of criminal proceedings, in particular when the taxable person against whom the criminal proceedings have been brought in parallel has not been able to have knowledge of that documentation or contest its legality before a court?

(16) Also having regard to question 6, must [Regulation No 904/2010], in the light, in particular, of recital 7 in its preamble, according to which, for the purposes of collecting the tax owed, Member States should cooperate to help ensure that VAT is correctly assessed and, in order to do so, they must not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other Member States for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another Member State, be interpreted as meaning that, in a situation where the facts are as in the present case, the tax authority of the Member State which discovers the tax debt must make a request to the tax authority of the Member State in which the taxable person was subject to a tax inspection and complied with its obligation to pay tax?

(17) If the answer to question 16 is in the affirmative and the decisions adopted by the tax authority of the Member State are challenged before a court and are found to be unlawful in procedural terms on that ground, in other words, on the basis of failure to obtain information and the absence of a request, what action should the court hearing the action against the administrative decisions adopted by the tax authority of the Member State take, having regard also to the considerations set out in question 14?

[...]

#### *Questions 10 to 15*

61 By questions 10 to 15, which it is appropriate to examine together, the referring court asks, in essence, whether EU law must be interpreted as not precluding, for the purposes of the application of Article 4(3) TEU, Article 325 TFEU and Articles 2, 250(1) and 273 of the VAT Directive, the tax authorities from being able, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not yet been concluded, by means, for example, of the interception of telecommunications and seizure of emails.

62 It is apparent from the grounds of the order for reference and the wording of the questions asked that the referring court is uncertain, first of all, whether, having regard to the freedom of action given to the Member States for ensuring collection of all the VAT due on their territory and for preventing tax evasion and avoidance, the tax authorities may, in the context of an administrative procedure, gather and use such evidence, although it was initially sought for the purpose of prosecution and by means specific to criminal procedure which, moreover, offers persons safeguards that they cannot enjoy in the context of an administrative procedure. It raises the question whether that possibility exists and, as the case may be, the question of the limits and obligations stemming in that regard from Article 8 of the ECHR and Articles 7, 8 and 52 of the Charter.

63 Should such a possibility be recognised, the referring court is uncertain, next, whether, in order to ensure observance of the rights of the defence, as referred to in Article 48 of the Charter, and the principle of good administration, enshrined in Article 41 thereof, the tax authorities are obliged to grant the taxable person access to the evidence thereby gathered and to hear him.

64 Finally, the referring court is uncertain whether Article 47 of the Charter means that the court hearing an action challenging the decision of the tax authorities that have adjusted the tax may review the legality of the obtaining of the evidence in the context of the criminal procedure when the taxable person has not been able to ascertain that evidence in that procedure and has not had the opportunity to contest its legality before another court. Furthermore, where national legislation provides that a procedural defect results in annulment of the contested decision vitiated by it only if that decision could have been different without the defect and if the applicant's legal position is affected by it, the referring court is uncertain whether the right to an effective judicial remedy means that, if the provisions of the Charter are infringed, that decision must be annulled irrespective of the effect of that infringement.

65 It should be noted, first, that the question whether action constituting an abusive practice has taken place must be examined in accordance with the rules of evidence of national law. Those rules must not, however, undermine the effectiveness of EU law (see, to this effect, judgment in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 76).

66 Secondly, in accordance with settled case-law, the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law (see, to this effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 19 and the case-law cited).

67 Thirdly, an adjustment of VAT after an abusive practice has been found, such as the adjustment which is the subject-matter of the main proceedings, constitutes implementation of Articles 2, 250(1) and 273 of the VAT Directive and Article 325 TFEU and, therefore, of EU law, for the purposes of Article 51(1) of the Charter (see, to this effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 25 to 27).

68 It follows that EU law does not preclude the tax authorities from being able in the context of an administrative procedure, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained in the context of a parallel criminal procedure that has not yet been concluded, provided that the rights guaranteed by EU law, especially by the Charter, are observed.

69 Article 52(1) of the Charter states regarding the scope and interpretation of the rights guaranteed by it that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In observance of the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

70 In this instance, as regards, in the first place, the obtaining of the evidence in the context of the criminal procedure, it should be noted that Article 7 of the Charter, concerning the right to respect for private and family life, contains rights which correspond to those guaranteed by Article 8(1) of the ECHR and that, in accordance with Article 52(3) of the Charter, Article 7 thereof is thus to be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (judgments in *McB.*, C-400/10 PPU, EU:C:2010:582, paragraph 53, and *Dereci and Others*, C-256/11, EU:C:2011:734, paragraph 70).

71 Thus, since interception of telecommunications constitutes interference with the exercise of the right guaranteed by Article 8(1) of the ECHR (see, inter alia, European Court of Human Rights, *Klass and Others v. Germany*, 6 September 1978, § 41, Series A no. 28; *Malone v. the United Kingdom*, 2 August 1984, § 64, Series A no. 82; *Kruslin v. France* and *Huvig v. France*, 24 April 1990, § 26 and § 25, Series A nos. 176-A and 176-B; and *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 79, ECHR 2006-XI), it also constitutes a limitation on the exercise of the corresponding right laid down in Article 7 of the Charter.

72 The same applies to the seizure of emails in the course of searches at the professional or business premises of a natural person or the premises of a commercial company, which also constitutes interference with the exercise of the right guaranteed by Article 8 of the ECHR (see, inter alia, European Court of Human Rights, *Niemietz v. Germany*, 16 December 1992, §§ 29 to 31, Series A no. 251-B; *Société Colas Est and Others v. France*, no. 37971/97, §§ 40 and 41, ECHR 2002-III; and *Vinci Construction and GTM Génie Civil et Services v. France*, nos. 63629/10 and 60567/10, § 63, 2 April 2015).

73 Such limitations are accordingly possible only if they are provided for by law and if, in observance of the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union.

74 As regards the principle of proportionality, the Court has already held that, in accordance with that principle, the measures which the Member States may adopt must not go further than is necessary to attain the objectives of ensuring the correct levying and collection of VAT and the prevention of tax evasion (judgment in *R.*, C-285/09, EU:C:2010:742, paragraph 45).

75 In the main proceedings, as the telecommunications were intercepted and the emails were seized in the context of a criminal procedure, it is in the light of that procedure that the aim of those acts and the need for them must be assessed.

76 In that regard, since, as has been pointed out in paragraph 35 of the present judgment, preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by the VAT Directive (see inter alia, to this effect, judgment in *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 71), investigative measures carried out in the context of a criminal procedure with a view, in particular, to prosecuting offences in that sphere have an aim which meets an objective of general interest recognised by the European Union.

77 As for the examination of the necessity of the investigative measures, the tax authority stated at the hearing that the emails were seized without judicial authorisation. It is to be noted that, in the absence of prior judicial authorisation, a strict legal framework for, and strict limits on, such seizure are required if individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 7 of the Charter (see European Court of Human Rights, *Camenzind v. Switzerland*, 16 December 1997, § 45, *Reports of Judgments and Decisions* 1997-VIII). Thus, such seizure can be compatible with Article 7 only if domestic legislation and practice afford adequate and effective safeguards against abuse and arbitrariness (see, inter alia, European Court of Human Rights, *Funke v. France*, 25 February 1993, §§ 56 and 57, Series A no. 256-A; *Mialhe v. France (no. 1)*, 25 February 1993, §§ 37 and 38, Series A no. 256-C; and *Société Colas Est and Others v. France*, §§ 48 and 49).

78 In the course of that examination, it is incumbent upon the referring court to examine whether the absence of a prior judicial warrant was, to a certain extent, counterbalanced by the availability to the person concerned by the seizure of an *ex post factum* judicial review relating to both the legality and necessity of the seizure, a review which must be effective in the particular circumstances of the case at issue (see European Court of Human Rights, *Smirnov v. Russia*, no. 71362/01, § 45, 7 June 2007).

79 So far as concerns, in the second place, the gathering and use of the evidence by the tax authorities, there is no need in this instance to examine whether transmission of the evidence by the department responsible for the criminal investigation and the gathering thereof by the department conducting the administrative procedure with a view to its use interfere with the right, guaranteed by Article 8 of the Charter, to the protection of personal data. WML is not a natural person and therefore cannot invoke that protection as its official title does not identify any natural person (see, to this effect, judgment in *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraphs 52 and 53).

80 On the other hand, in the light of Article 7 of the Charter, use by the tax authorities of evidence obtained, in the context of a criminal procedure that has not been concluded, by means of the interception of telecommunications and seizure of emails constitutes as such a limitation on the exercise of the right guaranteed by that article. It must therefore be examined whether that use also satisfies the requirements set out in Article 52(1) of the Charter.

81 In that regard, the requirement that any limitation on the exercise of that right must be provided for by law implies that the legal basis which permits the tax authorities to use the evidence referred to in the preceding paragraph must be sufficiently clear and precise and that, by defining itself the scope of the limitation on the exercise of the right guaranteed by Article 7 of the Charter, it affords a measure of legal protection against any arbitrary interferences by those authorities (see, inter alia, European Court of Human Rights, *Malone v. the United Kingdom*, 2 August 1984, § 67, Series A no. 82, and *Gillan and Quinton v. the United Kingdom*, 12 January 2010, no. 4158/05, § 77, ECHR 2010).

82 When considering the necessity for such use in the main proceedings, it must be assessed in particular, as the Advocate General has observed in point 133 of his Opinion, whether the use is proportionate to the aim pursued, examining whether all the necessary information could not have been obtained by means of investigation that interfere less with the right guaranteed by Article 7 of the Charter than interception of telecommunications and seizure of emails, such as a simple inspection at WML's premises and a request for information or for an administrative enquiry sent to the Portuguese authorities pursuant to Regulation No 904/2010.

83 In addition, with regard to observance of the rights of the defence and of the principle of good administration, it is to be observed that Articles 41 and 48 of the Charter, which are mentioned by the referring court, are not relevant in the main proceedings. First, it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (judgments in *YS and Others*, C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67, and *Mukarubega*, C-166/13, EU:C:2014:2336, paragraph 44). Secondly, Article 48 of the Charter protects the presumption of innocence and rights of the defence of which must be enjoyed by a person 'who has been charged' and is therefore not applicable in the main proceedings.

84 Nevertheless, observance of the rights of the defence is a general principle of EU law which applies where the authorities are minded to adopt in respect of a person a measure which will adversely affect him. In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of EU law, even if the EU legislation applicable does not expressly provide for such a procedural requirement (judgment in *Sabou*, C-276/12, EU:C:2013:678, paragraph 38 and the case-law cited).

85 In this instance, it appears from WML's written observations and the submissions made during the hearing that the tax authorities granted WML access to the transcripts of telephone conversations and emails used as evidence in support of the decision adjusting the tax and that WML had the opportunity to be heard on that evidence before the decision was adopted, a matter which is, however, for the referring court to verify.

86 As regards, in the third place, the right to an effective judicial remedy, guaranteed by Article 47 of the Charter, and the conclusions to be drawn from an infringement of the rights guaranteed by EU law, it should be noted that, under Article 47, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

87 In order for the judicial review guaranteed by that article to be effective, the court reviewing the legality of a decision implementing EU law must be able to verify whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter.

88 That requirement is satisfied if the court hearing an action challenging the decision of the tax authorities adjusting VAT is empowered to check that the evidence upon which that decision is founded, deriving from a parallel criminal procedure that has not yet been concluded, was obtained in that criminal procedure in accordance with the rights guaranteed by EU law or can at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that that evidence was obtained in accordance with EU law.

89 If that requirement is not satisfied and, therefore, the right to a judicial remedy is not effective, or if another right guaranteed by EU law is infringed, the evidence obtained in the context of the criminal procedure and used in the administrative tax procedure must be disregarded and the contested decision which is founded on that evidence must be annulled if, as a result, the decision has no basis.

90 Consequently, the answer to questions 10 to 15 is that EU law must be interpreted as not precluding, for the purposes of the application of Article 4(3) TEU, Article 325 TFEU and Articles 2, 250(1) and 273 of the VAT Directive, the tax authorities from being able, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not yet been concluded, by means, for example, of the interception of telecommunications and seizure of emails, provided that the obtaining of that evidence in the context of the criminal procedure and its use in the context of the administrative procedure do not infringe the rights guaranteed by EU law.

91 In circumstances such as those of the main proceedings, by virtue of Articles 7, 47 and 52(1) of the Charter it is incumbent upon the national court which reviews the legality of the decision founded on such evidence adjusting VAT to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter, it must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law.

[...]

On those grounds, the Court (Third Chamber) hereby rules:

[...]

**4. EU law must be interpreted as not precluding, for the purposes of the application of Article 4(3) TEU, Article 325 TFEU and Articles 2, 250(1) and 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, the tax authorities from being able, in order to establish the existence of an abusive practice concerning value added tax, to use evidence obtained without the taxable person's knowledge in the context of a parallel criminal procedure that has not yet been concluded, by means, for example, of the interception of telecommunications and seizure of emails, provided that the obtaining of that evidence in the context of the criminal procedure and its use in the context of the administrative procedure do not infringe the rights guaranteed by EU law.**

**In circumstances such as those of the main proceedings, by virtue of Articles 7, 47 and 52(1) of the Charter of Fundamental Rights of the European Union it is incumbent upon the national court which reviews the legality of the decision founded on such evidence adjusting value added tax to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter of Fundamental Rights of the European Union, it must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law.**

## Opinion 2/13

### I – The request for an Opinion

1. The request for an Opinion submitted to the Court of Justice of the European Union by the European Commission is worded as follows:

‘Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950 (“the ECHR”),] compatible with the Treaties?’

2. The following documents were sent by the Commission to the Court as annexes to its request:

– the draft revised agreement on the accession of the European Union (‘EU’) to the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the draft agreement’);

– the draft declaration by the EU to be made at the time of signature of the Accession Agreement (‘the draft declaration’);

– the draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party (‘draft Rule 18’);

– the draft model of memorandum of understanding between the EU and X [State which is not a member of the EU]; and

– the draft explanatory report to the Agreement on the Accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the draft explanatory report’, and, together with the other instruments referred to above, ‘the draft accession instruments’ or ‘the agreement envisaged’).

### II – The institutional framework and the European Convention for the Protection of Human Rights and Fundamental Freedoms

#### A – *The Council of Europe*

3. By an international agreement signed in London on 5 May 1949, which entered into force on 3 August 1949 (‘the Statute of the Council of Europe’), a group of 10 European States created the Council of Europe in order to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles of their common heritage and facilitating economic and social progress in Europe. At present, 47 European States are members of the Council of Europe, including the 28 Member States of the EU (‘the Member States’).

4. According to that statute, the organs of the Council of Europe are the Committee of representatives of governments (‘the Committee of Ministers’) and the Parliamentary Assembly (‘the Assembly’), which are served by the Secretariat of the Council of Europe.

5. In accordance with Article 14 of the Statute of the Council of Europe, the Committee of Ministers is composed of one representative for each member, each representative being entitled to one vote.

6. Under Article 15.a of the Statute of the Council of Europe, ‘[o]n the recommendation of the [Assembly] or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. ...’. The same article states, in the first part of paragraph b, that, ‘[i]n appropriate cases, the conclusions of the Committee [of Ministers] may take the form of recommendations to the governments of members’.

7. Article 20 of the Statute of the Council of Europe governs the quorums required for the adoption of decisions by the Committee of Ministers. It is worded as follows:

- ‘a. Resolutions of the Committee of Ministers relating to the following important matters, namely:
  - i. recommendations under Article 15.b;
  - ...
  - v. recommendations for the amendment of Articles ... 15 [and] 20 ...; and
  - vi. any other question which the Committee may, by a resolution passed under d below, decide should be subject to a unanimous vote on account of its importance,

require the unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee.

...

- d. All other resolutions of the Committee ... require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee.’

8. According to Article 25 of the Statute of the Council of Europe, the Assembly is to consist of representatives of each member of the Council of Europe, elected by its parliament from among the members thereof, or appointed from among the members of that national parliament, in such manner as it shall decide. Each member is to be entitled to a number of representatives determined by Article 26 of that statute. The highest number of representatives is 18.

*B – The European Convention for the Protection of Human Rights and Fundamental Freedoms*

9. The ECHR is a multilateral international agreement concluded in the Council of Europe, which entered into force on 3 September 1953. All the members of the Council of Europe are among the High Contracting Parties to that Convention (‘the Contracting Parties’).

10. The ECHR is in three sections.

1. Section I of the ECHR, entitled ‘Rights and freedoms’, and the substantive provisions thereof

11. Section I of the ECHR defines the rights and freedoms which the Contracting Parties, in accordance with Article 1 of the ECHR, ‘shall secure to everyone within their jurisdiction’. There is no provision for any derogation from that commitment other than that contained in Article 15 of the ECHR, ‘[i]n time of war or other public emergency threatening the life of the nation’. In particular, in no circumstances can any derogation be made from the obligations set out in Article 2 (right to life, save in the case of deprivation of life resulting from the necessary use of force), Article 3 (prohibition of torture), Article 4(1) (prohibition of slavery) and Article 7 (no punishment without law).

12. Article 6 of the ECHR, headed ‘Right to a fair trial’, states:

‘1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’

13. Article 13 of the ECHR, headed ‘Right to an effective remedy’, is worded as follows:

‘Everyone whose rights and freedoms as set forth in [the ECHR] are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

2. Section II of the ECHR and the control mechanisms

14. Section II of the ECHR governs the mechanisms for controlling the Contracting Parties’ compliance with their commitments in accordance with Article 1 thereof. That section includes, in particular, Article 19 of the ECHR, which establishes the European Court of Human Rights (‘the ECtHR’), and Article 46, which confers on the Committee of Ministers powers of supervision of the execution of judgments of the ECtHR.

a) The ECtHR

15. In accordance with Articles 20 and 22 of the ECHR, the Judges of the ECtHR, the number of which is equal to that of the Contracting Parties, are to be elected by the Assembly with respect to each Contracting Party from a list of three candidates nominated by that contracting party.

16. Article 32 of the ECHR confers on the ECtHR jurisdiction to interpret and apply the ECHR as provided, inter alia, in Articles 33 and 34 thereof.

17. Under Article 33 of the ECHR (Inter-State cases), the ECtHR may receive an application from a Contracting Party alleging breach of the provisions of the ECHR and of the protocols thereto by one (or more) other Contracting Parties.

18. In accordance with the first sentence of Article 34 of the ECHR, the ECtHR ‘may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the [Contracting Parties] of the rights set forth in the Convention or the Protocols thereto’.

19. The ECHR makes the admissibility of an individual application subject, in particular, to the following four criteria: First, under Article 34 of the ECHR, the applicant must be able to claim to be the victim of a violation of the rights set forth in the ECHR or the protocols thereto. Secondly, in accordance with Article 35(1) of the ECHR, the applicant must have exhausted all ‘domestic’ remedies, that is to say, those that exist in the legal order of the Contracting Party against which the application is brought. That admissibility criterion reflects the principle that the control mechanism established by the ECHR is subsidiary to the machinery of human rights protection that exists within the Contracting Parties (judgments of the ECtHR in *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65 and 66, *Reports of Judgments and Decisions* 1996-IV, and in *Burden v. the United Kingdom* [GC], no. 13378/05, § 42, ECHR 2008). Thirdly, under the same provision, the application must be brought within a period of six months from the date on which the final decision was taken. Fourthly, under Article 35(2)(b) of the ECHR, the admissibility of an application is subject to the application not being ‘substantially the same as a matter that has already been examined by the [ECtHR] or has already been submitted to another procedure of international investigation or settlement’, unless it contains relevant new information.

20. Proceedings before the ECtHR culminate either in a decision or judgment by which the ECtHR finds that the application is inadmissible or that the ECHR has not been violated, or in a judgment finding a violation of the ECHR. That judgment is declaratory and does not affect the validity of the relevant acts of the Contracting Party.

21. A judgment of the ECtHR delivered by the Grand Chamber is final, in accordance with Article 44(1) of the ECHR. It follows from Article 43, read in conjunction with Article 44(2) of the ECHR, that a judgment delivered by a Chamber of the ECtHR becomes final when the parties declare that they will not request that the case be referred to the Grand Chamber, or when such a request has been rejected by the panel of the Grand Chamber, or three months after the date of the judgment if no request has been made for the case to be referred to the Grand Chamber.

22. Under Article 46(1) of the ECHR, the Contracting Parties are obliged to abide by the final judgment of the ECtHR in any case to which they are parties. In accordance with that provision, a Contracting Party is obliged to take, so far as concerns the applicant, all individual measures applicable under domestic law in order to eliminate the consequences of the violation established in the judgment of the ECtHR (*restitutio in integrum*). If the domestic law of the Contracting Party concerned allows only partial reparation to be made, Article 41 of the ECHR provides that the ECtHR is to afford 'just satisfaction' to the applicant. Moreover, a Contracting Party is obliged to adopt general measures, such as the amendment of domestic law, changes in interpretation by the courts or other types of measures, in order to prevent further violations similar to those found by the ECtHR, or to put an end to the violations subsisting in domestic law.

b) The functioning of the Committee of Ministers in the exercise of its powers to supervise the execution of the judgments of the ECtHR

23. Article 46(2) of the ECHR confers on the Committee of Ministers responsibility for supervising the execution of the final judgments of the ECtHR. Similarly, under Article 39(4) of the ECHR, the Committee of Ministers is to supervise the execution of the terms of a friendly settlement of a case, as provided for in paragraph 1 of that article.

24. Pursuant to those powers, the Committee of Ministers examines, in essence, whether the Contracting Party has taken all the necessary measures to abide by the final judgment of the ECtHR or, where appropriate, to execute the terms of a friendly settlement. The exercise of those powers is governed by the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' ('the Rules for the supervision of execution').

25. According to Rule 17 of the Rules for the supervision of execution, the Committee of Ministers is to adopt a 'final resolution' if it establishes that the Contracting Party has taken all the necessary measures to abide by the final judgment of the ECtHR or, where appropriate, that the terms of a friendly settlement have been executed. In accordance with Rule 16 of those rules, the Committee of Ministers may adopt 'interim resolutions', notably in order to 'provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution'. In order for both types of resolution to be adopted, the quorum laid down in Article 20.d of the Statute of the Council of Europe must be satisfied.

26. According to Article 46(3) and (4) of the ECHR, the Committee of Ministers may, by a majority vote of two thirds of the representatives entitled to sit on that committee, if it considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of that judgment, submit a request for interpretation to the ECtHR. Moreover, if that committee considers that a Contracting Party is refusing to abide by a final judgment in a case to which it is a party, it may refer to the ECtHR the question whether that party has failed to fulfil its obligation under Article 46(1). If the ECtHR finds that that obligation has been violated, it is to refer the case to the Committee of Ministers for consideration of the measures to be taken. If no violation is found, the case is to be referred to the Committee of Ministers, which is to close its examination of the case, in accordance with Article 46(5).

27. The ECHR also confers certain other powers on the Committee of Ministers. Thus, in accordance with Article 26(2) thereof, it may, at the request of the plenary Court of the ECtHR, by a unanimous decision and for a fixed period reduce from seven to five the number of Judges of the Chambers, and, on the basis of Article 47 of the ECHR, request an advisory opinion of the ECtHR on legal questions concerning the interpretation of the ECHR and the protocols thereto.

28. Lastly, under Article 50 of the ECHR, the expenditure on the ECtHR is to be borne by the Council of Europe.

3. Section III of the ECHR, entitled ‘Miscellaneous provisions’

29. In accordance with Article 53 of the ECHR, nothing in the ECHR is to be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a party.

30. Under Article 55 of the ECHR, the Contracting Parties agree that, except by special agreement, they will not submit a dispute arising out of the interpretation or application of the ECHR to a means of settlement other than those provided for in the ECHR.

31. Article 57(1) of the ECHR allows the Contracting Parties, when signing that Convention or when depositing the instrument of ratification, to ‘make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision’, but prohibits ‘[r]eservations of a general character’.

4. The Protocols to the ECHR

32. The ECHR is supplemented by a series of 14 protocols.

33. A first group of protocols, comprising the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (‘the Protocol’) and Protocols No 4, No 6, No 7, No 12 and No 13, supplements the content of the ECHR by establishing additional fundamental rights. All the Member States are Contracting Parties to the Protocol and to Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (‘Protocol No 6’). By contrast, each of the other protocols has only a limited number of Member States among its Contracting Parties.

34. A second group of protocols, including Protocols No 2, No 3, No 5, Nos 8 to 11 and No 14, merely amends the ECHR and these protocols have no autonomous content. Moreover, most of them have been repealed or have become devoid of purpose.

35. Of the protocols in the second group, the most relevant for the purposes of the present request for an Opinion is Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which was adopted on 13 May 2004 and entered into force on 1 June 2010. By Article 17 of that protocol, Article 59(2) of the ECHR was amended to lay down the very principle of the EU’s accession to that Convention. That provision now reads as follows:

‘The [EU] may accede to [the ECHR].’

36. Lastly, two additional protocols are open for signature and are not yet in force. These are Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, which amends the ECHR in relatively minor respects, and Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 2 October 2013 (‘Protocol No 16’), which provides, in Article 1(1), for the highest courts and tribunals of the Contracting Parties to be able to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto.

### III – The relationship between the EU and the ECHR

37. According to well-established case-law of the Court of Justice, fundamental rights form an integral part of the general principles of EU law. For that purpose, the Court of Justice draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (judgments in *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 4, and *Nold v Commission*, 4/73, EU:C:1974:51, paragraph 13). In that context, the Court of Justice has stated that the ECHR has special significance (see, in particular, judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41, and *Kadi and Al*

*Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 283). Article F(2) of the Treaty on European Union (which became, after amendment, Article 6(2) EU) codified that case-law.

38. In paragraphs 34 and 35 of its Opinion 2/94 (EU:C:1996:140), the Court of Justice considered that, as Community law stood at the time, the European Community had no competence to accede to the ECHR. Such accession would have entailed a substantial change in the existing Community system for the protection of human rights in that it would have entailed the entry of the Community into a distinct international institutional system as well as integration of all the provisions of that Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would have been of constitutional significance and would therefore have been such as to go beyond the scope of Article 235 of the EC Treaty (which became Article 308 EC), a provision now contained in Article 352(1) TFEU, which could have been brought about only by way of amendment of that Treaty.

39. Subsequently, on 7 December 2000, the European Parliament, the Council of the European Union and the Commission proclaimed the Charter of Fundamental Rights of the European Union in Nice (OJ 2000 C 364, p. 1; ‘the Charter’). The Charter, which at that time was not a legally binding instrument, has the principal aim, as is apparent from the preamble thereto, of reaffirming ‘the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the [Court of Justice] and of the [ECtHR]’ (see, to that effect, judgment in *Parliament v Council*, C-540/03, EU:C:2006:429, paragraph 38).

40. The Treaty of Lisbon, which entered into force on 1 December 2009, amended Article 6 EU. As amended, that provision, which is now Article 6 TEU, is worded as follows:

‘1. The Union recognises the rights, freedoms and principles set out in the [Charter], which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the [ECHR]. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’

41. In that regard, Article 218(6)(a)(ii) TFEU provides that the Council is to adopt the decision concluding the agreement on EU accession to the ECHR (‘the accession agreement’) after obtaining the consent of the Parliament. In addition, Article 218(8) states that, for that purpose, the Council is to act unanimously and that its decision is to enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

42. The protocols to the EU and FEU Treaties, which, according to Article 51 TEU, form an integral part of those Treaties, include Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (‘Protocol No 8 EU’). This protocol consists of three articles, which are worded as follows:

‘Article 1

The [accession agreement] provided for in Article 6(2) [TEU] shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

- (a) the specific arrangements for the Union's possible participation in the control bodies of the [ECHR];
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

#### *Article 2*

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the [ECHR], in particular in relation to the Protocols thereto, measures taken by Member States derogating from the [ECHR] in accordance with Article 15 thereof and reservations to the [ECHR] made by Member States in accordance with Article 57 thereof.

#### *Article 3*

Nothing in the agreement referred to in Article 1 shall affect [Article 344 TFEU].'

43. The Declaration on Article 6(2) of the Treaty on European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, is worded as follows:

'The Conference agrees that the Union's accession to the [ECHR] should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the [Court of Justice] and the [ECtHR]; such dialogue could be reinforced when the Union accedes to that Convention.'

44. Article 52(3) of the Charter states:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

45. Lastly, according to Article 53 of the Charter:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions.'

#### **IV – The process of accession**

46. Upon the recommendation of the Commission of 17 March 2010, the Council adopted a decision on 4 June 2010 authorising the opening of negotiations in relation to the accession agreement, and designated the Commission as negotiator.

47. A supplementary annex to the Council's mandate for the negotiation of 26 and 27 April 2012 sets out the principles which will have to be covered by the EU's internal rules, the adoption of which is necessary in order to make the EU's accession to the ECHR effective ('the internal rules'). According to that document, the internal rules will deal in particular with the representation of the EU before the ECtHR, the triggering of the co-respondent mechanism before the ECtHR and coordination rules for the purpose of the conduct of the procedure before the ECtHR by the respondent and the co-respondent, the selection of three candidates for the office of Judge in the ECtHR, the prior involvement of the Court of Justice, and the circumstances in which the EU will agree a position and those in which the Member States will remain free to speak and act as they choose, both in the ECtHR and in the Committee of Ministers.

48. On 5 April 2013, the negotiations resulted in agreement among the negotiators on the draft accession instruments. The negotiators agreed that all those instruments constitute a package and that they are all equally necessary for the accession of the EU to the ECHR.

## V – The draft agreement

49. The draft agreement contains the provisions considered necessary to allow for the EU's accession to the ECHR. A first group of these provisions relates to accession proper and introduces the procedural mechanisms necessary in order for such accession to be effective. A second group of those provisions, of a purely technical nature, sets out, first, the amendments to the ECHR that are required having regard to the fact that the ECHR was drawn up to apply to the member States of the Council of Europe, whereas the EU is neither a State nor a member of that international organisation. Secondly, provisions are laid down relating to other instruments linked to the ECHR and the final clauses concerning entry into force and the notification of instruments of ratification or accession.

### A – *The provisions governing accession*

50. Taking account of Article 59(2) of the ECHR, Article 1(1) of the draft agreement provides that, by that agreement, the EU accedes to the ECHR, to the Protocol and to Protocol No 6, that is to say, to the two protocols to which all the Member States are already parties.

51. Article 1(2) of the draft agreement amends Article 59(2) of the ECHR so as, first, to enable the EU to accede to other protocols at a later stage, such accession continuing to be governed, *mutatis mutandis*, by the relevant provisions of each protocol, and, secondly, to make clear that the accession agreement 'constitutes an integral part of [the ECHR]'.

52. According to Article 2(1) of the draft agreement, the EU may, when signing or expressing its consent to be bound by the provisions of the accession agreement in accordance with Article 10 thereof, make reservations to the ECHR and to the Protocol in accordance with Article 57 of the ECHR. Article 4 of Protocol No 6 provides, however, that no reservation may be made in respect of that protocol. In addition, Article 2(2) of the draft agreement inserts a new sentence into Article 57 of the ECHR, according to which the EU 'may, when acceding to [the ECHR], make a reservation in respect of any particular provision of the Convention to the extent that any law of the [EU] then in force is not in conformity with the provision'. Article 11 of the draft agreement states, moreover, that no reservation may be made in respect of the provisions of that agreement.

53. According to Article 1(3) of the draft agreement, accession to the ECHR and the protocols thereto is to impose on the EU obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Moreover, nothing in the ECHR or the protocols thereto is to require the EU to perform an act or adopt a measure for which it has no competence under EU law.

54. Conversely, the first sentence of Article 1(4) of the draft agreement makes clear that, for the purposes of the ECHR, of the protocols thereto and of the accession agreement itself, an act, measure or omission of organs of a Member State of the EU or of persons acting on its behalf is to be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the EU, including decisions taken under the EU and FEU Treaties. The second sentence in the same paragraph makes clear that this is not to preclude the EU from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with, in particular, Article 3 of the draft agreement.

55. The aforementioned Article 3 introduces the co-respondent mechanism. Article 3(1) amends Article 36 of the ECHR by adding a paragraph 4 which provides that the EU or a Member State may become a co-respondent to proceedings before the ECtHR in the circumstances set out, in essence, in Article 3(2) to (8), and, moreover, that the co-respondent is a party to the case.

56. Article 3(2) to (8) of the draft agreement is worded as follows:

'2. Where an application is directed against one or more member States of the [EU], the [EU] may become a co-respondent to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of a provision of [EU] law, including decisions taken under the [EU Treaty] and under the [FEU Treaty], notably where that violation could have been avoided only by disregarding an obligation under [EU] law.

3. Where an application is directed against the [EU], the [Member States] may become co-respondents to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of a provision of the [EU Treaty], the [FEU Treaty] or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the [EU] and one or more of [the] Member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

5. A [Contracting Party] shall become a co-respondent either by accepting an invitation from the [ECtHR] or by decision of the [ECtHR] upon the request of that [Contracting Party]. When inviting a [Contracting Party] to become co-respondent, and when deciding upon a request to that effect, the [ECtHR] shall seek the views of all parties to the proceedings. When deciding upon such a request, the [ECtHR] shall assess whether, in the light of the reasons given by the [Contracting Party] concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.

6. In proceedings to which the [EU] is a co-respondent, if the [Court of Justice] has not yet assessed the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of the provision of [EU] law as under paragraph 2 of this article, sufficient time shall be afforded for the [Court of Justice] to make such an assessment, and thereafter for the parties to make observations to the [ECtHR]. The [EU] shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed. The provisions of this paragraph shall not affect the powers of the [ECtHR].

7. If the violation in respect of which a [Contracting Party] is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the [ECtHR], on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

8. This article shall apply to applications submitted from the date of entry into force of [the accession agreement].’

57. Lastly, Article 5 of the draft agreement states that proceedings before the Court of Justice are to be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the ECHR, nor means of dispute settlement within the meaning of Article 55 of the ECHR.

#### B – *The other provisions*

58. In the first place, one set of provisions is intended, first of all, to modify the provisions of the ECHR or of the protocols thereto which refer to the Contracting Parties as ‘States’ or to matters covered by the concept of ‘State’.

59. Accordingly, Article 1(5) of the draft agreement contains an interpretation clause according to which any of the terms ‘State’, ‘States’, ‘States Parties’, ‘national law’, ‘administration of the State’, ‘national laws’, ‘national authority’, ‘domestic’, ‘national security’, ‘economic well-being of the country’, ‘territorial integrity’, ‘life of the nation’, which appear in various provisions of the ECHR and in some of the protocols thereto, are to be understood after accession as referring also, *mutatis mutandis*, to the EU as a Contracting Party.

60. As regards the territorial aspects more specifically, as provided in Article 1(6) of the draft agreement, the expression ‘everyone within their jurisdiction’ appearing in Article 1 of the ECHR is to be understood, with regard to the EU, as referring to persons within the territories of the Member States to which the EU and FEU Treaties apply. In so far as that expression refers to persons outside the territory of a Contracting Party, it is to be understood as referring to persons who, if the alleged violation had been attributable to a Contracting Party which is a State, would have been within the jurisdiction of that Contracting Party. In addition, Article 1(7) provides that, with regard to the EU, the terms ‘country’ and ‘territory of a State’ appearing in various provisions of the ECHR and in some of the protocols thereto are to mean each of the territories of the Member States to which the EU and FEU Treaties apply.

61. Next, Article 1(8) of the draft agreement amends Article 59(5) of the ECHR so as to provide that the Secretary-General of the Council of Europe is henceforth to notify the EU also of the entry into force of the ECHR, the names of the Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently.

62. Lastly, Article 4 of the draft agreement amends the first sentence of Article 29(2) of the ECHR and the heading of Article 33 thereof by replacing the terms ‘inter-State applications’ and ‘inter-State cases’ with the terms ‘inter-Party applications’ and ‘inter-Party cases’, respectively.

63. In the second place, certain amendments of the ECHR were considered necessary on account of the fact that the EU is not a member of the Council of Europe.

64. Article 6(1) of the draft agreement provides that a delegation of the European Parliament is to be entitled to participate, with the right to vote, in the sittings of the Assembly whenever the Assembly exercises its functions related to the election of Judges to the ECtHR. The delegation is to have the same number of representatives as the delegation of the member State of the Council of Europe which is entitled to the highest number of representatives. According to Article 6(2), ‘[t]he modalities of the participation of representatives of the European Parliament in the sittings of the [Assembly] and its relevant bodies shall be defined by the [Assembly], in co-operation with the European Parliament’.

65. As regards the Committee of Ministers, first of all, Article 7(1) of the draft agreement is to amend Article 54 of the ECHR by adding a new paragraph 1, according to which ‘[p]rotocols to [the] Convention are adopted by the Committee of Ministers’. Next, according to Article 7(2), the EU is to be entitled to participate in the meetings of the Committee of Ministers, with the right to vote, when the latter takes decisions under certain provisions of the ECHR, namely Articles 26(2) (reduction of the number of Judges of the Chambers), 39(4) (supervision of the execution of a friendly settlement), 46(2) to (5) (execution of the judgments of the ECtHR), 47 (requests for advisory opinions) and 54(1) (powers of the Committee of Ministers). In addition, Article 7(3) provides that, before the adoption of any text relating to the ECHR or to any protocol to the ECHR to which the EU has become a party, to decisions by the Committee of Ministers under the provisions mentioned in paragraph 2 of that article, or to the selection of candidates for election of Judges by the Assembly, the EU is to be consulted within that Committee, which must take due account of the position expressed by the EU. Lastly, the first sentence of Article 7(4) of the draft agreement sets out the principle that the exercise of the right to vote by the EU and its Member States is not to prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the ECHR (execution of friendly settlements and of the judgments of the ECtHR). More specifically, Article 7(4)(a) states that, ‘in relation to cases where the Committee of Ministers supervises the fulfilment of obligations either by the [EU] alone, or by the [EU] and one or more of its [M]ember States jointly, it derives from the [EU Treaties] that the [EU] and its [M]ember States express positions and vote in a co-ordinated manner’, before going on to provide that the rules for the supervision of the execution of judgments and of the terms of friendly settlements ‘shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances’. By contrast, in the words of Article 7(4)(b), ‘where the Committee of Ministers otherwise [than in the cases referred to in subparagraph (a)] supervises the fulfilment of obligations by a [Contracting Party] other than the [EU], the [Member States] are free under the [EU Treaties] to express their own position and exercise their right to vote’.

66. It was precisely in response to the abovementioned Article 7(4)(a) that the negotiators agreed to add to the Rules for the supervision of execution a Rule 18, headed ‘Judgments and friendly settlements in cases to which the [EU] is a party’. The wording of that new Rule 18 is as follows:

‘1. Decisions by the Committee of Ministers under Rule 17 (Final Resolution) of the present rules shall be considered as adopted if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour.

2. Decisions by the Committee of Ministers under Rule 10 (Referral to the [ECtHR] for interpretation of a judgment) and under Rule 11 (Infringement proceedings) of the present rules shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.

3. Decisions on procedural issues or merely requesting information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.

4. Amendments to the provisions of this rule shall require consensus by all [Contracting Parties] to the [ECHR].’

67. As regards participation in the expenditure related to the ECHR, Article 8 of the draft agreement provides that the EU is to pay into the budget of the Council of Europe an annual contribution dedicated to the expenditure related to the functioning of the ECHR, and that that contribution is to be in addition to contributions made by the other Contracting Parties.

68. In the third place, the draft agreement includes a provision concerning relations between the ECHR and other agreements concluded in the Council of Europe that are related to the ECHR. Thus, under Article 9(1) of the draft agreement, the EU is, within the limits of its competences, to respect Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, concluded in Strasbourg on 5 March 1996; Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe, concluded in Paris on 2 September 1949; Articles 2 to 6 of the Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, concluded in Strasbourg on 6 November 1952; and Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, signed in Strasbourg on 5 March 1996. In addition, Article 9(2) of the draft agreement provides that, for the purpose of the application of those instruments, the Contracting Parties to each of them are to treat the EU as if it were a Contracting Party. Paragraphs 3 and 4 of the same article provide, respectively, for the EU to be consulted when those instruments are amended and for it to be notified of events such as signature, deposit, date of entry into force or any other act relating to them.

69. Lastly, Articles 10 and 12 of the draft agreement, headed ‘Signature and entry into force’ and ‘Notifications’, respectively, contain the final clauses.

70. It should also be noted that, in accordance with the terms of the draft declaration, at paragraph (a), ‘[u]pon its accession to the [ECHR], the [EU] will ensure that ... it will request to become a co-respondent to the proceedings before the [ECtHR] or accept an invitation by the [ECtHR] to that effect, where the conditions set out in Article 3, paragraph 2, of the Accession Agreement are met ...’.

## **VI – The Commission’s assessment in its request for an Opinion**

### *A – Admissibility*

71. According to the Commission, its request for an Opinion is admissible, given that the information available to the Court of Justice is sufficient for it to consider whether the draft agreement is compatible with the Treaties and that, moreover, the draft accession instruments agreed by the negotiators are sufficiently advanced to be regarded as an ‘agreement envisaged’ within the meaning of Article 218(11) TFEU. Furthermore, the fact that internal rules have yet to be adopted should not have any bearing on the admissibility of the request for an Opinion, given that those rules cannot be adopted until the accession agreement has been concluded.

### *B – Substance*

72. As regards the substance, the Commission analyses the conformity of the draft agreement with the various requirements set out in Article 6(2) TEU and Protocol No 8 EU. Furthermore, it also puts forward arguments to establish that the agreement envisaged respects the autonomy of the legal order of the EU in pursuing its own particular objectives. According to the Commission, it is necessary to avoid a situation in which the ECtHR or the Committee of Ministers could, when a dispute relating to the interpretation or application of one or more provisions of the ECHR or of the accession agreement is brought before them, be called upon, in the exercise of their powers under the ECHR, to interpret concepts in those instruments in a manner that might require them to rule on the respective competences of the EU and its Member States.

73. At the end of its analysis, the Commission concludes that the accession agreement is compatible with the Treaties.

1. Article 1(a) of Protocol No 8 EU

74. According to the Commission, the purpose of the requirement in Article 1(a) of Protocol No 8 EU to preserve the specific characteristics of the EU and EU law with regard to the specific arrangements for the EU’s possible

participation in the control bodies of the ECHR is to ensure that the EU participates on the same footing as any other Contracting Party in the control bodies of the ECHR, that is to say, the ECtHR, the Assembly and the Committee of Ministers.

75. The Commission submits that the draft agreement ensures such participation in those control bodies.

76. As regards the ECtHR, there is, it is argued, no need to amend the ECHR in order to allow the presence of a Judge elected in respect of the EU, since Article 22 of the ECHR provides that a Judge is to be elected in respect of each Contracting Party. As regards the election of Judges to the ECtHR by the Assembly, Article 6(1) of the draft agreement provides that a delegation of the European Parliament is to participate, with the right to vote, in the relevant sittings of the Assembly. As to the Committee of Ministers, Article 7(2) of the draft agreement provides that the EU is to be entitled to participate, with the right to vote, in the meetings of that Committee when it takes decisions in the exercise of the powers conferred on it by the ECHR. The EU is to have one vote, like the 47 other Contracting Parties.

77. The Commission notes that the obligation of sincere cooperation requires the EU and the Member States to act in a coordinated manner when they express their views or cast their votes on the execution of a judgment of the ECtHR delivered against the EU or against a Member State establishing a violation of the ECHR in proceedings to which the EU was a co-respondent. According to the Commission, it follows from this that, after accession, the EU and the Member States will together hold 29 votes out of a total number of 48 in the Committee of Ministers, and will, by themselves, hold a large majority within that Committee. Accordingly, in order to preserve both the effectiveness of the control machinery and the substantive equality of the Contracting Parties, the second sentence of Article 7(4)(a) of the draft agreement provides that the Rules for the supervision of execution are to be adapted to enable the Committee of Ministers to exercise its functions effectively. To that end, special voting rules are laid down in draft Rule 18. According to paragraph 4 of that draft rule, any amendment of those rules is to require consensus by all Contracting Parties.

78. Lastly, when the Committee of Ministers adopts instruments or texts without binding legal effect on the basis of its general competence under Article 15 of the Statute of the Council of Europe, it would not be possible for the EU, not being a member of that international organisation, to participate, with the right to vote, in the adoption of such decisions. Article 7(3) of the draft agreement therefore requires the EU to be consulted before the adoption of such texts or instruments and makes clear that the Committee of Ministers is to take due account of the position expressed by the EU.

## 2. Article 1(b) of Protocol No 8 EU

79. As regards the requirement in Article 1(b) of Protocol No 8 EU to preserve the specific characteristics of the EU and EU law with regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate, the Commission notes that, where a violation of the ECHR alleged before the ECtHR in relation to an act or omission on the part of a Contracting Party is linked to another legal provision, the compatibility of that provision with the ECHR is called into question, with the result that the review exercised by the ECHR bodies will necessarily be concerned with that provision. However, unlike the position in the case of any other Contracting Party which is simultaneously responsible for the act and for the provision on which that act is based, where a violation alleged before the ECtHR — in relation to an act of a Member State — is linked to a provision of EU law, the EU, as the Contracting Party to which that provision pertains, would not be a party to the proceedings before the ECtHR. The same applies to the Member States, taken together, where a violation alleged before the ECtHR in relation to an act or omission on the part of an institution, body, office or agency of the EU is linked to a provision of the Treaties, for which the Member States alone are responsible.

80. In the Commission's submission, in order to ensure that, in both situations, the Contracting Party that adopted the provision in question is not prevented either from taking part in the proceedings before the ECtHR or from being bound, as the case may be, by the obligations under Article 46(1) of the ECHR regarding the possible amendment or repeal of that provision, the draft agreement lays down specific procedural rules introducing the co-respondent mechanism. In particular, Article 3 of the draft agreement would, on the one hand, allow the EU to become a co-respondent in the case of an allegation of a violation calling into question the compatibility with the ECHR of a provision of EU law, and, on the other, allow Member States to become co-respondents in the case of an allegation of a violation calling into question the compatibility with the ECHR of a provision laid down in the Treaties.

81. The Commission points out that the new Article 36(4) of the ECHR, added by Article 3(1) of the draft agreement, states in the second sentence that '[a] co-respondent is a party to the case'. Thus, the co-respondent would enjoy all the procedural rights available to the parties and would not, therefore, be regarded merely as a third-party intervener. In addition, if a judgment of the ECtHR should find a violation of the ECHR, thus also calling into question a provision of EU law, the co-respondent would be obliged to remedy that violation so as to abide by the judgment, either by amending that provision or by repealing it.

82. According to the Commission, the provisions mentioned in the three preceding paragraphs of this Opinion preserve the autonomy of the EU legal order with regard to the decisions which the ECtHR may be called upon to take in respect of the EU and the Member States. In the first place, in accordance with Article 3(5) of the draft agreement, the status of co-respondent would be acquired either by accepting an invitation to that effect from the ECtHR, or by a decision of the ECtHR on the basis of the plausibility of the reasons given in the request from the Contracting Party concerned. Thus, the ECtHR would not be called upon to interpret EU law incidentally in order to establish whether an allegation of a violation of the ECHR called into question the compatibility with the ECHR of a provision of EU law. In the second place, Article 3(7) lays down the rule that the respondent and co-respondent are to be jointly responsible for any violation of the ECHR in proceedings to which a Contracting Party is a co-respondent. Consequently, in such cases, the ECtHR would confine itself to finding that the violation had taken place. By contrast, it would not be required to rule directly on the nature of the parts played in the violation by the EU and the Member State concerned, or their shares in it, or, therefore, to rule indirectly on their respective obligations with regard to the execution of the judgment and in particular any individual or general measures to be taken in that respect. Furthermore, in accordance with the second part of Article 3(7), only on the basis of any reasons given jointly by the respondent and the co-respondent could the ECtHR decide that only one of them should be held responsible.

83. The Commission further takes the view that the draft agreement also ensures that a judgment of the ECtHR delivered in proceedings to which the EU is a co-respondent cannot affect the competences of the EU. Such a judgment cannot impose on the EU obligations that go beyond those it is required to fulfil under the competences conferred on it in the Treaties.

84. Specifically, according to the Commission, the EU ought to join the proceedings as a co-respondent automatically whenever it is alleged that the ECHR has been violated by an act on the part of a Member State that is applying a provision of EU law in such a way that the allegation calls into question the compatibility of that provision with the ECHR. The Commission argues that the draft agreement makes it possible to achieve that result. It submits that, under Article 3(5) of the draft agreement, when the ECtHR is ruling on a request by a Contracting Party asking to become a co-respondent, the ECtHR is to assess whether, in the light of the reasons given by that party, it is plausible that the conditions in Article 3(2) or (3) of the ECHR are met. Those considerations also apply, *mutatis mutandis*, to the Member States when a violation of the ECHR by an act on the part of the EU calls into question the compatibility of the Treaties with the ECHR. The Commission adds, however, that in such cases fulfilment of the obligation of sincere cooperation requires that the Member States be represented before the ECtHR by a single agent, a requirement which should be included in the internal rules.

3. The second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU

85. As regards the requirement set out in the second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU, according to which accession must not affect the EU's competences as defined in the Treaties, the Commission notes that accession will impose an obligation on the EU to respect the rights guaranteed by the ECHR. In so far as that obligation entails an obligation to refrain from adopting any measure that might violate those rights, the EU, in acceding to the ECHR, would merely be accepting limits on the exercise of the competences conferred on it by the Member States in the Treaties. Moreover, in so far as that obligation on the part of the EU entails an obligation to adopt specific measures, the second sentence of Article 1(3) of the draft agreement provides that nothing in the ECHR or the protocols thereto is to require the EU to perform an act or adopt a measure for which it has no competence under EU law. Consequently, the commitments made by the EU when acceding to the ECHR would not in any way affect its competences.

86. Similarly, the competences of the EU would not be affected by the draft agreement's providing for the EU to accede not only to the ECHR but also to the Protocol and to Protocol No 6 and, moreover, for the possibility of acceding to the other existing protocols. Principally, the Commission takes the view that Article 6(2) TEU confers a competence on the EU to accede to all the existing protocols, irrespective of whether or not all the Member States are parties to them. If it were otherwise, the rule in the second sentence of Article 2 of Protocol No 8 EU,

according to which the accession agreement is to ensure that the situation of the Member States in relation to the protocols is not affected by the accession of the EU, would be meaningless. Furthermore, those protocols are merely accessory to the ECHR. Thus, the EU would have the competence, if necessary, to enter into any new protocols or to accede to them at a later stage, provided they too are accessory to the ECHR.

4. Article 1(b) and the first sentence of Article 2 of Protocol No 8 EU

87. According to the Commission, the powers of the EU institutions other than the Court of Justice are not affected by accession. Those institutions would have to exercise their powers with regard to the ECHR and its control bodies in the same way as they are required to do with regard to any other international agreement and the bodies set up or given decision-making powers by such an agreement. In particular, it follows, both from Article 335 TFEU and from paragraph 94 of the judgment in *Reynolds Tobacco and Others v Commission* (C-131/03 P, EU:C:2006:541) that the Commission represents the EU before courts other than those of the Member States. In the present case, the Commission would be required to represent the EU before the ECtHR, but, in accordance with the principle of sincere cooperation between institutions, if a provision of EU law laid down in an act of an institution other than the Commission were called into question in proceedings before the ECtHR, the powers of that other institution would be preserved if that institution were involved in the preparation of the procedural acts to be addressed to the ECtHR. In addition, when the Committee of Ministers is called upon to adopt acts having legal effects, the procedure provided for in Article 218(9) TFEU will apply *ipso jure*.

88. As regards the Court of Justice and, more generally, the preservation of the specific characteristics of the EU and of EU law with regard to the system of judicial protection, the Commission's assessment in that regard relates, in essence, to three issues: the exhaustion of domestic remedies, the effectiveness of judicial protection, particularly having regard to the common foreign and security policy ('the CFSP'), and the powers of the Court of Justice under Articles 258 TFEU, 260 TFEU and 263 TFEU. The first two issues arise in the light of Articles 6, 13 and 35(1) of the ECHR, according to which there must be an effective remedy before a domestic authority against any act on the part of a Contracting Party, and, moreover, an individual application brought before the ECtHR is admissible only after all domestic remedies have been exhausted.

89. With regard, first of all, to the prior exhaustion of domestic remedies, the Commission maintains that the draft agreement guarantees that remedies before the Courts of the EU must be exhausted before an application against an act on the part of the EU can be validly brought before the ECtHR. In the Commission's submission, the second indent in Article 1(5) of the draft agreement states that the term 'domestic' in Article 35(1) of the ECHR is to be understood as relating also, *mutatis mutandis*, to the internal legal order of the EU. Moreover, Article 5 of the draft agreement clearly states that proceedings before the Courts of the EU are not to be understood as constituting procedures of international investigation or settlement. Therefore, the fact that a matter had been submitted to those Courts would not make an application before the ECtHR inadmissible under Article 35(2)(b) of the ECHR.

90. Furthermore, in introducing the procedure for the prior involvement of the Court of Justice, the Commission emphasises that there is a possibility that a court of a Member State may find that an act or omission on the part of that Member State infringes a fundamental right that is guaranteed at EU level and which corresponds to a right guaranteed by the ECHR, and that that violation is linked to a provision of EU secondary law. In such a case, the national court is not itself entitled to find, incidentally, that the EU act containing that provision is invalid and to decline to apply it, since the Court of Justice alone, on a request for a preliminary ruling, can declare that act invalid (judgment in *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 11 to 20). If it were subsequently alleged before the ECtHR that the same act or omission violated the same fundamental right as guaranteed by the ECHR, and if, therefore, that allegation called into question the compatibility with the ECHR of the provision of EU law in question, the EU would become co-respondent and its institutions, including the Court of Justice, would be bound by the judgment of the ECtHR finding a violation of the ECHR. That situation could arise even though the Court of Justice would not yet have had the opportunity to consider the validity of the EU act at issue in the light of the fundamental right in question the violation of which was being alleged before the ECtHR. In that context, a reference to the Court of Justice for a preliminary ruling under point (b) in the first paragraph of Article 267 TFEU could not be regarded as a 'domestic remedy' which the applicant should have exhausted before bringing an application before the ECtHR, since the parties have no control over whether or not such a reference is made and, therefore, the omission of such a reference would not mean that an application to the ECtHR was inadmissible. That conclusion is all the more compelling given that the powers of the Court of Justice include the jurisdiction to declare an EU act invalid. According to the Commission, in order to preserve those powers, it is necessary to provide for the Court of Justice to be able to consider the compatibility of a provision of EU law with

the ECHR in connection with proceedings in the ECtHR to which the EU is a co-respondent. That opportunity should, moreover, arise before the ECtHR rules on the merits of the allegation raised before it and, therefore, indirectly, on the compatibility of that provision with the fundamental right in question. Furthermore, the necessity of prior consideration by the Court of Justice of the provision in question follows also from the fact that the control machinery established by the ECHR is subsidiary to the mechanisms that safeguard human rights at the level of the Contracting Parties.

91. It is, the Commission submits, to meet those needs that the first sentence of Article 3(6) of the draft agreement provides that, in such circumstances, sufficient time is to be afforded for the Court of Justice to make an assessment of the provision at issue in the context of the procedure for the prior involvement of that court. The second sentence of Article 3(6) states that that assessment must be made quickly so that the proceedings before the ECtHR are not unduly delayed. The ECtHR would not be bound by the assessment of the Court of Justice, as is apparent from the last sentence of that provision.

92. The Commission does add that Article 3(6) of the draft agreement must be accompanied by internal EU rules governing the procedure for the prior involvement of the Court of Justice. The draft agreement does not contain such rules. However, they should not be included in an international agreement, but should be laid down independently at EU level, since their purpose is to regulate an internal EU procedure. Nor would it be necessary or indeed appropriate to insert those procedural rules in the Treaties. The Treaties already impose an obligation on the EU institutions and on the Member States to ensure that the EU accedes to the ECHR and provide, moreover, that the powers of the Court of Justice are not to be affected by that accession. In that regard, the Commission takes the view that it is more appropriate for the rules laying down the principle of a procedure for the prior involvement of the Court of Justice, designating the bodies having the authority to initiate it, and defining the standards governing the examination of compatibility, to be included within the Council decision concluding the accession agreement pursuant to Article 218(6)(a)(ii) TFEU. As regards the content of the internal rules governing the procedure for the prior involvement of the Court of Justice, first of all, the power to make applications to the Court of Justice initiating that procedure should be exercised by the Commission and by the Member State to which the application to the ECtHR is addressed. Furthermore, the Court of Justice should be able to give its ruling before the EU and the Member State concerned present their views to the ECtHR. Next, since the prior involvement procedure has certain structural similarities with the preliminary ruling procedure, the rules concerning the entitlement to participate in it should be similar to those in Article 23 of the Statute of the Court of Justice of the European Union. Lastly, the requirements for speed could be met by applying the expedited procedure referred to in Article 23a of that statute.

93. As regards, secondly, the effectiveness of judicial protection, according to the Commission it is important that, when an act has to be attributed to the EU or indeed to a Member State in order to determine responsibility under the ECHR, this be done in accordance with the same criteria as those that apply within the EU. It is submitted that this requirement is met by the first sentence of Article 1(4) of the draft agreement, which provides that, for the purposes of the ECHR, a measure of a Member State is to be attributed to that State, even if that measure occurs when the State implements the law of the EU, including decisions taken under the EU and FEU Treaties. The effectiveness of the remedy would therefore be assured, given that, in accordance with the second subparagraph of Article 19(1) TEU, it is for the courts of that Member State to guarantee legal protection with regard to acts on the part of that State.

94. However, it is submitted that particular questions with regard to effective judicial protection arise in relation to the area of the CFSP, EU law having two specific characteristics in that respect.

95. In the first place, as regards the attributability of acts, military operations in application of the CFSP are conducted by the Member States, in accordance with the fourth sentence of the second subparagraph of Article 24(1) TEU and Articles 28(1) TEU, 29 TEU and 42(3) TEU. The Commission states that, in order to take account of that characteristic, Article 1(4) of the draft agreement provides that, even with respect to operations conducted in the framework of the CFSP, the acts of the Member States are to be attributed to the Member State in question and not to the EU. That clarification should preclude the possibility that the case-law of the ECtHR — whereby the ECtHR has ruled on the responsibility of an international organisation in relation to acts performed by a Contracting Party for the purpose of implementing a resolution of that organisation (decision of the ECtHR in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, nos 71412/01 and 78166/01, § 122, 2 May 2007, and judgment of the ECtHR in *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011) — might be applied to relations between the EU and its Member States. As stated, moreover, in

paragraph 24 of the draft explanatory report, in the cases giving rise to that case-law there was no specific rule on the attribution of acts, such as that provided for by Article 1(4) of the draft agreement.

96. In the second place, as regards the effectiveness of review by the EU judicature in the area of the CFSP, that review is limited, according to the Commission, both by the last sentence of the second subparagraph of Article 24(1) TEU and by the second paragraph of Article 275 TFEU. It follows, in essence, from those provisions that the Court of Justice is not to have jurisdiction with respect to the provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions. It is to have jurisdiction only to monitor compliance with Article 40 TEU and to rule on actions, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, for a review of the legality of decisions providing for ‘restrictive measures’ against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty. The question could therefore arise as to whether the EU provides effective internal remedies in relation to the CFSP.

97. The Commission points out in that regard that, in order for an application to the ECtHR to be admissible, the applicant must be able to claim to be a victim of a violation of the rights set forth in the ECHR or the protocols thereto, and must therefore be directly affected by the act or omission at issue.

98. On the one hand, when a CFSP act on the part of a Member State affects a person directly and may therefore be the subject of an application to the ECtHR, judicial protection with regard to the act is a matter for the courts of the Member States. Where, in exceptional cases, such an act is based on a provision of a Council decision adopted pursuant to Article 28(1) TEU, the compatibility of that provision with the ECHR could be called into question. According to the Commission, in such a case, the Council decision itself constitutes a ‘restrictive measure’ within the meaning of the second paragraph of Article 275 TFEU, with the result that, although that provision expressly recognises the jurisdiction of the Court of Justice only in respect of actions for annulment ‘brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU]’, such provisions could nevertheless be the subject of a reference for a preliminary ruling, including as regards their validity. The Commission relies in that regard in particular on the judgment in *Segi and Others v Council* (C-355/04 P, EU:C:2007:116), in which, despite the fact that Article 35(1) of the EU Treaty, as amended by the Treaty of Nice, excluded ‘common positions’ from the jurisdiction of the Court of Justice to give preliminary rulings, the Court of Justice held that national courts could ask it to deliver preliminary rulings on questions relating to a common position which, owing to its content, did of itself produce legal effects in relation to third parties, and consequently had a scope going beyond that assigned by the EU Treaty to that kind of act. In such circumstances, moreover, the procedure for the prior involvement of the Court of Justice should also apply.

99. On the other hand, where CFSP acts are performed by EU institutions, a distinction should be made between acts that have binding legal effects and those that do not. Acts that have binding legal effects are, in so far as they are capable of violating fundamental rights, ‘restrictive measures’ within the meaning of the second paragraph of Article 275 TFEU and could, therefore, be the subject of an action for annulment before the EU judicature. By contrast, acts that do not produce such effects could not by their nature be the subject of an action for annulment or of a reference for a preliminary ruling. The only remedy available within the EU against such acts would be an action for damages pursuant to Article 340 TFEU, since such an action is not, in the Commission’s submission, excluded by the first paragraph of Article 275 TFEU.

100. Thus, in the Commission’s view, the combined effect of Article 1(4) of the draft agreement, the first subparagraph of Article 19(1) TEU and Articles 275 TFEU and 340 TFEU is that all acts and measures on the part of the EU and of the Member States in the area of the CFSP, in respect of which a person may claim to be a victim of a violation of the rights set forth in the ECHR, have an effective remedy before the EU judicature or the courts of the Member States.

101. Thirdly, according to the Commission, the draft agreement does not affect the powers of the Court of Justice under Articles 258 TFEU, 260 TFEU and 263 TFEU either. Article 5 of the draft agreement contains an interpretation clause according to which ‘[p]roceedings before the [Court of Justice] shall [not] be understood as constituting means of dispute settlement within the meaning of Article 55 of the [ECHR]’. Thus, the possibility is expressly preserved that disputes regarding the interpretation and application of the ECHR, or indeed of fundamental rights as defined at EU level and, in particular, in the Charter, may be brought before the Court of Justice.

102. With regard, in particular, to actions for failure to fulfil obligations, the Commission notes that it follows from Article 1(3) of the draft agreement that no obligation is imposed on the Member States, under EU law, with

regard to the ECHR and the protocols thereto. Consequently, an action for failure to fulfil obligations could not, by definition, concern the failure of a Member State to fulfil its obligations under the ECHR. Nevertheless, the reference to Article 55 of the ECHR in Article 5 of the draft agreement serves a purpose as regards the requirement that accession should have no effect on the powers of the Court of Justice. The Member States are, under Article 51(1) of the Charter, bound by the fundamental rights defined at EU level when they are implementing EU law. In so far as the prohibition in Article 55 of the ECHR might be understood to refer also to disputes between Contracting Parties regarding the interpretation or application of provisions of an international instrument (such as, in the case of the Member States, the Treaties and the Charter) that has the same content as the provisions of the ECHR, Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against the EU.

103. Moreover, the ECtHR has specified that the exercise by the Commission of its powers under Article 258 TFEU does not correspond to resorting to procedures of international investigation or settlement within the meaning of Article 35(2)(b) of the ECHR (judgment of the ECtHR in *Karoussiotis v. Portugal*, no. 23205/08, §§ 75 and 76, ECHR 2011 (extracts)).

104. The Commission states that it is not necessary for the draft agreement to make provision for a specific objection of inadmissibility in the case of applications brought before the ECtHR, under Article 33 of the ECHR, by the EU against a Member State or, conversely, by a Member State against the EU in a dispute regarding the interpretation or application of the ECHR, given that such applications would be manifestly contrary to EU law. Not only would they constitute a circumvention of Article 258 TFEU, but the decision to make such an application could be challenged by an action for annulment under Article 263 TFEU. In addition, an application brought by a Member State against the EU would constitute a circumvention of Article 263 TFEU or, as the case may be, of Article 265 TFEU, which would be subject under EU law to the infringement procedure.

#### 5. The second sentence of Article 2 of Protocol No 8 EU

105. As regards the requirement, set out in the second sentence of Article 2 of Protocol No 8 EU, that accession must not affect the situation of Member States in relation to the ECHR, in particular in relation to the protocols thereto, measures taken by Member States derogating from the ECHR in accordance with Article 15 thereof and reservations to the ECHR made by Member States in accordance with Article 57 thereof, the Commission submits that, in accordance with the first sentence of Article 1(3) of the draft agreement, the scope of the EU's commitments is limited *ratione personae* to the EU alone, as a party governed by public international law which is distinct from the Member States. Therefore, the accession of the EU to the ECHR does not affect the legal situation of a Member State which, under Article 57 of the ECHR, has made a reservation in respect of a provision of the ECHR or of one of the protocols to which the EU is acceding, or which has taken measures derogating from the ECHR under Article 15 thereof, or which is not a party to one of the protocols to which the EU might accede in the future. It also follows from this that, even though under Article 216(2) TFEU agreements concluded by the EU are binding upon the institutions of the EU and on the Member States, the draft agreement does not impose any obligation on them, under EU law, in respect of the ECHR and the protocols thereto.

#### 6. Article 3 of Protocol No 8 EU

106. As regards, lastly, the requirement, set out in Article 3 of Protocol No 8 EU, that accession must not affect Article 344 TFEU, the Commission submits that another consequence of the fact that, in accordance with Article 1(3) of the draft agreement, the accession of the EU to the ECHR does not impose any obligation on the Member States, under EU law, in respect of the ECHR and the protocols thereto is that a dispute between Member States regarding the interpretation or application of the ECHR is not strictly speaking a dispute regarding the interpretation or application of the Treaties, of the kind referred to in Article 344 TFEU.

107. However, the reference to Article 55 of the ECHR in Article 5 of the draft agreement serves a purpose as regards that requirement also. In so far as the prohibition in Article 55 might be understood to refer also to disputes between Contracting Parties regarding the interpretation or application of provisions of an international instrument (such as, in the case of the Member States, the Treaties and the Charter) that has the same content as the provisions of the ECHR, Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against the Member States. The Commission adds that there is no need for a rule that an application brought before the ECtHR by one Member State against another in a dispute regarding the interpretation or application of provisions of EU law that have the same content as those of the ECHR, in particular provisions of the Charter, is to be

inadmissible. The bringing of such an application would itself constitute an infringement of Article 344 TFEU and would be subject, at EU level, to the proceedings referred to in Articles 258 TFEU to 260 TFEU.

## VII – Summary of the main observations submitted to the Court of Justice

108. In the context of the present request for an Opinion, observations were submitted to the Court in writing or orally at the hearing by the Belgian, Bulgarian, Czech, Danish, German and Estonian Governments, Ireland, the Greek, Spanish, French, Italian, Cypriot, Latvian, Lithuanian, Hungarian, Netherlands, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and United Kingdom Governments, and by the Parliament and the Council.

109. All the Member States and institutions mentioned above conclude, in essence, that the draft agreement is compatible with the Treaties, and largely endorse the Commission's assessment. However, their assessments differ from that of the Commission in a number of respects.

### A – *Admissibility of the request for an Opinion*

110. As regards the admissibility of the request for an Opinion, it is essentially common ground that the subject-matter of the request is indeed an 'agreement envisaged' within the meaning of Article 218(11) TFEU, and that the Court of Justice has all the information necessary to assess the compatibility of that agreement with the Treaties, as the Court of Justice requires (Opinion 2/94, EU:C:1996:140, paragraphs 20 and 21).

111. By contrast, the Commission's assessment regarding the internal rules has given rise to very different positions.

112. According to the Bulgarian and Danish Governments, Ireland, the French, Hungarian, Portuguese, Finnish, Swedish and United Kingdom Governments, as well as the Parliament and the Council, the fact that those rules have not yet been adopted does indeed not affect the admissibility of the request. That is particularly so since, as the Estonian and Latvian Governments note, such rules would have consequences only for the EU and could not affect the international aspects of the draft agreement and, moreover, as the Polish and Swedish Governments essentially emphasise, those rules must also be compatible with the Treaties, such compatibility being subject to review, if necessary, according to the Cypriot, Swedish and United Kingdom Governments, by the Court of Justice in accordance with Article 263 TFEU.

113. However, it is submitted that the Commission ought not to have initiated a discussion of such rules before the Court of Justice in the present Opinion procedure. It is impossible for the Court of Justice to express a view on such internal rules either, according to the Greek and Netherlands Governments, because of their hypothetical nature or, according to the French, Cypriot and Lithuanian Governments and the Council, because there is insufficient information regarding their content, or indeed, in the opinion of the Czech, Estonian, French, Cypriot, Lithuanian, Netherlands, Portuguese, Slovak and Swedish Governments, in the light of the fact that they are extraneous to the international agreement at issue, that agreement alone being capable of forming the subject-matter of a request for an Opinion within the meaning of Article 218(11) TFEU. Furthermore, for the Court of Justice to be required to express a view on the content of rules that have not yet been adopted by the EU legislature would, according to the Estonian and United Kingdom Governments and the Council, be to encroach upon the competences of the EU legislature, contrary to Article 13 TEU, or, according to the Estonian Government, be in breach of the principle of the division of powers set out in Article 5(1) and (2) TEU.

114. It is argued that it follows from this that the request for an Opinion is admissible only in so far as it concerns the agreement envisaged, whereas, so far as concerns the internal rules, either, according to the French and Cypriot Governments, the Court of Justice has no jurisdiction, or, according to the Czech, Estonian and French Governments, the request is inadmissible, or, according to the Lithuanian Government, it is not necessary for the Court of Justice to express a view.

115. Should, however, an analysis of the internal rules be necessary for the purposes of assessing whether the draft agreement is consistent with the Treaties — a point which, according to the Greek Government, is for the Court of Justice to determine — then either, according to the Polish Government, the Court of Justice must make its Opinion regarding the compatibility of that draft with the Treaties conditional on the internal rules also being compatible with the Treaties or, in the view of the Romanian Government, with the draft declaration; or, according

to the Estonian Government and the Council, the procedure must be stayed until those rules become available; or, according to the Greek Government and the Council, the request must be declared inadmissible in its entirety or, in the Spanish Government's view, be declared inadmissible in respect of those aspects of the draft agreement which have yet to be detailed in those internal rules, namely those concerning the issues of the EU's representation before the ECtHR, the prior involvement of the Court of Justice, the procedures to be followed in drawing up the list of three candidates for the position of Judge and the EU's participation in the Assembly or in the Committee of Ministers, and the new voting rules set out in draft Rule 18.

116. In the alternative, in the event that the Court of Justice should decide to express a view on the internal rules, observations were submitted with regard to the main rules.

## B – *Substance*

### 1. Article 1(a) of Protocol No 8 EU

117. All the Member States and institutions which submitted observations agree on the essence of the Commission's assessment in concluding that the draft agreement preserves the specific characteristics of the EU and EU law with regard to the specific arrangements for the EU's participation in the control bodies of the ECHR.

### 2. Article 1(b) of Protocol No 8 EU

118. Those Member States and institutions also consider that the co-respondent mechanism broadly enables the specific characteristics of the EU and EU law to be preserved by ensuring that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.

119. Nevertheless, certain Member States take the view that the Commission's assessment requires adjustment or clarification.

120. First of all, according to the Austrian Government, the co-respondent mechanism must be capable of being triggered not only where the violation of the ECHR 'could have been avoided only by disregarding an obligation under EU law', but also where such a violation is attributable to a Member State in the context of the implementation of EU law, and even though EU law accords that Member State a certain degree of autonomy. If the alleged violation is linked to an act transposing a directive, it might be in the EU's interest to defend the legality of that directive before the ECtHR, even if the directive does not compel the Member State concerned to adopt the act but merely authorises it to do so. Furthermore, it might be difficult to know in advance the extent of the margin of discretion to be given to the Member States in connection with the transposition of a directive.

121. Next, the Bulgarian Government takes the view that the fact that the co-respondent mechanism is optional means that it is open to potential co-respondents to escape their responsibilities under Article 46 of the ECHR. In that regard, the Austrian Government adds that the compatibility of that mechanism with the requirements of Article 1(b) of Protocol No 8 EU depends on there being an internal provision in EU law compelling the institutions of the EU, in proceedings against one or more Member States, to request that the EU be admitted as a co-respondent where it is alleged that the ECHR has been violated and the allegation calls into question the compatibility of EU law with the ECHR. Even though such an internal obligation is already envisaged in paragraph (a) of the draft declaration, it is none the less necessary for that obligation to be regulated in a binding manner, so that a failure to make such a request or a refusal to participate in proceedings upon being invited to do so by the ECtHR pursuant to Article 3(5) of the draft agreement constitutes a failure to act for the purposes of Article 265 TFEU. Furthermore, according to the Romanian Government, it follows from that draft declaration that although the EU's intervention as co-respondent is envisaged as a possibility by the draft agreement, the EU undertakes to establish rules internally that will make it possible to determine which alleged violation of the provisions of the ECHR are related to EU law and the amount of leeway available to the Member State concerned.

122. In addition, according to the French Government, in order to avoid the ECtHR ruling on issues relating to EU law, such as the division of responsibilities in the context of a violation established following proceedings to which a Contracting Party is a co-respondent, Article 3(7) of the draft agreement would certainly have to be interpreted as meaning that the ECtHR can decide on the sharing of responsibility between respondent and co-respondent only on the basis of the reasons they give in their joint request.

123. Lastly, the United Kingdom Government states that, contrary to the Commission's suggestion that the co-respondent will have an obligation under Article 46(1) of the ECHR to remedy a violation of the ECHR so as to abide by a judgment of the ECtHR, in fact that obligation must be shared. If such a judgment were to be given jointly against the EU and one or more of its Member States, it would not in itself give rise to a power for any of the EU institutions, in particular the Commission, to act in order to ensure its proper execution, which would have to be effected through the normal legislative processes of the EU.

3. Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8 EU

124. The Commission's assessment with regard to the requirement that accession to the ECHR does not affect the EU's competences is largely shared by the Member States that submitted observations to the Court of Justice, save as regards the question of the competence of the EU to accede to protocols other than those to which the EU is to accede pursuant to Article 1 of the draft agreement, that is the Protocol and Protocol No 6.

125. In particular, according to the German Government, the considerations included in the request for an Opinion regarding possible accession to protocols other than the Protocol and Protocol No 6 are inadmissible, since there is no 'agreement envisaged' in that respect.

126. As to the substance, the Slovak Government maintains that the EU currently has competence to accede only to the two protocols mentioned in the preceding paragraph, while, in the Danish Government's view, the EU does not have competence to accede to existing protocols to which the Member States are not already parties.

127. By contrast, the Latvian, Netherlands and Polish Governments take the view that the EU could, in theory, have competence to accede to the latter protocols also. However, it is submitted that that is not a decisive factor. According to the Netherlands Government, in the light of the procedure laid down in Article 218(6)(a)(ii) and the second subparagraph of Article 218(8) TFEU, which prescribes unanimity for the conclusion of an agreement within the meaning of that article and its approval by all the Member States in accordance with their respective constitutional requirements, it is unlikely that the EU would be able to obtain Member States' approval for accession to protocols to which they are not parties. In any event, at present, the EU would not be able to accede to protocols other than those mentioned in Article 1 of the draft agreement without, according to the Latvian Government, the Council having approved a specific mandate in that regard, or, according to the Polish Government, without regard to the will of the Member States. Lastly, the German Government adds that that competence must be exercised in accordance with the second sentence of Article 2 of Protocol No 8 EU, which states that the accession agreement must not affect the situation of Member States in relation to the ECHR, in particular in relation to the protocols thereto. Immediate accession to the protocols to which not all the Member States are parties would infringe that provision or, according to the Greek Government, would be in breach of the principle of sincere cooperation.

4. Article 1(b) and the first sentence of Article 2 of Protocol No 8 EU

128. As regards the question of the effectiveness of the remedies provided for by the Treaties in the area of the CFSP, and as regards in particular the Commission's assessment in relation to the attributability of acts adopted under that policy, that assessment was considered unnecessary by the United Kingdom Government on the ground that the ECtHR has never applied to the EU its case-law concerning the attributability to international organisations of acts of the Contracting Parties. In any event, according to the German Government, the rule laid down in Article 1(4) of the draft agreement, as explained in paragraphs 22 to 26 of the draft explanatory report, is to apply only for the purposes of the EU's accession to the ECHR and must not affect the general principles of international law in relation to the attributability of acts to international organisations.

129. The positions of the Member States on the limitations which the Treaties impose on the jurisdiction of the Court of Justice in the area of the CFSP are more nuanced.

130. First of all, according to the Greek and United Kingdom Governments, it is not necessary for the Court of Justice to interpret Article 275 TFEU and to express a view on its possible jurisdiction in respect of, inter alia, references for preliminary rulings in that area.

131. In any event, the United Kingdom Government adds that the broad interpretation of that article advocated by the Commission, according to which the jurisdiction of the Court of Justice under Article 267 TFEU extends also

to acts falling within the CFSP, is incorrect and is based on the judgments in *Gestoras Pro Amnistía and Others v Council* (C-354/04 P, EU:C:2007:115) and *Segi and Others v Council* (EU:C:2007:116), that is to say, on case-law that predates the Treaty of Lisbon. However, as the Spanish and Finnish Governments also note, that Treaty, through Article 275 TFEU, specifically limited reviews of the validity of acts covered by the CFSP to actions for annulment only, thereby excluding references for preliminary rulings on validity. According to those two governments, Article 275 TFEU must be interpreted narrowly, not only because of the fact that, in this area, the lack of jurisdiction of the Court of Justice is the rule, and its jurisdiction merely the exception, as the French and Polish Governments and the Council submit, but also because of the fact, highlighted by the Spanish and Polish Governments, that a broad interpretation expanding the jurisdiction of the Court of Justice in CFSP matters does not accord with the requirements of Article 2 of Protocol No 8 EU. The Netherlands Government submits, moreover, that such a broad interpretation creates uncertainty as to the criteria for the admissibility of actions for annulment of such acts. The Courts of the EU have jurisdiction only to rule, on the basis of the fourth paragraph of Article 263 TFEU, on decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty. According to the French Government, a broad interpretation of ‘restrictive measure’ has consequences as regards the interpretation of the criteria for the admissibility of actions for annulment and of actions based on a plea of illegality provided for in Article 277 TFEU. Lastly, according to the French Government and the Council, such an expansion is, moreover, likely to extend also to the procedure for the prior involvement of the Court of Justice. That procedure could in fact be triggered only where the allegation before the ECtHR is that there has been a violation of the ECHR linked to a restrictive measure; if it were otherwise the jurisdiction of the Court of Justice would be extended.

132. Next, in the submission of the French Government and of the Council, the distinction made by the Commission between measures that have binding effect and those that do not is unfounded, since what matters is only whether it is a ‘restrictive measure’ within the meaning of Article 275 TFEU. The meaning of ‘restrictive measure’ cannot depend simply on the fact that a measure is capable of infringing the fundamental rights of individuals, since such a definition goes beyond the letter of Article 215(2) TFEU and renders the first paragraph of Article 275 TFEU redundant.

133. Consequently, according to the Council, while the Court of Justice continues to have jurisdiction over pleas of illegality in accordance with Article 277 TFEU, it does not, according to the Polish Government, have jurisdiction over the validity of measures other than restrictive measures by means of a reference for a preliminary ruling, nor, according to the French Government and the Council, does it have jurisdiction to rule on claims in non-contractual liability in which compensation is sought for damage resulting from a CFSP act or measure. According to the French and Netherlands Governments and the Council, the concept of restrictive measures includes only ‘decisions imposing sanctions’ on natural or legal persons which are intended to limit their entry into the territory of the Member States and to freeze their funds and economic resources, which thus concerns both basic acts under Article 31(1) TEU and implementing acts adopted on the basis of Article 31(2) TEU.

134. In that regard, the French Government states that the judgment in *Segi and Others v Council* (EU:C:2007:116) concerning the admissibility of references for a preliminary ruling in the context of the former ‘third pillar’ cannot be applied to the present case, since, unlike Article 35(1) EU, Article 275 TFEU does not confer on the Court of Justice any jurisdiction to give preliminary rulings.

135. Lastly, according to the French Government, the fact that that interpretation of Article 275 TFEU is likely to deprive individuals of effective judicial protection against certain acts falling within the CFSP cannot be sufficient to confer on the Court of Justice a jurisdiction not provided for by the Treaties. According to the French, Polish, Finnish and Swedish Governments, it is precisely in order to avoid the EU being systematically censured for violation of Articles 6 and 13 of the ECHR that Article 1(4) of the draft agreement and paragraphs 23 and 24 of the draft explanatory report make clear that it is for the Member States to guarantee protection of the right to obtain a judicial determination and of the right to an effective judicial remedy, particularly as, according to the Council, the EU does not enjoy any immunity from legal proceedings, in accordance with Protocol (No 7) on the privileges and immunities of the European Union annexed to the EU, FEU and EAEC Treaties, and can therefore be sued for compensation in the national courts. Moreover, according to the Council, the question whether the system of judicial protection in relation to the CFSP is in conformity with Articles 6 and 13 of the ECHR is relevant only in respect of CFSP acts attributable to the EU, as regards both military and civilian operations, given that it is for the courts of the Member States to guarantee the effectiveness of such protection in respect of any such acts attributable to the Member States.

136. As regards the procedure for the prior involvement of the Court of Justice, it is, first of all, maintained by the United Kingdom Government that that procedure is not necessary in order for the draft agreement to be considered compatible with the Treaties: given their declaratory nature, decisions of the ECtHR have no effect on the validity of EU law. In any event, according to the Bulgarian Government, it is not necessary to initiate that procedure where the Court of Justice has already ruled on the validity of the act concerned in the light of the corresponding fundamental right in the Charter, in view of Article 52(3) of the Charter and of the presumption, according to the case-law of the ECtHR, that EU law offers equivalent protection (judgment of the ECtHR in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 155, ECHR 2005-VI).

137. Next, according to the Czech Government, Ireland and the Greek, Spanish and United Kingdom Governments, although the prior involvement procedure confers additional functions on the Court of Justice over and above those already given to it by the Treaties, that none the less does not mean that the powers of the Court of Justice are being extended by the draft agreement, since those additional functions do not alter the essential character of the Court's present powers (Opinions 1/92, EU:C:1992:189, paragraph 32; 1/00, EU:C:2002:231, paragraphs 21, 23 and 26; and 1/09, EU:C:2011:123, paragraph 75). In addition, according to the Danish and Hungarian Governments, the ability of the Court of Justice to adjudicate in the context of the prior involvement procedure flows naturally and necessarily from the Treaties themselves and, in particular, from Article 6(2) TEU. Thus, while no amendment of the Treaties is necessary, according to the French and Austrian Governments, a Council decision pursuant to Article 218(8) TFEU is, according to the Danish, German and Austrian Governments, sufficient to confer that new function on the Court of Justice, since such a decision requires approval by all the Member States in accordance with their respective constitutional requirements. In that regard, however, the Parliament also submits that, since the Council's decisions on the conclusion of international agreements in principle merely give legal force to an agreement concluded by the EU, it is doubtful whether such decisions can have a normative content of their own, particularly as they are not 'subject to amendment by the Parliament'.

138. In the light of respect for the powers of the institutions, but without coming to the conclusion that the procedure for the prior involvement of the Court of Justice is contrary to the requirements of Protocol No 8 EU, the Polish Government argues that to acknowledge that the Commission is entitled to bring before the Court of Justice requests for decisions regarding the validity and interpretation of provisions of EU legal acts outwith Articles 263 TFEU and 267 TFEU could ultimately alter the essential character of the powers of the institutions, both of the Commission and of the Court of Justice itself, and result in circumvention of the admissibility criteria laid down by those provisions. For example, in accordance with the sixth paragraph of Article 263 TFEU, an action for annulment of an EU act could be brought by an institution within two months of the publication of the measure or of its notification to the plaintiff. However, where the Commission had not brought an action for annulment within that period, it could obtain the annulment of a measure by means of the prior involvement procedure, and thus circumvent compliance with that time-limit. Similarly, the powers of the Court of Justice would be likely to undergo significant changes, given that, while Article 267 TFEU currently reserves to the courts or tribunals of Member States alone the possibility of submitting a request for a preliminary ruling, after accession, the Court of Justice would be interpreting EU law at the request also of the Commission. Yet, just like the other EU institutions, the Court of Justice does not have general powers, and its jurisdiction is limited to the cases brought before it. Consequently, the possibility of the Court of Justice ruling on issues submitted by the Commission would have to have a specific basis in the Treaty, which is not the case at present.

139. Furthermore, according to the Netherlands and Austrian Governments, even though the procedure for the prior involvement of the Court of Justice has to take account of the imperatives of speed, that procedure must be more comprehensive than the present urgent preliminary ruling procedure provided for in Article 23a of the Statute of the Court of Justice and allow all the Member States to submit written observations. In any event, according to the Netherlands Government, that procedure must be governed not by particular provisions of the Council decision concluding the accession agreement, but directly by the Statute of the Court of Justice and its rules of procedure.

140. Lastly, the Council argues that the scope of the jurisdiction of the Court of Justice to adjudicate, prior to the ECtHR, on whether acts directly or indirectly attributable to the EU in the area of the CFSP comply with fundamental rights must be the same as its internal jurisdiction in that area. Thus, the Court of Justice would be called upon to give a prior ruling in a case that is brought against one or more Member States and in which the EU is co-respondent concerning an act of a Member State implementing an EU act adopted in the area of the CFSP where the criteria laid down in Article 275 TFEU are met. Should the Court of Justice decide that the limits set out in Article 40 TEU have not in fact been observed and the act at issue ought not to have been adopted on the basis of the chapter of the EU Treaty relating to the CFSP, it would then have jurisdiction to rule both on the interpretation and the validity of the act in question, as it would not be an act falling within the CFSP. The fact

that EU acts in the area of the CFSP which do not affect persons directly cannot be annulled by a judicial body within the EU's system of judicial protection would not mean that that system violates the ECHR.

5. Second sentence of Article 2 of Protocol No 8 EU

141. Some Member States contend that the accession of the EU to the ECHR and, possibly, to protocols thereto which have not yet been ratified by all the Member States does, contrary to what the Commission maintains, involve obligations on the part of the Member States under Article 216 TFEU. While, in the view of the German Government, that means that accession to those protocols infringes the second sentence of Article 2 of Protocol No 8 EU, the Czech Government comes to the opposite conclusion, given that the source of those obligations is Article 216(2) TFEU and not the ECHR itself. In any event, according to the Czech Government, accession to those protocols could proceed only in accordance with the procedure laid down in Article 218 TFEU, which means that the Opinion of the Court of Justice can be obtained if necessary.

142. In addition, according to the Polish Government, on the assumption that the EU has the competence to conclude protocols which have not yet been ratified by all the Member States, it is not inconceivable that, in the event of accession to one of those protocols, a Member State which had not ratified that protocol could, within the Council, express its agreement to be bound through the EU and accordingly 'approve' the decision to be bound by that protocol in that way. That State would then be bound by that protocol only in the field of the EU's competence. That solution would raise doubts, however, particularly in the light of the need to apply the law in a consistent, transparent and uniform manner. Those doubts would be particularly significant as regards the protocols relating to matters covered by shared competences.

6. Article 3 of Protocol No 8 EU

143. As regards compliance with Article 344 TFEU, the Greek Government takes the view that it is pointless to provide that an action between Member States before the ECtHR is to be inadmissible, given that such an action is already prohibited by Article 344 TFEU; nevertheless the French Government states that it must still remain possible for a Member State to appear as a third-party intervener in support of one or more of its nationals in a case against another Member State that is brought before the ECtHR, even where that other Member State is acting in the context of the implementation of EU law.

## VIII – Position of the Court of Justice

### A – Admissibility

144. Certain Member States that participated in the present procedure have expressed doubts as to the admissibility of the Commission's request for an Opinion in so far as it contains an assessment relating to the internal rules.

145. It must be borne in mind in that regard that, under Article 218(11) TFEU, the Parliament, the Council, the Commission or a Member State may obtain the Opinion of the Court of Justice as to whether an envisaged agreement is compatible with the provisions of the Treaties. That provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the EU (see Opinions 2/94, EU:C:1996:140, paragraph 3; 1/08, EU:C:2009:739, paragraph 107; and 1/09, EU:C:2011:123, paragraph 47).

146. A possible decision of the Court of Justice, after the conclusion of an international agreement binding upon the EU, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal EU context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries (see Opinions 3/94, EU:C:1995:436, paragraph 17, and 1/09, EU:C:2011:123, paragraph 48).

147. In order to enable the Court of Justice to rule on the compatibility of the provisions of an envisaged agreement with the rules of the Treaties, the Court must have sufficient information on the actual content of that agreement (see Opinions 2/94, EU:C:1996:140, paragraphs 20 to 22, and 1/09, EU:C:2011:123, paragraph 49).

148. In this instance, the Commission has submitted to the Court of Justice the draft accession instruments on which the negotiators have already reached agreement in principle. All those instruments together constitute a sufficiently comprehensive and precise framework for the arrangements in accordance with which the envisaged accession should take place, and thus enable the Court to assess the compatibility of those drafts with the Treaties.

149. By contrast, since the internal rules have not yet been adopted, their content is merely hypothetical, and, in any event, the fact that they constitute internal EU law precludes them from forming the subject-matter of the present Opinion procedure, which can only relate to international agreements which the EU is proposing to conclude.

150. Moreover, the review which the Court of Justice is called upon to carry out in the context of the Opinion procedure, and which can take place regardless of the future content of the internal rules that will have to be adopted, is closely circumscribed by the Treaties; therefore, if it is not to encroach on the competences of the other institutions responsible for drawing up the internal rules necessary in order to make the accession agreement operational, the Court must confine itself to examining the compatibility of that agreement with the Treaties and satisfy itself not only that it does not infringe any provision of primary law but also that it contains every provision that primary law may require.

151. It follows from this that the assessments relating to those internal rules put forward both by the Commission and by the Member States and the other institutions that have submitted observations to the Court are irrelevant to the examination of the present request for an Opinion and, consequently, do not call into question the admissibility of that request.

152. Accordingly, the present request for an Opinion is admissible.

## B – *Substance*

### 1. Preliminary considerations

153. Before any analysis of the Commission's request can be undertaken, it must be noted as a preliminary point that, unlike the position under Community law in force when the Court delivered Opinion 2/94 (EU:C:1996:140), the accession of the EU to the ECHR has, since the entry into force of the Treaty of Lisbon, had a specific legal basis in the form of Article 6 TEU.

154. That accession would, however, still be characterised by significant distinctive features.

155. Ever since the adoption of the ECHR, it has only been possible for State entities to be parties to it, which explains why, to date, it has been binding only on States. This is also confirmed by the fact that, to enable the accession of the EU to proceed, not only has Article 59 of the ECHR been amended, but the agreement envisaged itself contains a series of amendments of the ECHR that are to make accession operational within the system established by the ECHR itself.

156. Those amendments are warranted precisely because, unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State.

157. As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65).

158. The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.

159. It is precisely in order to ensure that that situation is taken into account that the Treaties make accession subject to compliance with various conditions.

160. Thus, first of all, having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that '[s]uch accession shall not affect the Union's competences as defined in the Treaties'.

161. Next, Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU.

162. Lastly, by the Declaration on Article 6(2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that accession must be arranged in such a way as to preserve the specific features of EU law.

163. In performing the task conferred on it by the first subparagraph of Article 19(1) TEU, the Court of Justice must review, in the light, in particular, of those provisions, whether the legal arrangements proposed in respect of the EU's accession to the ECHR are in conformity with the requirements laid down and, more generally, with the basic constitutional charter, the Treaties (judgment in *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23).

164. For the purposes of that review, it must be noted that, as is apparent from paragraphs 160 to 162 above, the conditions to which accession is subject under the Treaties are intended, particularly, to ensure that accession does not affect the specific characteristics of the EU and EU law.

165. It should be borne in mind that these characteristics include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU.

166. To these must be added the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in *Costa*, EU:C:1964:66, p. 594, and *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in *van Gend & Loos*, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65).

167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.

168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (see judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41; *Kremzow*, C-299/95, EU:C:1997:254, paragraph 14; *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 73; and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 283 and 284).

170. The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU (see, to that effect, judgments in *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 4, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 281 to 285).

171. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 21).

172. The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself.

173. Similarly, the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in *van Gend & Loos*, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83).

177. Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above.

## 2. The compatibility of the agreement envisaged with EU primary law

178. In order to take a position on the Commission's request for an Opinion, it is important (i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of EU law just outlined and, as the Commission itself has emphasised, the autonomy of EU law in the interpretation and application of fundamental rights, as recognised by EU law and notably by the Charter, and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for the EU's accession to the ECHR are complied with.

### a) The specific characteristics and the autonomy of EU law

179. It must be borne in mind that, in accordance with Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law. However, as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU (see, to

that effect, judgments in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 60, and *Åkerberg Fransson*, EU:C:2013:105, paragraph 44).

180. By contrast, as a result of the EU's accession the ECHR, like any other international agreement concluded by the EU, would, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law (judgment in *Haegeman*, 181/73, EU:C:1974:41, paragraph 5; Opinion 1/91, EU:C:1991:490, paragraph 37; judgments in *LATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 36, and *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 73).

181. Accordingly, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR. In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR.

182. The Court of Justice has admittedly already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinions 1/91, EU:C:1991:490, paragraphs 40 and 70, and 1/09, EU:C:2011:123, paragraph 74).

183. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order (see Opinions 1/00, EU:C:2002:231, paragraphs 21, 23 and 26, and 1/09, EU:C:2011:123, paragraph 76; see also, to that effect, judgment in *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282).

184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law (see Opinions 1/91, EU:C:1991:490, paragraphs 30 to 35, and 1/00, EU:C:2002:231, paragraph 13).

185. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR, as Article 3(6) of the draft agreement provides and as is stated in paragraph 68 of the draft explanatory report.

186. The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU.

187. In that regard, it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions.

188. The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law (judgment in *Melloni*, EU:C:2013:107, paragraph 60).

189. In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should

be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.

190. However, there is no provision in the agreement envisaged to ensure such coordination.

191. In the second place, it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and *Melloni*, EU:C:2013:107, paragraphs 37 and 63).

192. Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.

193. The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.

194. In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

195. However, the agreement envisaged contains no provision to prevent such a development.

196. In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.

197. It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

198. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.

199. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure.

200. Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.

b) Article 344 TFEU

201. The Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein (see, to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282).

202. Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU (see, to that effect, judgment in *Commission v Ireland*, EU:C:2006:345, paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU.

203. It is precisely in view of these considerations that Article 3 of Protocol No 8 EU expressly provides that the accession agreement must not affect Article 344 TFEU.

204. However, as explained in paragraph 180 of this Opinion, as a result of accession, the ECHR would form an integral part of EU law. Consequently, where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR.

205. Unlike the international convention at issue in the case giving rise to the judgment in *Commission v Ireland* (EU:C:2006:345, paragraphs 124 and 125), which expressly provided that the system for the resolution of disputes set out in EU law must in principle take precedence over that established by that convention, the procedure for the resolution of disputes provided for in Article 33 of the ECHR could apply to any Contracting Party and, therefore, also to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.

206. In that regard, contrary to what is maintained in some of the observations submitted to the Court of Justice in the present procedure, the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the Court of Justice.

207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.

208. The very existence of such a possibility undermines the requirement set out in Article 344 TFEU.

209. This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seized of such a dispute.

210. Contrary to the provisions of the Treaties governing the EU's various internal judicial procedures, which have objectives peculiar to them, Article 344 TFEU is specifically intended to preserve the exclusive nature of

the procedure for settling those disputes within the EU, and in particular of the jurisdiction of the Court of Justice in that respect, and thus precludes any prior or subsequent external control.

211. Moreover, Article 1(b) of Protocol No 8 EU itself refers only to the mechanisms necessary to ensure that proceedings brought before the ECtHR by non-Member States are correctly addressed to Member States and/or to the EU as appropriate.

212. Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.

213. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU.

214. In the light of the foregoing, it must be held that the agreement envisaged is liable to affect Article 344 TFEU.

c) The co-respondent mechanism

215. The co-respondent mechanism has been introduced, as is apparent from paragraph 39 of the draft explanatory report, in order to 'avoid gaps in participation, accountability and enforceability in the [ECHR] system', gaps which, owing to the specific characteristics of the EU, might result from its accession to the ECHR.

216. In addition, that mechanism also has the aim of ensuring that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU, proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.

217. However, those objectives must be pursued in such a way as to be compatible with the requirement of ensuring that the specific characteristics of EU law are preserved, as required by Article 1 of that protocol.

218. Yet, first, Article 3(5) of the draft agreement provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party.

219. When the ECtHR invites a Contracting Party to become co-respondent, that invitation is not binding, as is expressly stated in paragraph 53 of the draft explanatory report.

220. This lack of compulsion reflects not only, as paragraph 53 of the draft explanatory report indicates, the fact that the initial application has not been brought against the potential co-respondent and that no Contracting Party can be forced to become a party to a case where it was not named in the application initiating proceedings, but also, above all, the fact that the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.

221. Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law.

222. While the draft agreement duly takes those considerations into account as regards the procedure in accordance with which the ECHR may invite a Contracting Party to become co-respondent, the same cannot be said in the case of a request to that effect from a Contracting Party.

223. As Article 3(5) of the draft agreement provides, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons.

224. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether, in the light of those reasons, it is plausible that the conditions set out in paragraphs 2 and 3 of Article 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.

225. Such a review would be liable to interfere with the division of powers between the EU and its Member States.

226. Secondly, Article 3(7) of the draft agreement provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent are to be jointly responsible for that violation.

227. That provision does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR.

228. Such a consequence of Article 3(7) of the draft agreement is at odds with Article 2 of Protocol No 8 EU, according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto.

229. Thirdly, there is provision at the end of Article 3(7) of the draft agreement for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. The ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation.

230. A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.

231. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States.

232. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent.

233. Contrary to the submissions of some of the Member States that participated in the present procedure and of the Commission, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly.

234. In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.

235. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved.

d) The procedure for the prior involvement of the Court of Justice

236. It is true that the necessity for the procedure for the prior involvement of the Court of Justice is, as paragraph 65 of the draft explanatory report shows, linked to respect for the subsidiary nature of the control mechanism established by the ECHR, as referred to in paragraph 19 of this Opinion. Nevertheless, it should equally be noted that that procedure is also necessary for the purpose of ensuring the proper functioning of the judicial system of the EU.

237. In that context, the necessity for the prior involvement of the Court of Justice in a case brought before the ECtHR in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved, as required by Article 2 of Protocol No 8 EU.

238. Accordingly, to that end it is necessary, in the first place, for the question whether the Court of Justice has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent EU institution, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice.

240. Yet neither Article 3(6) of the draft agreement nor paragraphs 65 and 66 of the draft explanatory report contain anything to suggest that that possibility is excluded.

241. Consequently, the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.

242. In the second place, it should be noted that the procedure described in Article 3(6) of the draft agreement is intended to enable the Court of Justice to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded. Paragraph 66 of the draft explanatory report explains that the words '[a]ssessing the compatibility of the provision' mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law.

243. It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure.

244. However, it must be noted that, just as the prior interpretation of primary law is necessary in order for the Court of Justice to be able to rule on whether that law is consistent with the EU's commitments resulting from its accession to the ECHR, it should be possible for secondary law to be subject to such interpretation for the same purpose.

245. The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation.

246. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

247. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR.

248. Having regard to the foregoing, it must be held that the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved.

e) The specific characteristics of EU law as regards judicial review in CFSP matters

249. It is evident from the second subparagraph of Article 24(1) TEU that, as regards the provisions of the Treaties that govern the CFSP, the Court of Justice has jurisdiction only to monitor compliance with Article 40 TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU.

250. According to the latter provision, the Court of Justice is to have jurisdiction, in particular, to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty.

251. Notwithstanding the Commission's systematic interpretation of those provisions in its request for an Opinion — with which some of the Member States that submitted observations to the Court have taken issue — essentially seeking to define the scope of the Court's judicial review in this area as being sufficiently broad to encompass any situation that could be covered by an application to the ECtHR, it must be noted that the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.

252. However, for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice.

253. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone.

254. Nevertheless, on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.

255. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR.

256. The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 78, 80 and 89).

257. Therefore, although that is a consequence of the way in which the Court's powers are structured at present, the fact remains that the agreement envisaged fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.

258. In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

– it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;

– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;

- it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
- it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

Consequently, the Court (Full Court) gives the following Opinion:

**The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.**

## LECTURE 9: DIRECT ACCESS TO EU COURTS

One of the most troubling institutional issues in EU law has always been the direct access to EU Courts. Whereas the EU abides by the fundamental right to a fair trial and access to courts, the Court of Justice has always limited the standing of individuals under Article 263 TFEU to initiate actions for annulment against generally applicable EU legal acts. In accordance with its *Plaumann* case law, individuals have to prove that they are directly – without intermediate measures at EU or Member State level – and individually – as if they were the specific addressee – concerned by the generally applicable EU legal act they want to have annulled. In practice, this has severely limited the standing of individuals. The Court explicitly recognised this in its *Jego Quéré* judgment, calling the EU institutions and the Member States for reform of the system. The reform eventually adopted has been an extension of *locus standi* for individuals when seeking the annulment of regulatory acts. The Court of Justice has been tasked to interpret this notion of a regulatory act, yet has failed so far to offer a clear-cut and predictable definition of that notion. In this lecture session, we will analyse the limits placed by EU law on direct access to EU Courts and the opportunities created in the wake of the Lisbon Treaty. At the same time, we will also question what policy reasons may underlie the interpretations of Article 263 TFEU and how law and policy interact in this context.

### Materials to read:

- Court of Justice, 15 July 1963, Case 25/62, *Plaumann & Co. v Commission of the European Economic Community*, ECLI:EU:C:1963:17.
- Court of Justice, 1 April 2004, Case C-263/02 P, *Commission v Jégo Quéré*, ECLI:EU:C:2004:210.
- Court of Justice, 23 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625.
- Court of Justice, 19 December 2013, Case C-274/12, *Telefónica SA v European Commission*, ECLI:EU:C:2013:852.
  
- R. Mastroianni and A. Pezza, “Striking the right balance: Limits on the right to bring an action under Article 263(4) of the Treaty on the Functioning of the European Union”, 30 *American University International Law Review* (2015), 743- 794 (via eCampus).

### Lecture 9 outline:

- a. Direct access to EU Courts in the Treaty system of remedies
  1. Member State judges as EU judges
  2. Exceptional access for individuals to EU Courts: addresses
  3. Beyond addressees?
- b. Individual standing in actions for annulment
  1. Article 263, §4 TFEU
  2. *Plaumann*: restricting standing to exceptional cases
  3. Exceptional cases in practice: *Codorniu* and beyond
  4. The General Court’s venture in *Jego Quéré*
  5. Time for a Treaty change?

- c. Individual standing after Lisbon
  - 1. Addressees
  - 2. Regulatory acts – in search of clear benchmarks
  - 3. Direct and individual concern
- d. Regulatory acts and the politics of *locus standi*
  - 1. The procedural economy argument
  - 2. The effective judicial protection argument
  - 3. Breaking the law before contesting it?
- e. The future of locus standi in EU institutional law
  - 1. Towards an EU ‘federal judiciary’?
  - 2. Better embedding Member States’ courts in the EU remedies’ system
  - 3. A clearer predictable delineation of ‘regulatory acts’

Questions for discussion:

- What are the legal and policy rationales behind the restricted locus standi for individuals? Do they make sense in a Union taking the right to effective judicial protection seriously?
- Can an EU legislative act be regulatory for the purposes of Article 263 TFEU? Which criteria should be guiding in that respect? How would this affect the classification of legal acts analysed in lecture 6?

**Case 25/62, Plaumann & Co. v Commission of the European Economic Community**

Parties

*IN CASE 25/62*

*PLAUMANN & CO ., HAMBURG, REPRESENTED BY HARALD DITGES, ADVOCATE OF THE COLOGNE BAR, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICES OF MR AUDRY, FEDERATION DES COMMERCANTS, 8 AVENUE DE L'ARSENAL, APPLICANT,*

*V*

*COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, REPRESENTED BY HUBERT EHRING, LEGAL ADVISER TO THE EUROPEAN EXECUTIVES, ACTING AS AGENT, ASSISTED BY ERNST STEINDORFF, PROFESSOR OF LAW AT THE UNIVERSITY OF TUBINGEN, WITH AN ADDRESS FOR SERVICE IN LUXEMBOURG AT THE OFFICES OF HENRI MANZANARES, SECRETARY OF THE LEGAL SERVICE OF THE EUROPEAN EXECUTIVES, 2 PLACE DE METZ, DEFENDANT,*

Subject of the case

*APPLICATION FOR :*

*-ANNULMENT OF THE DECISION N . SIII 03079 OF THE COMMISSION OF 22 MAY 1962, REFUSING TO AUTHORIZE THE FEDERAL REPUBLIC OF GERMANY TO SUSPEND IN PART CUSTOMS DUTIES APPLICABLE TO 'MANDARINS AND CLEMENTINES, FRESH' IMPORTED FROM THIRD COUNTRIES;*

*-PAYMENT OF 39 414.01 DM COMPENSATION;*

Grounds

*I - ON THE APPLICATION FOR ANNULMENT*

*ADMISSIBILITY*

*UNDER THE SECOND PARAGRAPH OF ARTICLE 173 OF THE EEC TREATY 'ANY NATURAL OR LEGAL PERSON MAY ...INSTITUTE PROCEEDINGS AGAINST A DECISION ...WHICH, ALTHOUGH IN THE FORM OF...A DECISION ADDRESSED TO ANOTHER PERSON, IS OF DIRECT AND INDIVIDUAL CONCERN TO THE FORMER '. THE DEFENDANT CONTENDS THAT THE WORDS 'OTHER PERSON' IN THIS PARAGRAPH DO NOT REFER TO MEMBER STATES IN THEIR CAPACITY AS SOVEREIGN AUTHORITIES AND THAT INDIVIDUALS MAY NOT THEREFORE BRING AN ACTION FOR ANNULMENT AGAINST THE DECISIONS OF THE COMMISSION OR OF THE COUNCIL ADDRESSED TO MEMBER STATES .*

*HOWEVER THE SECOND PARAGRAPH OF ARTICLE 173 DOES ALLOW AN INDIVIDUAL TO BRING AN ACTION AGAINST DECISIONS ADDRESSED TO 'ANOTHER PERSON' WHICH ARE OF DIRECT AND INDIVIDUAL CONCERN TO THE FORMER, BUT THIS ARTICLE NEITHER DEFINES NOR LIMITS THE SCOPE OF THESE WORDS . THE WORDS AND THE NATURAL MEANING OF THIS PROVISION JUSTIFY THE BROADEST INTERPRETATION . MOREOVER PROVISIONS OF THE TREATY REGARDING THE RIGHT OF INTERESTED PARTIES TO BRING AN ACTION MUST NOT BE INTERPRETED RESTRICTIVELY . THEREFORE, THE TREATY BEING SILENT ON THE POINT, A LIMITATION IN THIS RESPECT MAY NOT BE PRESUMED .*

*IT FOLLOWS THAT THE DEFENDANT'S ARGUMENT CANNOT BE REGARDED AS WELL FOUNDED .*

*THE DEFENDANT FURTHER CONTENDS THAT THE CONTESTED DECISION IS BY ITS VERY NATURE A REGULATION IN THE FORM OF AN INDIVIDUAL DECISION AND THEREFORE ACTION AGAINST IT IS NO MORE AVAILABLE TO INDIVIDUALS THAN IN THE CASE OF LEGISLATIVE MEASURES OF GENERAL APPLICATION .*

*IT FOLLOWS HOWEVER FROM ARTICLES 189 AND 191 OF THE EEC TREATY THAT DECISIONS ARE CHARACTERIZED BY THE LIMITED NUMBER OF PERSONS TO WHOM THEY ARE ADDRESSED . IN ORDER TO DETERMINE WHETHER OR NOT A MEASURE CONSTITUTES A DECISION ONE MUST ENQUIRE WHETHER THAT MEASURE CONCERNS SPECIFIC PERSONS . THE CONTESTED DECISION WAS ADDRESSED TO THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND REFUSES TO GRANT IT AUTHORIZATION FOR THE PARTIAL SUSPENSION OF CUSTOMS DUTIES ON CERTAIN PRODUCTS IMPORTED FROM THIRD COUNTRIES . THEREFORE THE CONTESTED MEASURE MUST BE REGARDED AS A DECISION REFERRING TO A PARTICULAR PERSON AND BINDING THAT PERSON ALONE .*

*UNDER THE SECOND PARAGRAPH OF ARTICLE 173 OF THE TREATY PRIVATE INDIVIDUALS MAY INSTITUTE PROCEEDINGS FOR ANNULMENT AGAINST DECISIONS WHICH, ALTHOUGH ADDRESSED TO ANOTHER PERSON, ARE OF DIRECT AND INDIVIDUAL CONCERN TO THEM, BUT IN THE PRESENT CASE THE DEFENDANT DENIES THAT THE CONTESTED DECISION IS OF DIRECT AND INDIVIDUAL CONCERN TO THE APPLICANT .*

*IT IS APPROPRIATE IN THE FIRST PLACE TO EXAMINE WHETHER THE SECOND REQUIREMENT OF ADMISSIBILITY IS FULFILLED BECAUSE, IF THE APPLICANT IS NOT INDIVIDUALLY CONCERNED BY THE DECISION, IT BECOMES UNNECESSARY TO ENQUIRE WHETHER HE IS DIRECTLY CONCERNED .*

*PERSONS OTHER THAN THOSE TO WHOM A DECISION IS ADDRESSED MAY ONLY CLAIM TO BE INDIVIDUALLY CONCERNED IF THAT DECISION AFFECTS THEM BY REASON OF CERTAIN ATTRIBUTES WHICH ARE PECULIAR TO THEM OR BY REASON OF CIRCUMSTANCES IN WHICH THEY ARE DIFFERENTIATED FROM ALL OTHER PERSONS AND BY VIRTUE OF THESE FACTORS DISTINGUISHES THEM INDIVIDUALLY JUST AS IN THE CASE OF THE PERSON ADDRESSED . IN THE PRESENT CASE THE APPLICANT IS AFFECTED BY THE DISPUTED DECISION AS AN IMPORTER OF CLEMENTINES, THAT IS TO SAY, BY REASON OF A COMMERCIAL ACTIVITY WHICH MAY AT ANY TIME BE PRACTISED BY ANY PERSON AND IS NOT THEREFORE SUCH AS TO DISTINGUISH THE APPLICANT IN RELATION TO THE CONTESTED DECISION AS IN THE CASE OF THE ADDRESSEE .*

*FOR THESE REASONS THE PRESENT ACTION FOR ANNULMENT MUST BE DECLARED INADMISSIBLE .*

## *II - ON THE ACTION FOR COMPENSATION*

### *ADMISSIBILITY*

*THE DEFENDANT MAINTAINS THAT THE CONCLUSIONS IN THE PRESENT ACTION, HAVING BEEN FORMULATED FOR THE FIRST TIME IN THE REPLY, WERE SUBMITTED OUT OF TIME AND ARE NOT THEREFORE ADMISSIBLE UNDER ARTICLE 38 ( 1)(D ) OF THE RULES OF PROCEDURE .*

*THE APPLICANT HAS HOWEVER INCLUDED IN THE APPLICATION A REQUEST FOR A DECLARATION WITH REGARD TO THE DAMAGE WHICH MAY RESULT FROM THE CONTESTED DECISION . IN THE COURSE OF THE WRITTEN AND ORAL PROCEDURES, THE APPLICANT SPECIFIED THE SUBJECT MATTER OF THIS REQUEST AND SET A VALUE ON THE AMOUNT OF THE DAMAGE . THEREFORE THE CONCLUSIONS OF THE ACTION FOR COMPENSATION MAY BE CONSIDERED AS A PERMISSIBLE AMPLIFICATION OF THOSE CONTAINED IN THE APPLICATION . THEY ARE THEREFORE ADMISSIBLE UNDER THE ABOVE-MENTIONED ARTICLE 38 ( 1)(D ) .*

### *SUBSTANCE*

*THE CONCLUSIONS OF THE APPLICANT ASK FOR PAYMENT OF COMPENSATION EQUIVALENT TO THE CUSTOMS DUTIES AND TURNOVER TAX WHICH THE APPLICANT HAD TO PAY IN CONSEQUENCE OF THE DECISION AGAINST WHICH IT HAS AT THE SAME TIME INSTITUTED PROCEEDINGS FOR ANNULMENT . IN THESE CIRCUMSTANCES IT MUST BE DECLARED THAT THE DAMAGE ALLEGEDLY SUFFERED BY THE APPLICANT ISSUES FROM THIS DECISION AND THAT THE ACTION FOR COMPENSATION IN FACT SEEKS TO SET ASIDE THE LEGAL EFFECTS ON THE APPLICANT OF THE CONTESTED DECISION .*

*IN THE PRESENT CASE THE CONTESTED DECISION HAS NOT BEEN ANNULLED . AN ADMINISTRATIVE MEASURE WHICH HAS NOT BEEN ANNULLED CANNOT OF ITSELF CONSTITUTE A WRONGFUL ACT ON THE PART OF THE ADMINISTRATION INFLECTING DAMAGE UPON THOSE WHOM IT AFFECTS . THE LATTER CANNOT THEREFORE CLAIM DAMAGES BY REASON OF THAT MEASURE . THE COURT CANNOT BY WAY OF AN ACTION FOR COMPENSATION TAKE STEPS WHICH WOULD NULLIFY THE LEGAL EFFECTS OF A DECISION WHICH, AS STATED, HAS NOT BEEN ANNULLED .*

*THE ACTION BROUGHT BY THE APPLICANT MUST THEREFORE BE DISMISSED AS UNFOUNDED .*

Decision on costs

*UNDER THE TERMS OF ARTICLE 69 ( 2 ) OF THE RULES OF PROCEDURE THE UNSUCCESSFUL PARTY SHALL BE ORDERED TO PAY THE COSTS .*

*THE APPLICANT HAVING FAILED IN ITS ACTION MUST BE ORDERED TO BEAR THE COSTS .*

Operative part

*THE COURT*

*HEREBY :*

- 1 . DISMISSES THE APPLICATION FOR ANNULMENT AS INADMISSIBLE;*
- 2 . DISMISSES THE CLAIM FOR COMPENSATION AS UNFOUNDED;*
- 3 . ORDERS THE APPLICANT TO PAY THE COSTS .*



## Case C-263/02 P, *Commission v Jégo Quéré*

In Case C-263/02 P,

**Commission of the European Communities**, represented by T. van Rijn and A. Bordes, acting as Agents, with an address for service in Luxembourg,

applicant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber, Extended Composition) of 3 May 2002 in Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, seeking to have that judgment set aside,

the other party to the proceedings being:

**Jégo-Quéré & Cie SA**, represented by A. Creus Carreras and B. Uriarte Valiente, abogados,

THE COURT (Sixth Chamber),

composed of C. Gulmann (Rapporteur), acting for the President of the Sixth Chamber, J. N. Cunha Rodrigues, J.-P. Puissechot, R. Schintgen and F. Macken, Judges,

Advocate General: F. Jacobs,  
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 22 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2003,

gives the following

Judgment

1

By application lodged at the Court Registry on 17 July 2002, the Commission of the European Communities brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 3 May 2002 in Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365 (hereinafter 'the contested judgment'), in which the Court of First Instance held that the action brought by the company *Jégo-Quéré & Cie S.A.* (hereinafter '*Jégo-Quéré*') for annulment of Articles 3(d) and 5 of Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels (OJ 2001 L 159, p. 4) was admissible.

**Legal framework**

2

Article 15 of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1) empowers the Commission to take emergency measures when the conservation of fish stocks is threatened by serious and unexpected upheaval.

3

In December 2000, the Commission and the Council, having been alerted by the International Council for the Exploration of the Sea (ICES), noted the urgent need to establish a plan for the recovery of the stock of hake.

4

The principal aim of Regulation No 1162/2001, which was adopted in consequence, is to reduce catches of juvenile hake immediately. This regulation applies to fishing vessels operating in the areas defined by it. It imposes minimum mesh sizes for those vessels, varying according to the areas concerned, for the different net fishing techniques employed, irrespective of the type of fish which the vessel is seeking to catch. The provision does not apply to vessels of less than 12 metres in length which leave port for not more than 24 hours.

5

Article 3(d) of Regulation No 1162/2001 prohibits the use of 'any demersal towed net to which a cod-end of mesh size less than 100 mm is attached by any means other than being sewn into that part of the net anterior to the cod-end'. Article 5(1) of the regulation defines the geographical areas in which the regulation is applicable and Article 5(2) specifies, in respect of all of those areas, the prohibitions concerning the use, immersion and deployment of towed nets of a specified mesh size, and the obligations regarding the lashing and stowing of such nets. It also sets out the prohibitions applicable in each of those areas concerning the use, immersion and deployment of fixed gear of a specified mesh size and the obligations regarding the lashing and stowing of such gear. As regards towed nets, the prohibitions apply to mesh sizes of between 55 and 99 mm; as regards fixed gear, they apply, depending on the zone concerned, to mesh sizes of less than 100 or 120 mm.

### **The facts and the contested judgment**

6

Jégo-Quééré is a fishing company established in France which operates on a regular basis in the waters south of Ireland, in ICES sub-area VII as referred to in Article 5(1)(a) of Regulation No 1162/2001. It fishes mainly for whiting, which represents, on average, 67.3% of its catches. It owns four vessels over 30 metres in length and uses nets having a mesh size of 80 mm.

7

By application lodged at the Court Registry on 2 August 2001, Jégo-Quééré brought an action under the fourth paragraph of Article 230 EC for annulment of Articles 3(d) and 5 of Regulation No 1162/2001.

8

By separate document lodged at the Court Registry on 30 October 2001, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

9

By the contested judgment, the Court of First Instance dismissed the objection of inadmissibility and ordered that the action should proceed on the substance.

10

Having held at paragraph 24 of its judgment that the contested provisions are, by their nature, of general application, the Court of First Instance pointed out at paragraph 25 of the judgment that the fact that a provision is of general application does not prevent it from being of direct and individual concern to some of the economic operators whom it affects.

11

At paragraph 38 of the contested judgment, the Court of First Instance held that Jégo-Quéré ‘cannot be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC, on the basis of the criteria hitherto established by Community case-law’.

12

Jégo-Quéré had claimed that, in the circumstances, it had no right of action before the national courts, as Regulation No 1162/2001 does not provide for the adoption of any implementing measures by the Member States, and accordingly that, were its action before the Court of First Instance to be dismissed as inadmissible, it would be denied any legal remedy enabling it to challenge the legality of the contested provisions. The Court of First Instance held that it was therefore necessary to consider whether, in proceedings such as the case before it, where an individual applicant is contesting the lawfulness of provisions of general application directly affecting its legal situation, the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy, of the kind guaranteed by the legal order based on the EC Treaty, and in particular under Articles 6 and 13 of the European Convention for the Protection of Fundamental Human Rights and Freedoms (hereinafter the ‘ECHR’).

13

In that regard, the Court of First Instance held as follows:

‘44

... it should be recalled that, apart from an action for annulment, there exist two other procedural routes by which an individual may be able to bring a case before the Community judicature - which alone has jurisdiction for this purpose - in order to obtain a ruling that a Community measure is unlawful, namely proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC and an action based on the non-contractual liability of the Community, as provided for in Article 235 EC and the second paragraph of Article 288 EC.

45

However, as regards proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC, it should be noted that, in a case such as the present, there are no acts of implementation capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice (see [paragraph] 43 of the Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677).

46

The procedural route of an action for damages based on the non-contractual liability of the Community does not, in a case such as the present, provide a solution that satisfactorily protects the interests of the individual affected. Such an action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal. Given that it presupposes that damage has been directly occasioned by the application of the measure in issue, such an action is subject to criteria of admissibility and substance which are different from those governing actions for annulment, and does not therefore place the Community judicature in a position whereby it can carry out the comprehensive judicial review which it is its task to perform. In particular, where a measure of general application, such as the provisions contested in the present case, is challenged in the context of such an action, the review carried out by the Community judicature does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently serious infringements of rules of law intended to confer rights on individuals (see Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraphs 41 to 43; Case T-155/99 *Dieckmann & Hansen v Commission* [2001] ECR II-3143, paragraphs 42 and 43; see also, as regards an insufficiently serious infringement, Joined

Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061, paragraphs 18 and 19, and, for a case in which the rule invoked was not intended to confer rights on individuals, paragraph 43 of the judgment in Case T-196/99 *Area Cova and Others v Council and Commission* [2001] ECR II-3597).

47

On the basis of the foregoing, the inevitable conclusion must be that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation.

48

It is true that such a circumstance cannot constitute authority for changing the system of remedies and procedures established by the Treaty, which is designed to give the Community judicature the power to review the legality of acts of the institutions. In no case can such a circumstance allow an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by the fourth paragraph of Article 230 EC to be declared admissible (see the order of the President of the Court of Justice of 12 October 2000 in Case C-300/00 P(R) *Federación de Cofradías de Pescadores and Others v Council* [2000] ECR I-8797, paragraph 37).

49

However, as Advocate General Jacobs stated in [paragraph] 59 of his Opinion in *Unión de Pequeños Agricultores v Council* (cited in paragraph 45 above), there is no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.

50

In those circumstances, and having regard to the fact that the EC Treaty established a complete system of legal remedies and procedures designed to permit the Community judicature to review the legality of measures adopted by the institutions (paragraph 23 of the judgment in *Les Verts v Parliament*, cited in paragraph 41 above), the strict interpretation, applied until now, of the notion of a person individually concerned according to the fourth paragraph of Article 230 EC, must be reconsidered.

51

In the light of the foregoing, and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.

52

In the present case, obligations are indeed imposed on Jégo-Quére by the contested provisions. The applicant, whose vessels are covered by the scope of the regulation, carries on fishing operations in one of the areas in which, by virtue of the contested provisions, such operations are subjected to detailed obligations governing the mesh size of the nets to be used.

53

It follows that the contested provisions are of individual concern to the applicant.

54

Since those provisions are also of direct concern to the applicant (see paragraph 26 above), the objection of inadmissibility raised by the Commission must be dismissed and an order made for the action to proceed.’

### **The appeal**

14

By its appeal, the Commission claims that the Court should:

–

set aside the contested judgment;

–

declare the action for annulment of Regulation No 1162/2001 to be inadmissible or, alternatively, refer the case back to the Court of First Instance;

–

order Jégo-Quééré to pay the costs, including those incurred in the Court of First Instance.

15

Jégo-Quééré claims that the Court should:

–

declare the appeal to be inadmissible as it was brought out of time;

–

declare the appeal to be unfounded and uphold the contested judgment;

–

set aside the contested judgment in so far as it holds that Jégo-Quééré was not individually concerned for the purpose of the fourth paragraph of Article 230 EC;

–

adjudicate on the case itself in accordance with Jégo-Quééré’s observations submitted to the Court of First Instance, and, in particular,

–

declare the action brought before the Court of First Instance to be admissible;

–

annul Articles 3(d) and 5 of Regulation No 1162/2001;

–

examine the following witnesses:

–

Mr John Farnell, Director ‘Conservation Policy’ of the Commission’s Fisheries Directorate-General;

–

Mr Victor Badiola, manager of the Organisation of Fish Producers of Ondárroa;

—  
order the Commission to pay the costs of these proceedings and those incurred before the Court of First Instance.

16

The Commission advances two pleas in law in support of its appeal.

17

First, it claims that the Court of First Instance infringed its own Rules of Procedure, on the ground that the case should have been referred to the Court of First Instance sitting in plenary session. Secondly, it claims that the Court of First Instance infringed the fourth paragraph of Article 230 EC, by interpreting the requirement that the applicant be individually concerned in a manner contrary to the judicial system established by the EC Treaty.

*The admissibility of the appeal*

18

Jégo-Quééré submits that the appeal is inadmissible. It claims that the Commission gave no indication of the date on which the judgment was notified to it. In the absence of evidence to the contrary, Jégo-Quééré does not accept that the appeal was lodged within the time-limit.

19

It should be noted in that regard that under Article 49 of the EC Statute on the Court of Justice, read in conjunction with Article 81(2) of the Rules of Procedure, an appeal may be brought before the Court within two months of the notification of the decision appealed against, with an extension on account of distance of a single period of 10 days. Under Article 112(2) of the Rules of Procedure, the decision of the Court of First Instance appealed against is to be attached to the appeal and the date on which the decision appealed against was notified to the appellant is to be stated.

20

The Commission appended to its appeal the judgment appealed against, together with the letter which accompanied it from the Registrar of the Court of First Instance, which bears a stamp indicating that the letter was received on 8 May 2002. That date, moreover, is confirmed by the certificate of receipt of the letter. As mentioned at paragraph 1 of this judgment, the Commission's appeal was lodged at the Court Registry on 17 July 2002.

21

It therefore appears that the Commission indicated in its appeal the date on which it was notified of the contested judgment and that it lodged its appeal within the time-limit.

22

The Commission's appeal must therefore be held to be admissible.

*The second plea*

*Arguments of the parties*

23

The Commission alleges that the interpretation of individual concern adopted by the Court of First Instance in the contested judgment is so wide as to remove in fact the requirement of individual concern laid down by the fourth paragraph of Article 230 EC. The Court of First Instance erred in law by confusing the right to an effective remedy with a general individual direct right to bring proceedings for annulment of general measures, as the fact that the latter is unavailable does not mean that the former does not exist. It is wrong to conclude, as the Court of First Instance did at paragraph 47 of the contested judgment, that the judicial system established by the Treaty can no longer be regarded as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation, and that, accordingly,

the conditions governing the admissibility of an application for annulment should be extended for the benefit of individuals by reconsidering the settled case-law relating to the notion of a person individually concerned according to the fourth paragraph of Article 230 EC.

24

The Commission points out in this regard that in the majority of the Member States, the right of individuals to bring direct proceedings for the annulment of a measure of general application is limited in various ways. Frequently, it is impossible to bring proceedings for the annulment of a law, or the right to do so is restricted by reason of the legal bases on which proceedings may be brought or the conditions governing *locus standi*. In some Member States, there is in fact no general right of individuals to bring direct proceedings for the annulment of legislative acts promulgated by the administrative authorities. Those systems have never been subject to censure by the European Court of Human Rights.

25

Lastly, the Commission claims that, having regard to the case-law set out in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, the interpretation of individual concern upheld by the Court of First Instance would restrict the ability of individuals to challenge the legality of Community measures of general application.

26

Jégo-Quéré argues that a wide and flexible interpretation of the fourth paragraph of Article 230 EC, as adopted by the Court of First Instance, would allow it, without at the same time changing the system of judicial remedies established by the Treaty, to challenge the legality of a provision which causes it considerable harm. Failing such an interpretation, there would be a breach of Articles 6 and 13 of the ECHR, as there would be no means for it to contest the validity of the provisions at issue. Since Regulation No 1162/2001 applies directly, without intervention on the part of the national authorities, there is no measure capable of being challenged before the national courts, thus enabling the validity of that regulation to be contested indirectly. Accordingly, it cannot benefit from full legal protection under national law without contravening Regulation No 1162/2001.

27

As regards proceedings brought on the basis of non-contractual liability under Articles 235 EC and the second paragraph of Article 288 EC, Jégo-Quéré disputes the Commission's argument that, given the fact that the duration of Regulation No 1162/2001 is limited to six months, an action for damages might constitute a more appropriate remedy than an application for annulment. It claims that the regulation is merely a stage in an ongoing process of reform of the common fisheries policy, which requires the adoption of medium and long-term measures. As a consequence, Jégo-Quéré would be left with no choice but to bring fresh actions for damages on a periodic basis.

28

Furthermore, it would be paradoxical to interpret the notion of individual concern restrictively, when there are no restrictions on individuals bringing actions for damages under Articles 235 EC and 288 EC, which are based on the premiss that the legality of Community measures of general application may be contested without restriction.

Assessment by the Court

29

It should be noted that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the ECHR (see, in particular, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 39).

30

By Articles 230 EC and Article 241 EC, on the one hand, and by Article 234, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions, and has entrusted such review to the Community Courts. Under that system, where natural or

legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 241 EC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity (see *Unión de Pequeños Agricultores v Council*, paragraph 40).

31

Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection (see *Unión de Pequeños Agricultores v Council*, paragraph 41).

32

In that context, in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act (see *Unión de Pequeños Agricultores v Council*, paragraph 42).

33

However, it is not appropriate for an action for annulment before the Community Court to be available to an individual who contests the validity of a measure of general application, such as a regulation, which does not distinguish him individually in the same way as an addressee, even if it could be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures (see *Unión de Pequeños Agricultores v Council*, paragraphs 37 and 43).

34

Accordingly, an action for annulment before the Community Court should not on any view be available, even where it is apparent that the national procedural rules do not allow the individual to contest the validity of the Community measure at issue unless he has first contravened it.

35

In the present case, it should be pointed out that the fact that Regulation No 1162/2001 applies directly, without intervention by the national authorities, does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by Regulation No 1162/2001 may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly.

36

Although the condition that a natural or legal person can bring an action challenging a regulation only if he is concerned both directly and individually must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty (see *Unión de Pequeños Agricultores v Council*, paragraph 44).

37

That applies to the interpretation of the condition in question set out at paragraph 51 of the contested judgment, to the effect that a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.

38

Such an interpretation has the effect of removing all meaning from the requirement of individual concern set out in the fourth paragraph of Article 230 EC.

39

It follows from the above that the Court of First Instance erred in law. Accordingly, the second plea in law must be declared to be well founded.

#### *The cross-appeal*

#### Arguments of the parties

40

Jégo-Quééré claims that the Court of First Instance was wrong to hold that it is not individually concerned by Regulation No 1162/2001 for the purposes of the fourth paragraph of Article 230 EC, as that provision has been interpreted in the settled case-law of the Court. The regulation in question is in reality made up of a bundle of individual decisions, adapted to meet the particular circumstances of some of the operators concerned. There are no objective reasons justifying such a differentiated approach. Having regard to the objective of the protection of juvenile hake, a regulation of general application should prohibit all fishing in the relevant areas with a mesh size of less than 100 mm.

41

According to Jégo-Quééré, there are two particular circumstances which differentiate it from all other persons affected by Regulation No 1162/2001. First, it is the only party fishing for whiting in the Irish Sea on a permanent basis with vessels of over 30 metres in length and which only catches minimal quantities of juvenile hake in the form of by-catches. Secondly, it is the only fishing company to have proposed to the Commission, before Regulation No 1162/2001 was adopted, a particular solution for the renewal of hake stocks, which was ultimately not accepted.

42

At the hearing, the Commission submitted that none of the arguments relied on by Jégo-Quééré could justify the conclusion that that company was individually concerned by Regulation No 1162/2001. The appeal should accordingly be dismissed.

#### Assessment by the Court

43

As the Court of First Instance rightly held at paragraphs 23 and 24 of the contested judgment, Articles 3(d) and 5 of Regulation No 1162/2001, which Jégo-Quééré seeks to have annulled, are addressed in abstract terms to undefined classes of persons and apply to objectively determined situations. Accordingly, those articles are, by their nature, of general application.

44

However, the Court has consistently held that the fact that a measure is of general application does not mean that it cannot be of direct and individual concern to certain economic operators (see, inter alia, Case C-142/00 P *Commission v Netherlands Antilles* [2003] ECR I-3484, paragraph 64).

45

In particular, natural or legal persons cannot be individually concerned by such a measure unless they are affected by it by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them

from all other persons and distinguishes them individually in the same way as an addressee (see, inter alia, Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107, and *Commission v Netherlands Antilles*, paragraph 65).

46

The fact that Jégo-Quééré is the only operator fishing for whiting in the waters south of Ireland with vessels of over 30 metres in length does not, as the Court of First Instance points out at paragraph 30 of the contested judgment, differentiate it, as Articles 3(d) and 5 of Regulation No 1162/2001 are of concern to it only in its objective capacity as an entity which fishes for whiting using a certain fishing technique in a specific area, in the same way as any other economic operator actually or potentially in the same situation.

47

Furthermore, no provision of Community law required the Commission, when adopting Regulation No 1162/2001, to follow a procedure under which Jégo-Quééré would be entitled to claim rights that might be available to it, including the right to be heard. Community law has accordingly not conferred any particular legal status on an operator such as Jégo-Quééré with regard to the adoption of Regulation No 1162/2001 (see, to that effect, Case 191/82 *FEDIOL v Commission* [1983] ECR 2913, paragraph 31).

48

In those circumstances, the fact that Jégo-Quééré was the only fishing company to propose to the Commission, before Regulation No 1162/2001 was adopted, a particular solution for the renewal of hake stocks does not make it individually concerned for the purposes of the fourth paragraph of Article 230 EC.

49

The cross-appeal should accordingly be dismissed.

50

In the light of the foregoing, the contested judgment should be set aside, and, having regard to the first paragraph of Article 61 of the Statute of the Court of Justice, the application for annulment of Articles 3(d) and 5 of Regulation No 1162/2001 must be declared to be inadmissible.

#### **Costs**

[...]

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1.

**Sets aside the judgment of the Court of First Instance of 3 May 2002 in *Jégo-Quééré v Commission*;**

2.

**Declares the application for annulment by Jégo-Quééré & Cie SA of Articles 3(d) and 5 of Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels to be inadmissible;**

3.

**Orders Jégo-Quééré & Cie SA to pay the costs of both sets of proceedings.**

**Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council***

In Case C-583/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 21 November 2011,

**Inuit Tapiriit Kanatami**, established in Ottawa (Canada),

[...],

appellants,

the other parties to the proceedings being:

**European Parliament**, represented by I. Anagnostopoulou, D. Gauci and L. Visaggio, acting as Agents,

**Council of the European Union**, represented by M. Moore and K. Michoel, acting as Agents,

defendants at first instance,

supported by:

**European Commission**, represented by P. Oliver, E. White and K. Mifsud-Bonnici, acting as Agents,

**Kingdom of the Netherlands**,

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, Vice-President, acting as President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz (Rapporteur), A. Rosas and M. Berger, Presidents of Chambers, U. Lõhmus, E. Levits, A. Ó Caoimh, A. Arabadjiev, J.-J. Kasel, M. Safjan, D. Šváby, A. Prechal and C. Vajda, Judges

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2012,

after hearing the Opinion of the Advocate General at the sitting on 17 January 2013,

gives the following

**Judgment**

1 By their appeal, Inuit Tapiriit Kanatami, Nattivak Hunters and Trappers Association, Pangnirtung Hunters' and Trappers' Association, Mr Moesesie, Mr Kooneeliusie, Mr Newkingnak, Mr Kuptana, Ms Aariak, Canadian Seal Marketing Group, Ta Ma Su Seal Products, Inc., Fur Institute of Canada, NuTan Furs, Inc., GC Rieber Skinn AS, Inuit Circumpolar Council Greenland (ICC-Greenland), Mr Egede and Kalaallit Nunaanni Aalisartut Piniartullu Kattuffiat (KNAPK) request that the Court set aside the order of the General Court of the European Union of 6 September 2011 in Case T-18/10 [2011] ECR II-5599 ('the order under appeal'), whereby the General Court dismissed the action brought by the appellants and by Mr Agathos for the annulment of Regulation (EC)

No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (OJ 2009 L 286, p. 36, ‘the contested regulation’) as being inadmissible.

## **Legal context**

### *The contested regulation*

2 According to Article 1 of the contested regulation, its subject matter is the establishment of ‘harmonised rules concerning the placing on the market of seal products’.

3 Under Article 2(4) of the contested regulation, ‘Inuit’ means ‘indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognised by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)’.

4 As regards the conditions for placing seal products on the market, Article 3 of that regulation provides:

‘1. The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.

2. By way of derogation from paragraph 1:

(a) the import of seal products shall also be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons;

(b) the placing on the market of seal products shall also be allowed where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing on the market shall be allowed only on a non-profit basis. The nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons.

The application of this paragraph shall not undermine the achievement of the objective of this Regulation.

3. The Commission shall, in accordance with the management procedure referred to in Article 5(2), issue technical guidance notes setting out an indicative list of the codes of the Combined Nomenclature which may cover seal products subject to this Article.

4. Without prejudice to paragraph 3, measures for the implementation of this Article, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 5(3).’

### *Regulation (EU) No 737/2010*

5 On the basis of Article 3(4) of the contested regulation, the Commission adopted Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 (OJ 2010 L 216, p. 1).

6 That regulation, according to Article 1 thereof, ‘lays down detailed rules for the placing on the market of seal products pursuant to Article 3 of Regulation (EC) No 1007/2009’.

## **The procedure before the General Court and the order under appeal**

7 By application lodged at the Registry of the General Court on 11 January 2010, the appellants and Mr Agathos brought an action for the annulment of the contested regulation.

8 The European Parliament and the Council of the European Union each raised an objection of inadmissibility, under Article 114(1) of the Rules of Procedure of the General Court. The Kingdom of the Netherlands and the Commission were granted leave to intervene before the General Court in support of the forms of order of the Parliament and the Council.

9 The General Court upheld that objection in holding that the appellants and Mr Agathos did not satisfy the conditions of admissibility for the purposes of the fourth paragraph of Article 263 TFEU.

10 First, the General Court held that, although the contested regulation was adopted on the basis of the EC Treaty, the conditions of admissibility of the action, which was brought after the entry into force of the FEU Treaty, have to be examined on the basis of Article 263 TFEU.

11 The General Court then examined the admissibility of the action before it. In that context, it first assessed the concept of ‘regulatory act’ within the meaning of the fourth paragraph of Article 263 TFEU. In that regard, the General Court undertook a literal, historical and teleological interpretation of that provision and made the following findings in paragraphs 41 to 51 of the order under appeal:

‘41 In the first place and as a reminder, the fourth paragraph of Article 230 EC allowed natural and legal persons to institute proceedings against decisions as acts of individual application and against acts of general application such as a regulation which is of direct concern to those persons and affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision (see, to that effect, Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107, and Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 36).

42 The fourth paragraph of Article 263 TFEU, even though it omits the word ‘decision’ reproduces those two possibilities and adds a third. It permits the institution of proceedings against individual acts, against acts of general application which are of direct and individual concern to a natural or legal person and against a regulatory act which is of direct concern to them and does not entail implementing measures. It is apparent from the ordinary meaning of the word ‘regulatory’ that the acts covered by that third possibility are also of general application.

43 Against that background, it is clear that that possibility does not relate to all acts of general application, but to a more restricted category, namely regulatory acts.

44 The first paragraph of Article 263 TFEU sets out a number of categories of acts of the European Union which may be subject to a review of legality, namely, first, legislative acts and, secondly, other binding acts intended to produce legal effects vis-à-vis third parties, which may be individual acts or acts of general application.

45 It must be concluded that the fourth paragraph of Article 263 TFEU, read in conjunction with its first paragraph, permits a natural or legal person to institute proceedings against an act addressed to that person and also (i) against a legislative or regulatory act of general application which is of direct and individual concern to them and (ii) against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures.

46 Furthermore, such an interpretation of the word “regulatory”, and of the equivalent word in the different language versions of the FEU Treaty, as opposed to the word “legislative”, is also apparent from a number of other provisions of the FEU Treaty, in particular Article 114 TFEU, concerning the approximation of the “provisions laid down by law, regulation or administrative action in Member States”.

47 In that regard, it is necessary to reject the ... argument [of the appellants and Mr Agathos] that the distinction between legislative and regulatory acts, as proposed by the Parliament and the Council and upheld in paragraphs 42 to 45 above, consists of adding the qualifier “legislative” to the word “act” with reference to the first two possibilities covered by the fourth paragraph of Article 263 TFEU. As is apparent from the conclusion drawn in paragraph 45 above, the word “act” with reference to those first two possibilities covers not only an act addressed to the natural or legal person, but also any act, legislative or regulatory, which is of direct and individual concern to them. In particular, legislative acts and regulatory acts entailing implementing measures are covered by that latter possibility.

48 Furthermore, it must be stated that, contrary to the ... claim [of the appellants and Mr Agathos], it is apparent from the wording of the final part of the fourth paragraph of Article 263 TFEU that the objective of the Member States was not to limit the scope of that provision solely to delegated acts within the meaning of Article 290 TFEU, but more generally, to regulatory acts.

49 In the second place, the interpretation of the fourth paragraph of Article 263 TFEU upheld in paragraphs 42 to 45 above is borne out by the history of the process which led to the adoption of that provision, which had initially been proposed as [Article III-365(4) of the proposed] treaty establishing a Constitution for Europe. It is apparent, inter alia from the cover note of the Praesidium of the Convention (Secretariat of the European Convention, CONV 734/03) of 12 May 2003, that, in spite of the proposal for an amendment to the fourth paragraph of Article 230 EC mentioning “an act of general application”, the Praesidium adopted another option, that mentioning “a regulatory act”. As is apparent from the cover note referred to above, that wording enabled “a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the ‘of direct and individual concern’ condition remains applicable)”.

50 In the third place, on account of the choice of such wording in the fourth paragraph of Article 263 TFEU, it must be observed that the purpose of that provision is to allow a natural or legal person to institute proceedings against an act of general application which is not a legislative act, which is of direct concern to them and does not entail implementing measures, thereby avoiding the situation in which such a person would have to infringe the law to have access to the court (see cover note of the Praesidium of the Convention, referred to above). As is apparent from the analysis in the preceding paragraphs, the wording of the fourth paragraph of Article 263 TFEU does not allow proceedings to be instituted against all acts which satisfy the criteria of direct concern and which are not implementing measures or against all acts of general application which satisfy those criteria, but only against a specific category of acts of general application, namely regulatory acts. Consequently, the conditions of admissibility of an action for annulment of a legislative act are still more restrictive than in the case of proceedings instituted against a regulatory act.

51 That finding cannot be called into question by the ... argument [of the appellants and Mr Agathos] relating to the right to effective judicial protection, inter alia having regard to Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1 [‘the Charter’]). According to settled case-law, the Courts of the European Union may not, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against a regulation in a way which has the effect of setting aside those conditions, expressly laid down in the Treaty, even in the light of the principle of effective judicial protection (see, to that effect, Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425, paragraph 36, and order of 9 January 2007 in Case T-127/05 *Lootus Teine Osaihiing v Council*, not published in the ECR, paragraph 50).’

12 The General Court concluded, in paragraph 56 of the order under appeal, that ‘the meaning of “regulatory act” for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts’. Consequently, a legislative act may form the subject matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them.

13 Secondly, the General Court, in paragraphs 57 to 67, examined the issue of whether the contested regulation is to be categorised as a legislative act or as a regulatory act. In that regard, the General Court held, in paragraph 61 of the order under appeal, that the procedure defined in Article 294 TFEU and known as the ‘ordinary legislative procedure’, reproduces, in essence, the procedure defined in Article 251 EC. The General Court concluded, in that paragraph, that the contested regulation, which was adopted according to the procedure covered in Article 251 EC, must, within the categories of legal acts provided for by the FEU Treaty, be categorised as a legislative act. In paragraph 65 of the order under appeal, the General Court found that, in this case, the criterion relevant to the categorisation of an act as a legislative act or as a regulatory act is the procedure which led to its adoption.

14 In the light of the interpretation of the concept of ‘regulatory act’ for the purposes of the fourth paragraph of Article 263 TFEU, adopted in paragraphs 41 to 56 of the order under appeal, and the conclusion that the contested regulation is not a regulatory act within the meaning of that article, the General Court concluded that the action could not be declared to be admissible on the basis of the third limb of the fourth paragraph of Article 263 TFEU. In those circumstances, there was no need to determine whether the contested regulation entails implementing measures.

15 Third, the General Court examined, in paragraphs 68 to 87 of the order under appeal, the issue of whether the appellants and Mr Agathos are directly concerned by the contested regulation.

16 In that regard, the General Court recalled, in paragraph 71 of the order under appeal, that if an individual is to be directly affected by an act it is necessary that the European Union act which is challenged should directly affect the legal situation of that individual and that there should be no discretion left to the addressees of that act who are responsible for its implementation, that implementation being purely automatic and resulting from European Union rules alone without the application of other intermediate rules.

17 As regards the contested regulation, the General Court held, in paragraph 75 of the order under appeal, referring to the order in Case T-40/04 *Bonino and Others v Parliament and Council* [2005] ECR II-2685, paragraph 56, that, in the light of what is stated in Article 3(1) of the contested regulation, that regulation directly affects only the legal situation of those applicants who are active in the placing of seal products on the European Union market. That regulation did not prohibit seal hunting, which indeed takes place outside the European Union market, or the use or consumption of seal products which are not marketed. While it cannot be precluded that the general prohibition of placing on the market provided for by the contested regulation might have consequences for the business activities of persons intervening upstream or downstream of that placing on the market, such consequences cannot be regarded as resulting directly from that regulation. Furthermore, any economic consequences of that prohibition affect only the factual situation of the appellants, not their legal situation.

18 After recalling, in paragraph 76 of the order under appeal, the wording of Articles 3(4) and 5(3) of the contested regulation and recital 17 of its preamble, the General Court found, in paragraph 77 of the order under appeal, that, notwithstanding the prohibition on placing on the market seal products in respect of which it is established that they do not result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence, the conditions for the placing of products on the market are not defined.

19 In that regard, the General Court held, in paragraphs 78 to 80 of the order under appeal, that the contested regulation did not specify, in particular, what was meant by ‘other indigenous communities’, and offered no explanation concerning hunts traditionally conducted to contribute to subsistence, nor how the Inuit origin or that of other indigenous communities was established. Accordingly, as regards products which might be subject to the exception, the national authorities were not in a position to apply the contested regulation without implementing measures established by an implementing regulation defining the conditions under which the placing of those products on the market is permitted. The situation of the appellants and Mr Agathos, to the extent that it is covered by the exception concerned, could consequently be assessed only on the basis of measures relating to the implementation of the contested regulation. That being so, the contested regulation affects only the legal situation of the appellants who are active in the placing of seal products on the European Union market and who are affected by the general prohibition on placing those products on the market.

20 In contrast, that is not the case for the appellants whose business activity is not the placing of those products on the market and/or those of the appellants covered by the exception provided by the contested regulation, since, in principle, placing on the European Union market seal products resulting from hunts traditionally conducted by Inuit and other indigenous communities to contribute to their subsistence continues to be permitted. More specifically, seal hunters and trappers of Inuit origin, and organisations which represent the appellants’ interests, cannot be regarded as active in the placing of seal products on the market.

21 Accordingly, the General Court held, in paragraphs 81 to 87 of the order under appeal, that only four of the appellants are directly concerned by the contested regulation, namely those who are active in the processing and/or marketing of seal products supplied by Inuit and non-Inuit hunters and trappers. As regards Ms Aariak, the General Court found, in paragraph 82 of the order under appeal, that she cannot be regarded as directly concerned by the contested regulation. While she is active in the processing of seal products, namely the design and sale of garments manufactured using sealskins, it is apparent from the application and the observations of the appellants and Mr Agathos on the objections of inadmissibility that she also belongs to the Inuit community and makes no claim to be active in placing on the market products other than those covered by the exception concerned.

22 Since an individual’s situation must be affected both directly and individually if the conditions of admissibility of an action laid down in the fourth paragraph of Article 263 TFEU are to be satisfied, the General Court examined, in paragraphs 88 to 93 of the order under appeal, whether the four appellants whom it regarded as being directly concerned by the contested regulation could also be regarded as being individually concerned by it. In that regard, the General Court held, referring to paragraph 41 of that order, that the contested regulation

applies to objectively determined situations and produces legal effects in regard to categories of persons envisaged generally and in the abstract. The general prohibition on placing on the market seal products other than those resulting from hunts traditionally conducted by Inuit and other indigenous communities to contribute to their subsistence is expressed in a general manner and is capable of applying indiscriminately to any trader who falls within the scope of that regulation.

23 While the four appellants involved are active in placing on the market seal products supplied by Inuit and non-Inuit hunters and trappers, they are, in that capacity, concerned by the contested regulation in the same way as any other trader who places seal products on the market. Even if those appellants are covered not only by the general prohibition but also by the exception in relation to products of Inuit origin, that is not sufficient to distinguish them individually in the same way as the addressee of a decision.

24 In those circumstances, the General Court declared the action for annulment to be inadmissible.

#### **Forms of order sought by the parties**

25 The appellants claim that the Court should:

- set aside the order under appeal;
- declare the application for annulment to be admissible if the Court considers that all information required for a decision on the admissibility of the action for annulment of the contested is available;
- in the alternative, set aside the order under appeal and refer the case back to the General Court;
- order the Parliament and the Council to pay the appellants' costs;
- order the Commission and the Kingdom of the Netherlands to bear their own costs.

26 The Council contends that the Court should:

- dismiss the appeal;
- order the appellants jointly and severally to pay the costs.

27 The Parliament contends that the Court should:

- dismiss the appeal;
- order the appellants to pay the costs.

28 The Commission requests that the Court dismiss the appeal and order the appellants to pay the costs.

29 The Kingdom of the Netherlands has not submitted a statement in intervention.

#### **The appeal**

30 The appellants put forward four grounds in support of their appeal. The first ground of appeal concerns an error in law in the interpretation and application of the fourth paragraph of Article 263 TFEU. It is divided into two parts. By their second ground of appeal, the appellants claim that the General Court was in breach of its obligation to state reasons. The third ground of appeal is that the General Court disregarded Article 47 of the Charter and Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'). Last, by their fourth ground of appeal, the appellants consider that the General Court distorted the clear sense of the evidence.

#### *The first ground of appeal*

The first part of the first ground of appeal

– Arguments of the parties

31 By the first part of the first ground of appeal, the appellants consider that the General Court, in its interpretation of the concept of ‘regulatory act’ provided for in the fourth paragraph of Article 263 TFEU and, in particular, in that it excluded from the scope of that concept legislative acts, such as the contested regulation, erred in law.

32 According to the appellants, the distinction made by the General Court between legislative acts and regulatory acts is not supported by the wording used in the FEU Treaty, in particular, in Articles 288 TFEU, 289 TFEU and 290 TFEU. Those provisions distinguish between legislative acts and non-legislative acts. Further, as opposed to what was held by the General Court, the concept of ‘regulatory act’ covers not only some, but all, acts of general application, and consequently the literal interpretation carried out by the General Court in paragraphs 41 to 48 of the order under appeal is erroneous.

33 The appellants argue that the distinction made by the General Court leads to a situation where only recommendations and opinions adopted by the Parliament and/or the Council can be deemed to be regulatory acts, given that legislative acts encompass regulations, directives and decisions adopted by the Parliament and the Council, whereas delegated acts encompass acts adopted by the Commission. However, recommendations and opinions are not among the acts listed in the first paragraph of Article 263 TFEU which can be the subject matter of an action for annulment.

34 If it had been the intention of the draftsmen of the Treaty of Lisbon to use the term ‘regulatory act’ in the fourth paragraph of Article 263 TFEU as meaning the opposite of ‘legislative act’, use would instead have been made of the concept of ‘delegated act’ within the meaning of Article 290 TFEU. The reason why the Treaty draftsmen used the term ‘regulatory act’ is because what they had in mind were acts other than legislative or non-legislative acts. Furthermore, the implementing acts provided for in Article 291 TFEU are not covered by the distinction made by the General Court.

35 Consequently, the interpretation made by the General Court of the term ‘regulatory act’, as opposed to the term ‘legislative act’, nullifies the possibility, introduced by the Treaty of Lisbon, of a right of action against regulatory acts under the conditions stated in the third limb of the fourth paragraph of Article 263 TFEU, the objective of that change having been to open up the conditions of admissibility of actions in respect of natural and legal persons. The effect of such an interpretation is to preclude the bringing of any action by an individual on the basis of the third limb of the fourth paragraph of Article 263 TFEU.

36 The historical interpretation of the term ‘regulatory act’ carried out by the General Court is also erroneous. The Treaty of Lisbon, although it refers in the fourth paragraph of Article 263 TFEU – as did Article III-365(4) of the proposed treaty establishing a Constitution for Europe – to regulatory acts, does not use the classification of legal acts provided for by that proposed treaty, including, inter alia, the concept of ‘European regulation’ as a form of non-legislative act. In the context of the FEU Treaty, regulations can be legislative acts or non-legislative acts.

37 According to the appellants, the fact that the wording of the fourth paragraph of Article 263 TFEU was not altered demonstrates that the concept of ‘regulatory act’ for the purposes of that provision was extended so that it would cover all regulations, whether legislative in nature or not. That teleological interpretation is moreover in line with the original concern both of the authors of the proposed treaty establishing a Constitution for Europe and of those of the Treaty of Lisbon, who wanted to fill the lacunae which had been clearly identified in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002 ECR] I-6677, and in *Commission v Jégo-Quéré*.

38 The Parliament, the Council and the Commission endorse the General Court’s interpretation of the concept of ‘regulatory act’.

39 The Parliament submits that, while it is true that the hierarchy of norms laid down in Article I-33 of the proposed treaty establishing a Constitution for Europe, which distinguished between legislative acts, on the one hand, and regulatory acts, on the other, has not been carried over to the FEU Treaty, Article 289(3) TFEU clearly defines legislative acts as those adopted following the ordinary or special legislative procedure. Further, Article

263 TFEU distinguishes in its first and fourth paragraphs ‘legislative acts’ from ‘regulatory acts’. Those two concepts must be reconciled in order to preserve the full *effet utile* of Article 263 TFEU.

40 The Parliament maintains that the appellants’ complaint in relation to the General Court’s finding that not all acts of general application can be considered to be regulatory acts contains no specific criticism, but repeats the arguments already put forward at first instance. Accordingly the appellants’ arguments in relation thereto are in any event inadmissible.

41 As regards the appellants’ argument that the General Court’s interpretation of the concept of ‘regulatory act’ leaves that concept bereft of content, the Parliament, the Council and the Commission submit that that concept encompasses various categories of legal acts, including, inter alia, delegated acts and implementing acts of general application, adopted on the basis of Articles 290 TFEU or 291 TFEU, such acts constituting the overwhelming majority of European Union legal acts. It follows that the appellants’ argument that the authors of the FEU Treaty would have used the term ‘delegated’, if they had wanted to refer to acts of general application which are not legislative acts, is misconceived. The Commission adds that the concept of ‘regulatory act’ also covers non-legislative acts of general application adopted on specific legal bases, such as Articles 43(3) TFEU, 109 TFEU and 215(1) TFEU and also acts of general application adopted by the various other ‘bodies, offices or agencies’ referred to in the first paragraph of Article 263 TFEU.

42 As regards the origins of the fourth paragraph of Article 263 TFEU, the Parliament considers that since the appellants present no specific criticism of the order under appeal they are asking the Court to re-examine the arguments put forward at first instance, which is, however, inadmissible in an appeal. In any event, the arguments put forward within the appeal are unfounded. In that regard, the Parliament and the Commission submit that it is patent that the Convention on the Future of Europe had chosen the term ‘regulatory act’ with the intention of excluding legislative acts and that the authors of the Treaty of Lisbon wanted to maintain the same distinction between legislative acts and regulatory acts for the purposes of legal remedies.

43 As regards the General Court’s teleological approach, the Commission states that it cannot simply be inferred from the purpose behind the introduction of the third limb of the fourth paragraph of Article 263 TFEU, namely to extend the scope of the rules of *locus standi*, that the concept of ‘regulatory act’ must extend to legislative acts.

44 According to the Parliament, the General Court’s interpretation of the concept of ‘regulatory act’ within the meaning of the fourth paragraph of Article 263 TFEU does not run counter to the objective pursued by that provision, which is to allow direct actions to be brought against non-legislative acts of general application on conditions which are less strict than those applying to actions brought on the basis of the fourth paragraph of Article 230 EC. By enabling natural or legal persons to institute proceedings directly against regulatory acts which are of direct concern to them and do not entail implementing measures, Article 263 TFEU fully remedies, in the opinion of the Parliament and the Council, the situation identified in *Unión de Pequeños Agricultores v Council* and *Commission v Jégo-Quéré*. It may be noted that in *Commission v Jégo-Quéré* the act at issue was a Commission implementing regulation which would, if the General Court’s analysis is followed, clearly have to be categorised as a ‘regulatory act’ within the meaning of the fourth paragraph of Article 263 TFEU. The Council states, further, that, in accordance with the case-law of the General Court and the Court, the Member States must help to ensure that the system of legal remedies established by the Treaties is comprehensive.

– Findings of the Court

45 By the first part of their first ground of appeal, the appellants complain, in essence, that the General Court erred in law in holding that the concept of ‘regulatory act’, to be found in the fourth paragraph of Article 263 TFEU, does not encompass legislative acts within the meaning of Article 289(3) TFEU, such as the contested regulation.

46 It must, first, be recalled that, according to settled case-law, it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. An appeal which merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court, including those based on facts expressly rejected by the

General Court, does not satisfy the requirement to state reasons under those provisions (see, inter alia, Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraphs 15 and 16, and Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 24 and the case-law cited).

47 However, provided that the appellant challenges the interpretation or application of European Union law by the General Court, the points of law examined at first instance may be argued again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (Case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, paragraph 51 and the case-law cited).

48 In this case, it must be held that by the first part of their first ground of appeal the appellants are not seeking to obtain a mere re-examination of the application submitted to the General Court. By that first part, the appellants clearly indicate the passages in the order under appeal which they consider to be vitiated by errors in law and the legal arguments on which they rely in support of their appeal, including, in particular, those relating to the various methods of interpretation applied by the General Court. Accordingly, contrary to what was contended by the Parliament, the arguments already put forward at first instance are not merely repeated, but are in fact directed against an essential part of the reasons stated in the order under appeal, and, consequently, enable the Court to undertake its review.

49 The first part of the first ground of appeal is therefore admissible.

50 As regards the merits of this part of the first ground of appeal, it must be observed that, in accordance with the Court's settled case-law, the interpretation of a provision of European Union law requires that account be taken not only of its wording and the objectives it pursues, but also its context and the provisions of European Union law as a whole (see, to that effect, Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 20). The origins of a provision of European Union law may also provide information relevant to its interpretation (see, to that effect, the judgment of 27 November 2012 in Case C-370/12 *Pringle* [2012] ECR, paragraph 135).

51 Accordingly, it is necessary to examine, on the basis of those methods of interpretation, whether the General Court erred in law in concluding, in paragraph 56 of the order under appeal, that the concept of 'regulatory act' within the meaning of the fourth paragraph of Article 263 TFEU refers to acts of general application other than legislative acts.

52 The first paragraph of Article 263 TFEU identifies the European Union acts which may be the subject matter of an action for annulment before the Courts of the European Union, namely (i) legislative acts and (ii), as correctly stated by the General Court in paragraph 44 of the order under appeal, other binding acts intended to produce legal effects vis-à-vis third parties, and the latter may be individual acts or acts of general application. Those acts may, in accordance with the second paragraph of Article 263 TFEU, be the subject matter of an action brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

53 Next, Article 263 TFEU makes a clear distinction between the right of the European Union institutions and Member States to institute proceedings, on the one hand, and the right of natural and legal persons to do so, on the other. Thus, the second paragraph of Article 263 TFEU grants the European Union institutions there listed and the Member States the right to challenge, by an action for annulment, the legality of any act covered by the first paragraph, and it is not a condition of that right being exercised that any legal interest in bringing proceedings is established (see the judgment of 5 September 2012 in Case C-355/10 *Parliament v Council* [2012] ECR, paragraph 37 and the case-law cited). Further, in accordance with the third paragraph of Article 263, the institutions and the Committee listed there may bring before the Court an action for annulment of those acts, provided that the action is brought for the purpose of protecting their prerogatives.

54 On the other hand, as regards the right of natural and legal persons to institute proceedings, the fourth paragraph of Article 263 TFEU provides that '[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

55 First, it must be stated that the first two limbs of the fourth paragraph of Article 263 TFEU correspond with those which were laid down, before the entry into force of the Treaty of Lisbon, by the EC Treaty, in the fourth paragraph of Article 230 thereof (see, in relation to the latter provision, *Unión de Pequeños Agricultores v Council*, paragraphs 34 to 37).

56 Given the reference to ‘acts’ in general, the subject matter of those limbs of Article 263 is any European Union act which produces binding legal effects (see, to that effect, Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9; Case C-521/06 P *Athinaiki Techniki v Commission* [2008] ECR I-5829, paragraph 29; Case C-322/09 P *NDSHT v Commission* [2010] ECR I-11911, paragraph 45; and Joined Cases C-463/10 P and C-475/10 P *Deutsche Post v Commission* [2011] ECR I-9639, paragraphs 36 to 38). That concept therefore covers acts of general application, legislative or otherwise, and individual acts. The second limb of the fourth paragraph of Article 263 TFEU specifies that if the natural or legal person who brings the action for annulment is not a person to whom the contested act is addressed, the admissibility of the action is subject to the condition that the act is of direct and individual concern to that person.

57 Secondly, by means of the Treaty of Lisbon, there was added to the fourth paragraph of Article 263 TFEU a third limb which relaxed the conditions of admissibility of actions for annulment brought by natural and legal persons. Since the effect of that limb is that the admissibility of actions for annulment brought by natural and legal persons is not subject to the condition of individual concern, it renders possible such legal actions against ‘regulatory acts’ which do not entail implementing measures and are of direct concern to the applicant.

58 As regards the concept of ‘regulatory act’, it is apparent from the third limb of the fourth paragraph of Article 263 TFEU that its scope is more restricted than that of the concept of ‘acts’ used in the first and second limbs of the fourth paragraph of Article 263 TFEU, in respect of the characterisation of the other types of measures which natural and legal persons may seek to have annulled. The former concept cannot, as the General Court held correctly in paragraph 43 of the order under appeal, refer to all acts of general application but relates to a more restricted category of such acts. To adopt an interpretation to the contrary would amount to nullifying the distinction made between the term ‘acts’ and ‘regulatory acts’ by the second and third limbs of the fourth paragraph of Article 263 TFEU.

59 Further, it must be observed that the fourth paragraph of Article 263 TFEU reproduced in identical terms the content of Article III-365(4) of the proposed treaty establishing a Constitution for Europe. It is clear from the *travaux préparatoires* relating to that provision that while the alteration of the fourth paragraph of Article 230 EC was intended to extend the conditions of admissibility of actions for annulment in respect of natural and legal persons, the conditions of admissibility laid down in the fourth paragraph of Article 230 EC relating to legislative acts were not however to be altered. Accordingly, the use of the term ‘regulatory act’ in the draft amendment of that provision made it possible to identify the category of acts which might thereafter be the subject of an action for annulment under conditions less stringent than previously, while maintaining ‘a restrictive approach in relation to actions by individuals against legislative acts (for which the “of direct and individual concern” condition remains applicable)’ (see, inter alia, Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003, CONV 636/03, paragraph 22, and Cover note from the Praesidium to the Convention of 12 May 2003, CONV 734/03, p. 20).

60 In those circumstances, it must be held that that the purpose of the alteration to the right of natural and legal persons to institute legal proceedings, laid down in the fourth paragraph of Article 230 EC, was to enable those persons to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts.

61 The General Court was therefore correct to conclude that the concept of ‘regulatory act’ provided for in the fourth paragraph of Article 263 TFEU does not encompass legislative acts.

62 The first part of the first ground of appeal must, therefore, be rejected as unfounded.

The second part of the first ground of appeal

– Arguments of the parties

63 By the second part of the first ground of appeal, the appellants submit that the General Court committed errors in law in its examination of whether the contested regulation was of direct and individual concern to them.

64 As regards the condition that the act of which annulment is sought should be of direct concern, the appellants consider that the General Court erred in law in holding that the contested regulation is of direct concern only to those four appellants who are active in placing seal products on the European Union market. In paragraph 82 of the order under appeal, concerning the situation of Ms Ariak, the General Court considered that the contested regulation is of direct concern only to the appellants who are active in placing on the market seal products other than seal products allegedly covered by the exception in favour of the Inuits. However, it is of no relevance whether the products which Ms Ariak places on the market are or are not covered by the exception in order for her to be directly concerned by that regulation. The General Court thus added an additional factor to the condition of direct concern.

65 As regards the condition that the act of which annulment is sought should be of individual concern, the appellants consider that the General Court erred in law by applying a restrictive interpretation of that condition. The Member States were inspired to modify the fourth paragraph of Article 230 EC in such a way as to extend the conditions of admissibility in respect of natural and legal persons following the judgments in *Unión de Pequeños Agricultores v Council* and *Commission v Jégo-Quéré*. In the light of that development, the Court should review the restrictive interpretation of the condition of individual concern, established by *Plaumann v Commission*. If the Court applies the test of ‘substantial adverse effect’ on the appellants’ interests caused by the contested regulation, as proposed by Advocate General Jacobs in point 60 of his Opinion in the case which gave rise to the judgment in *Unión de Pequeños Agricultores v Council*, the Court will come to the conclusion that that regulation is of individual concern to the appellants in this case.

66 The Parliament, the Council and the Commission consider that the Treaty of Lisbon did not alter the content of the conditions that the act of which annulment is sought should be of direct and individual concern. There is no indication to that effect in the Treaty or in the *travaux préparatoires* which would necessitate a modification of existing case-law on the matter. The General Court did not err in law by interpreting those conditions in the same way as before the entry into force of that treaty.

67 The Council considers, further, that the appellants’ assertions in relation to how the fact of being individually concerned should be understood have the effect, in practice, that any person to whom the act of which annulment is sought is of direct concern also has to be regarded as a person to whom that act is of individual concern. Accordingly, the distinction established between regulatory acts and legislative acts becomes largely irrelevant.

– Findings of the Court

68 By the second part of their first ground of appeal, the appellants complain, in essence, that the General Court erred in law in holding that they do not satisfy the conditions laid down in the second limb of the fourth paragraph of Article 263 TFEU governing the bringing of an action for annulment, in that the contested regulation is not of direct and individual concern to them.

69 As regards the condition that the act of which annulment is sought should be of individual concern, it must be noted that while the appellants do not claim that the General Court erroneously applied the assessment criteria deriving from the Court’s settled case-law since *Plaumann v Commission* in relation to that condition of admissibility, they explicitly ask that the Court should review those assessment criteria and replace them with a criterion of ‘substantial adverse effect’.

70 In that regard, it can be seen that the second limb of the fourth paragraph of Article 263 TFEU corresponds, as stated in paragraph 55 of this judgment, to the second limb of the fourth paragraph of Article 230 EC. The wording of that provision has not been altered. Further, there is nothing to suggest that the authors of the Treaty of Lisbon had any intention of altering the scope of the conditions of admissibility already laid down in the fourth paragraph of Article 230 EC. Moreover, it is clear from the *travaux préparatoires* relating to Article III-365(4) of the proposed treaty establishing a Constitution for Europe that the scope of those conditions was not to be altered (see, inter alia, Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003, CONV 636/03, paragraph 23).

71 In those circumstances, it must be held that the content of the condition that the act of which annulment is sought should be of individual concern, as interpreted by the Court in its settled case-law since *Plaumann v Commission*, was not altered by the Treaty of Lisbon. It must therefore be held that the General Court did not err in law in applying the assessment criteria laid down by that case-law.

72 According to that case-law, natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (see *Plaumann v Commission*; Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 36; and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* [2011] ECR I-4727, paragraph 52).

73 In this case, it is true that the General Court confined itself in paragraphs 88 to 93 of the order under appeal to examining whether the contested regulation was of individual concern to four of the appellants for the purposes of the fourth paragraph of Article 263 TFEU, since that regulation was not, in any event, of direct concern to the other appellants for the purposes of that provision. However, it must be found that none of the appellants are distinguished individually by the contested regulation just as in the case of the person addressed, within the meaning of the settled case-law since *Plaumann v Commission*. The prohibition on the placing of seal products on the market laid down in the contested regulation is worded in general terms and applies indiscriminately to any trader falling within its scope.

74 In those circumstances, there is no need to examine whether the General Court erred in law in holding that only those appellants who are active in the processing and/or marketing of seal products supplied by Inuit and non-Inuit hunters and trappers are directly concerned by the contested regulation, given that any error in law in that regard is immaterial to the outcome of proceedings and does not affect the operative part of the order under appeal.

75 It is apparent, from the actual wording of the fourth paragraph of Article 263 TFEU and from settled case-law, that a natural or legal person is entitled to bring an action for annulment of an act which is not a decision addressed to that person only if the person is not only directly concerned by such an act but also individually concerned by it (see, with regard to Article 230 EC, Case C-167/02 P *Rothley and Others v Parliament* [2004] ECR I-3149, paragraph 25 and the case-law cited).

76 Accordingly, since the conditions that the act of which annulment is sought should be of direct concern and individual concern are cumulative, the consequence, if one of those conditions is not met by an applicant, is that an action brought by him for annulment of that act must be held to be inadmissible.

77 In the light of the foregoing, the second part of the first ground of appeal must be rejected as being unfounded and, consequently, the first ground of appeal as a whole must be rejected.

#### *The second ground of appeal*

##### Arguments of the parties

78 By their second ground of appeal, the appellants claim that the General Court erred in law in not replying specifically and expressly to the arguments put forward in paragraphs 53 to 57 of their observations on the objections of inadmissibility, to the effect that only a broad interpretation of the fourth paragraph of Article 263 TFEU is compatible with Article 47 of the Charter and Articles 6 and 13 of the ECHR.

79 Further, the finding made in paragraph 51 of the order under appeal, that the conditions relating to the institution of proceedings against a regulation 'are expressly laid down' in the fourth paragraph of Article 263 TFEU, cannot be reconciled with the need to undertake a literal, historical and teleological interpretation of that provision. As the General Court carried out such a thorough interpretation of the fourth paragraph of Article 263 TFEU, it could not reject the appellants' arguments by merely declaring that the conditions governing the right to institute proceedings are 'expressly laid down'.

80 According to the Parliament, the Council and the Commission, the response of the General Court to the appellants' arguments was sufficient. The General Court was not required to give separate consideration to

Articles 6 and 13 of the ECHR, given that the meaning and scope of those articles and of Article 47 of the Charter are identical. The Parliament adds that the General Court was under no obligation to respond in detail to the appellants' claims, since the General Court had already rejected on other grounds, in the preceding paragraphs of the order under appeal, the interpretation of the fourth paragraph of Article 263 TFEU put forward by the appellants. The Council maintains, moreover, that even if the General Court did not examine in detail Article 47 of the Charter, the obligation to state reasons was complied with by means of reference to the Court's own case-law, from which it is clearly apparent that the Courts of the European Union cannot disregard the conditions laid down in Article 263 TFEU.

#### Findings of the Court

81 There is no dispute that the General Court replied, in paragraph 51 of the order under appeal, to the appellants' arguments relating to the fundamental right to effective judicial protection, as set out in paragraphs 53 to 57 of their observations on the objection of inadmissibility submitted by the Parliament and the Council. The General Court held, on the basis of the Court's case-law, that the Courts of the European Union cannot, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against a regulation in a way which has the effect of setting aside those conditions, which are expressly laid down by the Treaty, even in the light of the principle of effective judicial protection.

82 In accordance with the Court's settled case-law, the General Court was not required to provide an account which follows exhaustively all the arguments put forward by the parties to the case. According to that case-law, the reasoning of the General Court may be implicit, on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review (see Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland v Commission* [2009] ECR I-6155, paragraph 114 and the case-law cited).

83 In those circumstances, the fact that the General Court, in paragraph 51 of the order under appeal, does not explicitly refer to Articles 6 and 13 of the ECHR, relied on by the appellants, and does not explicitly deal with all the details of their arguments cannot be regarded as constituting a breach of the obligation to state reasons.

84 The same is true of the fact that the General Court concluded, in the same paragraph, that it could not disregard the conditions relating to the institution of proceedings against a regulation which 'are expressly laid down' in the fourth paragraph of Article 263 TFEU, even though it undertook a literal, historical and teleological interpretation of that provision. The General Court ruled on the scope of the concept of 'regulatory act', provided for in the fourth paragraph of Article 263 TFEU, by undertaking a classical interpretation using methods of interpretation recognised by European Union law. To proceed in such a way does not alter the fact that that concept represents a condition of admissibility expressly laid down in the fourth paragraph of Article 263 TFEU, which actions for annulment brought by natural and legal persons must satisfy, and does not mean that the reasoning of the General Court is self-contradictory.

85 It follows from the foregoing that the second ground of appeal is unfounded.

#### *The third ground of appeal*

##### Arguments of the parties

86 By the third ground of appeal, the appellants claim that the General Court's interpretation of the fourth paragraph of Article 263 TFEU is in breach of Article 47 of the Charter and Articles 6 and 13 of the ECHR. The General Court, in its judgment in Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365, stated that a strict interpretation by the Courts of the European Union of the conditions of admissibility of direct actions could not be regarded as guaranteeing to natural and legal persons the right to an effective remedy enabling them to challenge the legality of acts of general application which directly affect their legal situation.

87 The interpretation of the fourth paragraph of Article 263 TFEU in the order under appeal is, according to the appellants, even a step backward by comparison with the situation which existed before the entry into force of the Treaty of Lisbon. Before the entry into force of that Treaty, the Courts of the European Union had applied a material criterion in order to determine whether natural and legal persons had standing to bring proceedings for annulment, whereas, now, a purely formal criterion is applied.

88 The Parliament, the Council and the Commission consider that the appellants have the benefit of effective judicial protection given that they have the right to institute proceedings against Regulation No 737/2010, which is the implementing measure in respect of the contested regulation and which they challenged in the case which gave rise to the judgment of 25 April 2013 in Case T-526/10 *Inuit Tapiriit Kanatami and Others v Commission* [2013] ECR, enabling them to put forward the same substantive arguments as were presented before the General Court in this case. Moreover, with reference to the Explanations on the Charter relating to Article 47 thereof, the Council and the Commission argue that that article was 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.

#### Findings of the Court

89 By the third ground of appeal, the appellants claim, in essence, that the interpretation adopted by the General Court of the fourth paragraph of Article 263 TFEU is in breach of Article 47 of the Charter in that it enables natural and legal persons to bring actions for annulment of European Union legislative acts solely where those acts are of direct and individual concern to them, within the meaning of the fourth paragraph of Article 263 TFEU.

90 First, it must be recalled that judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, by the Court of Justice and the courts and tribunals of the Member States (see, to that effect, Opinion of the Court 1/09 [2011] ECR I-1137, paragraph 66).

91 Further, the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, the general principles of law and fundamental rights (see, to that effect, Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 44).

92 To that end, the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union (see Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23; *Unión de Pequeños Agricultores v Council*, paragraph 40; *Reynolds Tobacco and Others v Commission*, paragraph 80; and Case C-59/11 *Association Kokopelli* [2012] ECR, paragraph 34).

93 Accordingly, natural or legal persons who cannot, by reason of the conditions of admissibility stated in the fourth paragraph of Article 263 TFEU, challenge directly European Union acts of general application do have protection against the application to them of those acts. Where responsibility for the implementation of those acts lies with the European Union institutions, those persons are entitled to bring a direct action before the Courts of the European Union against the implementing measures under the conditions stated in the fourth paragraph of Article 263 TFEU, and to plead, pursuant to Article 277 TFEU, in support of that action, the illegality of the general act at issue. Where that implementation is a matter for the Member States, such persons may plead the invalidity of the European Union act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU (see, to that effect, *Les Verts v Parliament*, paragraph 23).

94 In that context, it must be emphasised that, in proceedings before the national courts, individual parties have the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a European Union act of general application, by pleading the invalidity of such an act (see, to that effect, *Unión de Pequeños Agricultores v Council*, paragraph 42, and *E and F*, paragraph 45).

95 It follows that requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, means for reviewing the legality of European Union acts (see Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 18, and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 103).

96 In that regard, it must be borne in mind that where a national court or tribunal considers that one or more arguments for invalidity of a European Union act, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity, the Court alone having jurisdiction to declare a European Union act invalid (Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraphs 27 and 30 and the case-law cited).

97 Having regard to the protection conferred by Article 47 of the Charter, it must be observed that that article 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, as is apparent also from the Explanation on Article 47 of the Charter, which must, in accordance with the third subparagraph of Articles 6(1) TEU and Article 52(7) of the Charter, be taken into consideration for the interpretation of the Charter (see the judgment of 22 January 2013 in Case C-283/11 *Sky Österreich* [2013] ECR, paragraph 42, and the judgment of 18 July 2013 in Case C-426/11 *Alemo-Herron and Others* [2013] ECR, paragraph 32).

98 Accordingly, the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty (see, to that effect, *Unión de Pequeños Agricultores v Council*, paragraph 44, and *Commission v Jégo-Quéré*, paragraph 36).

99 As regards the role of the national courts and tribunals, referred to in paragraph 90 of this judgment, it must be recalled that the national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed (Opinion of the Court 1/09, paragraph 69).

100 It is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection (*Unión de Pequeños Agricultores v Council*, paragraph 41, and *Commission v Jégo-Quéré*, paragraph 31).

101 That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States ‘shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law’.

102 In that regard, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to designate, with due observance of the requirements stemming from paragraphs 100 and 101 of this judgment and the principles of effectiveness and equivalence, the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions brought to safeguard rights which individuals derive from European Union law (see, to that effect, inter alia, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 44 and the case-law cited; Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 31; and Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraphs 47 and 61).

103 As regards the remedies which Member States must provide, while the FEU Treaty has made it possible in a number of instances for natural and legal persons to bring a direct action, where appropriate, before the Courts of the European Union, neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law (Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 40).

104 The position would be otherwise only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully (see, to that effect, *Unibet*, paragraphs 41 and 64 and the case-law cited).

105 As regards the appellants’ argument that the interpretation adopted by the General Court of the concept of ‘regulatory act’, provided for in the fourth paragraph of Article 263 TFEU, creates a gap in judicial protection, and is incompatible with Article 47 of the Charter in that its effect is that any legislative act is virtually immune to judicial review, it must be stated that the protection conferred by Article 47 of the Charter does not require that an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the European Union.

106 Last, neither that fundamental right nor the second subparagraph of Article 19(1) TEU require that an individual should be entitled to bring actions against such acts, as their primary subject matter, before the national courts or tribunals.

107 In those circumstances, the third ground of appeal must be rejected as being unfounded.

### *The fourth ground of appeal*

#### Arguments of the parties

108 By their fourth ground of appeal, the appellants claim that the clear sense of the evidence was distorted. In that regard, they claim that the General Court, on a number of occasions, distorted the sense of their arguments relating to the extent to which legislative acts are covered by the concept of ‘regulatory act’ provided for in the fourth paragraph of Article 263 TFEU. In particular, the General Court confused their arguments with those of the Parliament and the Council. Accordingly, the conclusion reached by the General Court is vitiated by a number of manifest errors of assessment, and consequently the Court should set aside the order under appeal, or at least that part of it dealing with the interpretation of that concept of ‘regulatory act’, and should itself examine the appellants’ arguments in that regard.

109 The Parliament considers that this ground of appeal is manifestly inadmissible. In reality, the appellants are seeking to obtain a re-examination of the arguments relied on at first instance. In any event, this ground of appeal is unfounded given that the General Court did not incorrectly interpret the appellants’ arguments. Further, the appellants have not shown that the alleged errors had any effect on the General Court’s finding that the contested regulation is not a ‘regulatory act’ for the purposes of Article 263 TFEU.

110 The Council and the Commission consider that this ground of appeal should be rejected in the light of the fact that the appellants do not refer to any facts or evidence the sense of which might have been distorted by the General Court.

#### Findings of the Court

111 By their fourth ground of appeal, the appellants claim, in essence, that some of their arguments put forward before the General Court were distorted and seek, for that reason, to call into question the conclusion of the General Court that the concept of ‘regulatory act’ within the meaning of the fourth paragraph of Article 263 TFEU does not encompass legislative acts.

112 In this case, however, as is apparent from paragraph 61 of this judgment, the General Court was right to hold that the concept of ‘regulatory act’ does not encompass legislative acts. Accordingly, even if the General Court had distorted some of the appellants’ arguments, such distortion would not affect the operative part of the order under appeal and cannot therefore lead to the setting aside of that order.

113 In those circumstances, the fourth ground of appeal must be rejected.

114 It follows from all the foregoing that, since none of the grounds of appeal put forward by the appellants have been upheld, the appeal must be dismissed in its entirety.

#### Costs

[...]

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

1. **Dismisses the appeal;**
2. **Orders Inuit Tapiriit Kanatami, Nattivak Hunters and Trappers Association, Pangnirtung Hunters’ and Trappers’ Association, Mr Jaypootie Moesesie, Mr Allen Kooneeliusie, Mr Toomasie Newkingnak, Mr David Kuptana, Ms Karliin Aariak, Canadian Seal Marketing Group, Ta Ma Su Seal Products, Inc., Fur Institute of Canada, NuTan Furs, Inc., GC Rieber Skinn AS, Inuit Circumpolar Council Greenland (ICC-Greenland), Mr Johannes Egede and Kalaallit Nunaanni Aalisartut Piniartullu Kattuffiat (KNAPK) to bear their own costs and to pay those incurred by the European Parliament and the Council of the European Union;**
3. **Orders the European Commission to bear its own costs.**

## Case C-274/12, *Telefónica SA v European Commission*

In Case C-274/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 1 June 2012,

**Telefónica SA**, established in Madrid (Spain), represented by J. Ruiz Calzado and J. Domínguez Pérez, abogados, and M. Núñez Müller, Rechtsanwalt,

appellant,

the other party to the proceedings being:

**European Commission**, represented by P. Němečková and C. Urraca Caviedes, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz, E. Juhász and A. Borg Barthet, Presidents of Chambers, G. Arestis, E. Levits, A. Arabadjiev, A. Prechal, E. Jarašiūnas and C. Vajda (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

### **Judgment**

1 By its appeal, Telefónica SA ('Telefónica') asks the Court to set aside the order of the General Court of the European Union of 21 March 2012 in Case T-228/10 *Telefónica v Commission* ('the order under appeal'), by which the General Court dismissed as inadmissible its action for annulment of Article 1(1) of Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48; 'the contested decision').

### **Background to the dispute**

2 Article 12(5) of Law 43/1995 of 27 December 1995 on corporation tax (BOE No 310 of 28 December 1995, p. 37072) provided that the acquisition of a shareholding in a company not established in Spain could, under certain conditions, result in financial goodwill that was capable of being amortised for up to 20 years, thereby reducing the acquiring company's tax burden ('the scheme at issue').

3 The European Commission took the view that the scheme at issue, which did not apply to the acquisition of shareholdings in companies established in Spain, constituted State aid within the meaning of Article 87(1) EC, and it accordingly initiated the formal investigation procedure in accordance with Article 88(2) EC by a decision of 10 October 2007 inviting the Kingdom of Spain and the potential beneficiaries of that scheme to submit their comments.

4 On completion of the procedure, the Commission adopted the contested decision.

5 Article 1(1) of the contested decision states that the scheme at issue was put into effect in breach of Article 88(3) EC and declares it incompatible with the common market.

6 However, the Commission acknowledged that it had, before the initiation of the formal investigation procedure and as a result of statements of two Commissioners to the European Parliament, provided specific, unconditional and consistent assurances of a nature such that the beneficiaries of the scheme at issue could entertain justified hopes that it was lawful, in the sense that it did not fall within the scope of the State aid rules because it was not selective. Accordingly, the Commission concluded that those beneficiaries had a legitimate expectation that no aid would be recovered and it therefore decided that advantages granted by 21 December 2007, the date on which the Commission's decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union*, could be preserved subject to certain conditions.

7 That is the reason why Article 1(2) of the contested decision provides that the scheme at issue can continue to apply, on the basis of the principle of the protection of legitimate expectations, to shareholdings acquired by that date.

8 Under Article 4(1) of the contested decision, the Kingdom of Spain is to recover the incompatible aid referred to in Article 1(1) thereof from the beneficiaries whose rights in foreign companies, acquired in the context of intra-Community acquisitions, do not fulfil the conditions described in Article 1(2).

9 Article 5 of the contested decision provides that recovery of the aid in question is to be immediate and effective and that the Kingdom of Spain is to ensure that that decision is implemented within four months of the date of notification thereof.

10 Finally, Article 6 of the contested decision provides that the Kingdom of Spain is required to submit certain information to the Commission and to keep it informed of the progress of the national measures taken to implement that decision. In particular, under Article 6(1)(a) the Kingdom of Spain is required to submit to the Commission the list of beneficiaries that received aid under the scheme at issue. It is undisputed that Telefónica appeared on that list.

11 In 2005 and 2006 Telefónica had acquired two shareholdings – in a company established in the Czech Republic and in another company whose seat was in the United Kingdom – with the benefit of the scheme at issue and in both cases those acquisitions took place before the date laid down in Article 1(2) of the contested decision.

#### **Procedure before the General Court and the order under appeal**

12 In its action against the contested decision, brought on 21 March 2010, Telefónica claimed that Article 1(1) of the contested decision should be annulled.

13 By separate document lodged at the Registry of the General Court on 30 September 2010, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the General Court. It contended that the action was inadmissible on the ground that Telefónica had not shown either that it had a legal interest in bringing proceedings or that it was individually concerned by the contested decision. Telefónica submitted written observations on that objection of inadmissibility.

14 By the order under appeal, the General Court dismissed Telefónica's action as inadmissible on the basis of the second of the two pleas of inadmissibility raised by the Commission. The General Court held, in paragraph 41 of the order under appeal, that Telefónica is not individually concerned by the contested decision within the meaning of the fourth paragraph of Article 263 TFEU and, in paragraph 45 of the order, that that decision cannot be classified as an act not entailing implementing measures within the meaning of the final limb of that provision. Consequently, the General Court dismissed Telefónica's action without examining the first plea of inadmissibility, to the effect that Telefónica had no interest in bringing proceedings.

#### **Forms of order sought**

15 Telefónica claims that the Court should:

- set aside the order under appeal;
- declare the action for annulment in Case T-228/10 admissible and refer the case back to the General Court for it to give judgment on the substance of the dispute; and
- order the Commission to pay the costs ‘of the proceedings at both instances relating to admissibility’.

16 The Commission contends that the appeal should be dismissed and Telefónica ordered to pay the costs.

### **The appeal**

17 Telefónica relies on three pleas in law in support of its appeal. First, it complains that the General Court infringed its right to effective judicial protection. Second, it contends that the General Court misinterpreted the fourth paragraph of Article 263 TFEU in holding that it is not individually concerned by the contested decision. Third, in its submission, the General Court interpreted incorrectly the concept of an act not entailing implementing measures within the meaning of the final limb of that provision.

18 The question whether Telefónica’s right to effective judicial protection is affected by the order under appeal arises only if the General Court declared its action inadmissible on the basis of a correct interpretation of the fourth paragraph of Article 263 TFEU. Consequently, the first plea relied upon by Telefónica in support of its appeal should not be examined until after its two other pleas, concerning errors of law committed by the General Court in interpreting that provision.

19 It is also to be recalled that the fourth paragraph of Article 263 TFEU provides for two situations in which natural or legal persons are accorded standing to institute proceedings against an act not addressed to them. First, such proceedings may be instituted if the act is of direct and individual concern to them. Second, they may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them.

20 If the contested decision were to be regarded as a regulatory act not entailing implementing measures, as Telefónica submits in its third plea, there would be no need for it to show that, as it contends in its second plea, it is individually concerned by that decision. It is accordingly appropriate to examine the third plea first.

### *The third plea*

#### Arguments of the parties

21 Telefónica contends that the General Court erred in law in holding that State aid decisions such as the contested decision entail implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU.

22 Telefónica states that the decision declaring an aid scheme incompatible with the common market has direct effect and does not require implementing measures in that it immediately renders the aid granted unlawful and normally entails an obligation on the Member State concerned to recover the aid. The measures subsequent to such a decision that may be necessary in order to discharge the obligation to recover the aid from certain beneficiaries, as referred to in Article 6(2) of the contested decision and taken into account by the General Court in paragraph 43 of the order under appeal, concern only an ancillary obligation that cannot call into question the direct effect of the articles of the operative part of that decision. In Telefónica’s submission, if it were accepted, as the General Court considers, that any measure, however minor it may be, that a Member State is required to adopt in order to give effect to a European Union act constitutes an implementing measure within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, a wide variety of regulatory acts would be automatically excluded from the scope of that provision, contrary to the objective pursued by the European Union legislature of facilitating access to the General Court for persons whose interests are affected by non-legislative acts adopted by the European Union institutions.

23 According to the Commission, the General Court did not err in law in concluding that the contested decision cannot be classified as an act not entailing implementing measures.

24 As the concept of implementing measures is not defined in the Treaties, it seems logical to interpret it literally, that is to say, to consider that it refers to any legal act necessary for implementation of another legal act. The literal meaning of that concept is equivalent to that adopted by Advocate General Jacobs in point 43 of his Opinion in Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 in order to point out a possible gap in the European Union's judicial system. According to the Commission, it is apparent from the documents relating to the work of the European Convention for the drawing up of a Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1) that, when the provision which subsequently became the final limb of the fourth paragraph of Article 263 TFEU was drawn up, the founders' intention was to fill that possible gap in the European Union's judicial system. The Commission considers that the relaxing of the conditions relating to standing to bring proceedings thus reflected the intention that individuals should have a direct legal remedy against acts of general application, while, however, restricting that remedy to situations in which it is impossible for those individuals to contest the validity of an implementing act.

25 The Commission adds that, where a regulatory act requires an implementing measure, be it a national measure or a measure adopted at European Union level, the judicial protection of individuals is ensured because they can contest the legality of the implementing measure while raising, where appropriate, a plea of illegality relating to the basic regulatory act upon which such a measure is founded. It is therefore unnecessary for them to have standing to challenge the basic act directly.

26 As regards the contested decision, there is no doubt that a decision requiring a Member State to recover aid declared incompatible with the common market requires implementing measures. Such a decision is addressed solely to the Member State concerned and cannot give rise to an obligation of direct payment on the beneficiaries. The Commission recalls in this regard that, in accordance with the second sentence of the fourth paragraph of Article 288 TFEU, a decision which specifies those to whom it is addressed is to be binding only on them. It considers that, in order for an obligation to apply to the beneficiaries, it is necessary for the Member State to adopt implementing measures consisting in their being required to refund the aid that has been paid improperly. Furthermore, the contested decision imposes upon the Kingdom of Spain other implementing measures in addition to the obligation to recover aid, such as the obligation to bring the scheme at issue to an end.

#### Findings of the Court

27 As the Advocate General has observed in points 40 and 41 of her Opinion, the concept of a 'regulatory act which ... does not entail implementing measures', within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, is to be interpreted in the light of that provision's objective, which, as is clear from its origin, consists in preventing an individual from being obliged to infringe the law in order to have access to a court. Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective judicial protection if he did not have a direct legal remedy before the European Union judicature for the purpose of challenging the legality of the regulatory act. In the absence of implementing measures, natural or legal persons, although directly concerned by the act in question, would be able to obtain a judicial review of that act only after having infringed its provisions, by pleading that those provisions are unlawful in proceedings initiated against them before the national courts.

28 It should be explained in this regard, first, that where a regulatory act entails implementing measures, judicial review of compliance with the European Union legal order is ensured irrespective of whether those measures are adopted by the European Union or the Member States. Natural or legal persons who are unable, because of the conditions governing admissibility laid down in the fourth paragraph of Article 263 TFEU, to challenge a regulatory act of the European Union directly before the European Union judicature are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails.

29 Where responsibility for the implementation of such acts lies with the institutions, bodies, offices or agencies of the European Union, natural or legal persons are entitled to bring a direct action before the European Union judicature against the implementing acts under the conditions stated in the fourth paragraph of Article 263 TFEU, and to plead in support of that action, pursuant to Article 277 TFEU, the illegality of the basic act at issue. Where that implementation is a matter for the Member States, those persons may plead the invalidity of the basic act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court

of Justice, pursuant to Article 267 TFEU (Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECR, paragraph 93).

30 Second, as the Advocate General has observed in point 48 of her Opinion, the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the final limb of the fourth paragraph of Article 263 TFEU. It is therefore irrelevant whether the act in question entails implementing measures with regard to other persons.

31 Third, in order to determine whether the measure being challenged entails implementing measures, reference should be made exclusively to the subject-matter of the action and, where an applicant seeks only the partial annulment of an act, it is solely any implementing measures which that part of the act may entail that must, as the case may be, be taken into consideration.

32 It is in the light of those explanations that the third plea relied upon by Telefónica in support of its appeal should be examined.

33 As the Advocate General has observed in point 33 of her Opinion, Telefónica's action was concerned solely with challenging the declaration in Article 1(1) of the contested decision that the scheme at issue is partially incompatible with the common market, and did not criticise the recovery of the aid, ordered in Article 4(1) of that decision, or the other directions issued to the Kingdom of Spain in Article 6(2) thereof.

34 First, as the Advocate General has observed in point 48 of her Opinion, the declaration in Article 1(1) of the contested decision that the scheme at issue is partially incompatible with the common market is addressed solely to the Member State to which that decision is addressed, namely the Kingdom of Spain, and therefore the decision is not binding on other persons, in accordance with the fourth paragraph of Article 288 TFEU.

35 Second, Article 1(1) of the contested decision is concerned exclusively with declaring the scheme at issue incompatible with the common market. It does not define the specific consequences which that declaration has for each taxpayer. Those consequences will be embodied in administrative documents such as a tax notice, which constitutes as such an implementing measure that Article 1(1) of the contested decision 'entails' within the meaning of the final limb of the fourth paragraph of Article 263 TFEU.

36 Consequently, the General Court was correct in holding, in paragraph 44 of the order under appeal, that the measures for giving effect to the decision as to incompatibility – including in particular the measure consisting of rejection of an application for grant of the tax advantage at issue, a rejection which Telefónica will also be able to contest before the national courts – are implementing measures in respect of the contested decision.

37 Such a finding in itself justifies rejection of Telefónica's line of argument before the General Court that the contested decision does not entail implementing measures.

38 The General Court was therefore correct in holding, in paragraph 45 of the order under appeal, that, irrespective of whether the contested decision is a regulatory act, the conditions governing admissibility laid down in the final limb of the fourth paragraph of Article 263 TFEU are not met in the case in point.

39 In the light of all these considerations, the third plea relied upon by Telefónica in support of its appeal should be dismissed.

#### *The second plea*

##### Arguments of the parties

40 In Telefónica's submission, the General Court erred in law by reason of its overly restrictive interpretation of the concept of an actual beneficiary of an aid scheme that is the subject of a Commission decision, as is clear in particular from Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* [2011] ECR I-4727. Telefónica contends that, contrary to what the General Court held in paragraphs 24 and 25 of the order under appeal, the important point is not that a party who has in fact benefited

from the aid in question is among those who must certainly repay aid; instead it would suffice for there to be a risk of his interests being seriously affected, as would be the case if he were led to be required to repay the aid.

41 Telefónica submits that it is exposed on two counts to the risk of having to repay the aid received notwithstanding the Commission's acknowledgment that it entertained legitimate expectations. First, the exception to the obligation to recover, laid down in Article 1(2) and (3) of the contested decision, is the subject of an action for annulment before the General Court, in Case T-207/10 *Deutsche Telekom v Commission* which is pending before it. If that action were to be successful, Telefónica could be obliged to repay the aid that it has received. Second, the finding in the contested decision that the rules concerning the amortisation of goodwill constituted unlawful aid enables third parties in competition with the beneficiaries of the aid to bring actions at national level in order to obtain compensation for any loss suffered.

42 The Commission contends, on the other hand, that the case-law requires two conditions to be met in order for an applicant to be individually concerned in circumstances such as those here. First, the applicant must be an actual recipient of individual aid granted under an aid scheme. Second, he must be obliged to repay the aid in question or, at least, be exposed to the risk of having to repay it. Contrary to Telefónica's assertions, it is not, on the other hand, sufficient that the applicant runs the risk of his interests being, in a more general way, seriously harmed. The Court rejected the proposition that an applicant is individually concerned simply by virtue of being the beneficiary of an aid scheme in Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others v Commission* [1988] ECR 219, paragraph 15, and Case C-6/92 *Federmineraria and Others v Commission* [1993] ECR I-6357, paragraphs 11 to 16.

43 In the present case, there is in any event no risk of Telefónica having to repay the aid that it has received, or even of its interests being seriously harmed, because it was clear, from when the contested decision was adopted, that it would enjoy the benefit of the principle of the protection of legitimate expectations.

#### Findings of the Court

44 The contested decision is not addressed to Telefónica and, as is clear from paragraphs 34 to 36 of the present judgment, it entails implementing measures.

45 Under the fourth paragraph of Article 263 TFEU, natural or legal persons may institute proceedings against an act which is not addressed to them and entails implementing measures only if that act is of direct and individual concern to them.

46 As regards the second of those conditions, that is to say, being individually concerned by the act in question, it is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107; *Comitato 'Venezia vuole vivere' and Others v Commission*, paragraph 52; and *Inuit Tapiriit Kanatami and Others v Parliament and Council*, paragraph 72).

47 As the General Court pointed out in paragraph 28 of the order under appeal, it is also clear from settled case-law that the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it (see, to this effect, Case C-451/98 *Antillean Rice Mills v Council* [2001] ECR I-8949, paragraph 52).

48 This is so in the case of Article 1(1) of the contested decision, whose annulment Telefónica seeks and in the light of which Telefónica's standing to bring proceedings must therefore be examined. Article 1(1) applies to objectively determined situations and produces legal effects with respect to categories of persons viewed generally and in the abstract. Telefónica therefore cannot claim to be individually distinguished by that provision.

49 The sole effect of Article 1(1) of the contested decision is to prevent, in the future, any person from benefiting from the scheme at issue. It is settled case-law that an undertaking cannot, in principle, contest a Commission decision prohibiting an aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in

question and being a potential beneficiary of the scheme (see Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, paragraph 33 and the case-law cited).

50 Accordingly, the General Court was correct in holding, in paragraph 41 of the judgment under appeal, that Telefónica is not individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, by Article 1(1) of the contested decision.

51 It follows from the foregoing that the second plea relied upon by Telefónica in support of its appeal must also be dismissed.

#### *The first plea*

##### Arguments of the parties

52 Telefónica submits that, in dismissing its action as inadmissible, the General Court failed to have regard to its right to effective judicial protection flowing from Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, and from Article 47 of the Charter of Fundamental Rights of the European Union.

53 Telefónica argues in particular that it is not possible for it to obtain a judicial review of Article 1(1) of the contested decision by way of preliminary objection, namely by provoking a dispute with the tax authorities and relying on the scheme at issue, even though it no longer forms part of the legislation in force in Spain, in order that the national court with jurisdiction refers to the Court for a preliminary ruling a question as to validity pursuant to subparagraph (b) of the first paragraph of Article 267 TFEU. That would require it to decide to commit an infringement of the law, that is to say, to act deliberately in a manner contrary to the legislation in force. In voluntarily breaching the law, it would not only be acting contrary to the codes of conduct to which it has agreed to adhere, but would also expose itself to a definite risk that the Spanish tax authorities would decide to exercise their power to impose penalties on the basis of a series of provisions of the applicable tax legislation.

54 The Commission states that, according to the Court's settled case-law, the FEU Treaty, by Articles 263 TFEU and 277 TFEU, on the one hand, and Article 267 TFEU, on the other, has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the European Union judicature.

55 Telefónica's submission that the General Court should have examined the circumstances in which it would in fact have been possible to seek judicial remedies at national level must moreover be rejected. It is not possible to accept an interpretation of the system of remedies to the effect that a direct action for annulment before the European Union judicature will be available where it can be shown, following an examination by the latter of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the European Union measure at issue. Such an interpretation would require the European Union judicature to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of acts of the European Union institutions. It is in any event not possible for an action for annulment before the European Union judicature to be available to an individual even if it turns out that the national procedural rules permit him to contest the validity of the European Union measure at issue only after he has infringed it.

##### Findings of the Court

56 First of all, it is to be remembered that the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights (*Inuit Tapiriit Kanatami and Others v Parliament and Council*, paragraph 91).

57 Judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, by the Court of Justice and the courts and tribunals of the Member States. To that end, the FEU Treaty has established, by Articles 263 TFEU and 277 TFEU, on the one hand, and Article 267 TFEU, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the European Union judicature (*Inuit Tapiriit Kanatami and Others v Parliament and Council*, paragraphs 90 and 92).

58 As is clear from paragraphs 34 to 36 of the present judgment, the contested decision entails implementing measures, in the Member State concerned, with regard to Telefónica.

59 Consequently, even though Telefónica cannot, because of the conditions governing admissibility laid down in the fourth paragraph of Article 263 TFEU, challenge the contested decision directly before the European Union judicature, it can contend that it is invalid before the national courts and cause the latter to refer questions to the Court of Justice for a preliminary ruling, pursuant to Article 267 TFEU, in particular by bringing before the national courts the administrative act which refuses it amortisation under the regime at issue.

60 It follows that the first plea relied upon by Telefónica in support of its appeal must be dismissed.

61 Since none of the three pleas raised by Telefónica in support of its appeal can be successful, the appeal must be dismissed in its entirety.

### **Costs**

62 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded the Court is to make a decision as to the costs. Article 138(1) of those Rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

63 Since the Commission has applied for costs and Telefónica has been unsuccessful, the latter must be ordered to pay the costs.

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

1. **Dismisses the appeal;**
2. **Orders Telefónica SA to pay the costs.**

## LECTURE 10: ENHANCED COOPERATION: A NEW INSTITUTIONAL WAY FORWARD?

One of the most peculiar features of the EU Treaty framework has been the introduction of enhanced cooperation by means of the Treaty of Amsterdam. Enhanced cooperation implies that some Member States decide to fast track EU integration by adopting regulatory measures which will not be joined by all Member States. The establishment of an enhanced cooperation framework occurs in accordance with a specific procedure, resulting in a Council decision granting a mandate to take enhanced cooperation action. On the basis of that mandate, the cooperating Member States can use the EU decision-making procedures and legal instruments to make their cooperation a reality. As such, the cooperation instruments adopted are structured as EU Regulations or other binding decisions. In recent years, harmonisation initiatives in the field of cross-border divorce procedures and a unitary patent have been achieved; proposals for a financial transaction tax and a harmonised patrimonial regime are currently in preparation. In this lecture, we will analyse the features of the enhanced cooperation procedure before framing it in the wider context of EU institutional law. Questions to be raised include how a fast-track EU can be reconciled with the need for overall legal coherence, how the application of enhanced cooperation measures may frustrate such coherence and the role of the Court of Justice in embedding enhanced cooperation initiatives clearly into the EU institutional law framework.

### Materials to read:

- Part VI, Title III, TFEU.
  - Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, [2011] O.J. L76/53 (via eCampus).
  - Council decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax, [2013] O.J. L22/11 (via eCampus).
  - Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax /\* COM/2013/071 final - 2013/0045 (CNS) (via eCampus)
  - Court of Justice, 16 October 2013, Joined Cases C-274/11 and C-295/11, *Spain and Italy v Council*, ECLI:EU:C:2013:240.
  - Court of Justice, 30 April 2014, Case C-209/13, *United Kingdom v Council*, ECLI:EU:C:2014:283.
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- W. Devroe and P. Van Cleynenbreugel, “The EU financial transaction tax project” in B. De Witte, E. Vos and A. Ott (eds.), *Between Flexibility and Disintegration: The State of EU law today* (Cheltenham, Edward Elgar Publishing, forthcoming, 2016) (via eCampus).

### Lecture 10 outline:

- a. Enhanced cooperation as a new EU institutional mechanism
  1. Rationale
  2. Legal setup
  3. Use in the early years

- b. Taking enhanced cooperation more seriously: unitary patent proceedings
  1. The need for a unitary patent
  2. Steps taken – authorisation and regulatory framework
  3. Enhanced cooperation before the Court – *Spain and Italy v Council*
  4. The future of the Unitary Patent in EU law
- c. Completing the internal market through enhanced cooperation – the proposed financial transaction tax
  1. Taxing the financial sector at EU level
  2. Proposed legislation and extraterritorial effects
  3. U.K. objections: *U.K. v Council*
  4. The fate of the financial transaction tax
- d. The future of enhanced cooperation in the EU regulatory framework
  1. Coherence objections
  2. Intra-EU extraterritoriality difficulties
  3. How much diversity within the EU legal environment?

Questions for discussion:

- Enhanced cooperation not only creates political tensions, but is also capable of resulting in widening regulatory disharmony between Member States' legislation. Do you agree with that hypothesis? How can EU law better integrate enhanced cooperation instruments?
- Can enhanced cooperation in the realm of tax harmonisation be used as an instrument implicitly to impose new rules on non-participating Member States? What are the legal and political limits of this approach?

## **Part VI, Title III TFEU**

### ENHANCED COOPERATION

#### Article 326

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall comply with the Treaties and Union law.

Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

#### Article 327

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.

#### Article 328

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

2. The Commission and, where appropriate, the High Representative of the Union for Foreign Affairs and Security Policy shall keep the European Parliament and the Council regularly informed regarding developments in enhanced cooperation.

#### Article 329

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy,

and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.

Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously.

#### Article 330

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

Unanimity shall be constituted by the votes of the representatives of the participating Member States only.

A qualified majority shall be defined in accordance with Article 238(3).

#### Article 331

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 329(1) shall notify its intention to the Council and the Commission.

The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

However, if the Commission considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request. On the expiry of that deadline, it shall re-examine the request, in accordance with the procedure set out in the second subparagraph. If the Commission considers that the conditions of participation have still not been met, the Member State concerned may refer the matter to the Council, which shall decide on the request. The Council shall act in accordance with Article 330. It may also adopt the transitional measures referred to in the second subparagraph on a proposal from the Commission.

2. Any Member State which wishes to participate in enhanced cooperation in progress in the framework of the common foreign and security policy shall notify its intention to the Council, the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.

The Council shall confirm the participation of the Member State concerned, after consulting the High Representative of the Union for Foreign Affairs and Security Policy and after noting, where necessary, that the conditions of participation have been fulfilled. The Council, on a proposal from the High Representative, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation. However, if the Council considers that the conditions of participation have not been fulfilled, it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request for participation.

For the purposes of this paragraph, the Council shall act unanimously and in accordance with Article 330.

#### Article 332

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.

#### Article 333

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority.

2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.

3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.

#### Article 334

(ex Articles 27a to 27e, 40 to 40b and 43 to 45 TEU and ex Articles 11 and 11a TEC)

The Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.



**Joined Cases C-274/11 and C-295/11, *Spain and Italy v Council***

In Joined Cases C-274/11 and C-295/11,

APPLICATIONS for annulment under Article 263 TFEU, lodged on 30 and 31 May 2011, respectively,

**Kingdom of Spain**, represented by N. Díaz Abad, acting as Agent,

applicant,

supported by:

**Italian Republic**, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

intervener,

and

**Italian Republic**, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

supported by:

**Kingdom of Spain**, represented by N. Díaz Abad, acting as Agent,

intervener,

v

**Council of the European Union**, represented initially by T. Middleton, F. Florindo Gijón and A. Lo Monaco, and subsequently by T. Middleton, F. Florindo Gijón, M. Balta and K. Pellinghelli, acting as Agents,

defendant,

supported by:

**Kingdom of Belgium**, represented by C. Pochet, J.-C. Halleux and T. Materne, acting as Agents,

**Czech Republic**, represented by M. Smolek, D. Hadroušek and J. Vláčil, acting as Agents,

**Federal Republic of Germany**, represented by T. Henze and J. Kemper, acting as Agents,

**Ireland**, represented by D. O'Hagan, acting as Agent, assisted by N. J. Travers, BL,

**French Republic**, represented by E. Belliard, G. de Bergues and A. Adam, acting as Agents,

**Hungary**, represented by M. Z. Fehér and K. Molnár, acting as Agents,

**Kingdom of the Netherlands**, represented by C. Wissels and M. de Ree, acting as Agents,

**Republic of Poland**, represented by B. Majczyna, E. Gromnicka and M. Laszuk, acting as Agents,

**Kingdom of Sweden**, represented by A. Falk and C. Meyer-Seitz, acting as Agents,

**United Kingdom of Great Britain and Northern Ireland**, represented by L. Seeboruth, acting as Agent, assisted by T. Mitcheson, Barrister,

**European Parliament**, represented by I. Díez Parra, G. Ricci and M. Dean, acting as Agents,

**European Commission**, represented by I. Martínez del Peral, T. van Rijn, B. Smulders, F. Bulst and L. Prete, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič (Rapporteur), T. von Danwitz, J. Malenovský, Presidents of Chambers, U. Løhmus, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev and C. Toader, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 September 2012,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2012

gives the following

## **Judgment**

1 By their applications, the Kingdom of Spain and the Republic of Italy seek annulment of Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (OJ 2011 L 76, p. 53) ('the contested decision').

### **The contested decision**

2 The contested decision is worded as follows:

'Having regard to the Treaty on the Functioning of the European Union, and in particular Article 329(1) thereof,

...

Whereas:

1. In accordance with Article 3(3) of the Treaty on European Union (TEU), the Union shall establish an internal market, shall work for the sustainable development of Europe based on balanced economic growth and shall promote scientific and technological advance. The creation of the legal conditions enabling undertakings to adapt their activities in manufacturing and distributing products across national borders and providing companies with more choice and opportunities contributes to attaining this objective. A unitary patent which provides uniform effects throughout the Union should feature amongst the legal instruments which undertakings have at their disposal.

...

(3) On 5 July 2000, the Commission adopted a proposal for a Council Regulation on the Community patent for the creation of a unitary patent providing uniform protection throughout the Union. On 30 June 2010, the

Commission adopted a proposal for a Council Regulation on the translation arrangements for the European Union patent (hereinafter “the proposed Regulation on the translation arrangements”) providing for the translation arrangements applicable to the European Union patent.

(4) At the Council meeting on 10 November 2010, it was recorded that there was no unanimity to go ahead with the proposed Regulation on the translation arrangements. It was confirmed on 10 December 2010 that insurmountable difficulties existed, making unanimity impossible at the time and in the foreseeable future. Since the agreement on the proposed Regulation on the translation arrangements is necessary for a final agreement on unitary patent protection in the Union, it is established that the objective to [sic] create unitary patent protection for the Union could not be attained within a reasonable period by applying the relevant provisions of the Treaties.

(5) In these circumstances, 12 Member States, namely, Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom, addressed requests to the Commission by letters dated 7, 8 and 13 December 2010 indicating that they wished to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection on the basis of the existing proposals supported by these Member States during the negotiations and that the Commission should submit a proposal to the Council to that end. The requests were confirmed at the meeting of the Council on 10 December 2010. In the meantime, 13 more Member States, namely, Belgium, Bulgaria, the Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia have written to the Commission indicating that they also wish to participate in the envisaged enhanced cooperation. In total, 25 Member States have requested enhanced cooperation.

(6) Enhanced cooperation should provide the necessary legal framework for the creation of unitary patent protection in participating Member States and ensure the possibility for undertakings throughout the Union to improve their competitiveness by having the choice of seeking uniform patent protection in participating Member States ...

(7) Enhanced cooperation should aim at creating a unitary patent, providing uniform protection throughout the territories of the participating Member States, which would be granted in respect of all those Member States by the European Patent Office (EPO). As a necessary part of the unitary patent, the applicable translation arrangements should be simple and cost-effective and correspond to those provided for in the proposal for a Council Regulation on the translation arrangements for the European Union patent, presented by the Commission on 30 June 2010, combined with the elements of compromise proposed by the Presidency in November 2010 that had wide support in Council. The translation arrangements would maintain the possibility of filing patent applications in any language of the Union at the EPO, and would ensure compensation of the costs related to the translation of applications filed in languages other than an official language of the EPO. The patent having unitary effect should be granted only in one of the official languages of the EPO ... No further translations would be required without prejudice to transitional arrangements ...

...

(9) The area within which enhanced cooperation would take place, the establishment of measures for the creation of a unitary patent providing protection throughout the Union and the setting-up of centralised Union-wide authorisation, coordination and supervision arrangements, is identified by Article 118 TFEU as one of the areas covered by the Treaties.

(10) It was recorded at the Council meeting on 10 November 2010 and confirmed on 10 December 2010 that the objective to [sic] establish unitary patent protection within the Union cannot be attained within a reasonable period by the Union as a whole, thus fulfilling the requirement in Article 20(2) TEU that enhanced cooperation be adopted only as a last resort.

(11) Enhanced cooperation in the area of the creation of unitary patent protection aims at fostering scientific and technological advance and the functioning of the internal market. The creation of unitary patent protection for a group of Member States would improve the level of patent protection by providing the possibility to obtain uniform patent protection throughout the territories of the participating Member States and eliminate the costs and complexity for those territories. Thus, it furthers the objectives of the Union, protects its interests and reinforces its integration process in accordance with Article 20(1) TEU.

...

(14) Enhanced cooperation in the area of the creation of unitary patent protection respects the competences, rights and obligations of non-participating Member States. The possibility of obtaining unitary patent protection on the territories of the Member States participating does not affect the availability or the conditions of patent protection on the territories of non-participating Member States. Moreover, undertakings from non-participating Member States should have the possibility to obtain unitary patent protection on the territories of the participating Member States under the same conditions as undertakings from participating Member States. Existing rules of non-participating Member States determining the conditions of obtaining patent protection on their territory remain unaffected.

...

(16) Subject to compliance with any conditions of participation laid down in this Decision, enhanced cooperation in the area of the creation of unitary patent protection is open at any time to all Member States willing to comply with the acts already adopted within this framework in accordance with Article 328 TFEU.

...

#### *Article 1*

The Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the French Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland are hereby authorised to establish enhanced cooperation between themselves in the area of the creation of unitary patent protection, by applying the relevant provisions of the Treaties.

#### *Article 2*

This Decision shall enter into force on the day of its adoption.’

#### **Procedure before the Court**

3 By orders of the President of the Court of 27 October 2011, the Italian Republic was granted leave to intervene in Case C-274/11 in support of the form of order sought by the Kingdom of Spain and, in the same case, the Kingdom of Belgium, the Czech Republic, the Federal Republic of Germany, Ireland, the French Republic, the Republic of Latvia, Hungary, the Kingdom of the Netherlands, the Polish Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament and the Commission were granted leave to intervene in support of the form of order sought by the Council.

4 By order of the President of the Court of 13 October 2011, the Kingdom of Spain was granted leave to intervene in Case C-295/11 in support of the form of order sought by the Italian Republic and, in the same case, the Kingdom of Belgium, the Czech Republic, the Federal Republic of Germany, Ireland, the French Republic, the Republic of Latvia, Hungary, the Kingdom of the Netherlands, the Polish Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament and the Commission were granted leave to intervene in support of the form of order sought by the Council.

5 Written observations were submitted by all the Member States but the Republic of Latvia and by all the institutions intervening in the proceedings (‘the interveners’).

6 By order of the President of the Court of 10 July 2012, Cases C-274/11 and C-295/11 were joined for the purposes of the oral procedure and of the judgment.

#### **The actions**

7 In support of its action, the Kingdom of Spain claims, principally, that the contested decision is vitiated by misuse of powers and failure to have due regard for the judicial system of the Union. In the alternative, it alleges breach of the conditions set forth in Article 20 TEU and in Articles 326 TFEU and 327 TFEU, especially those relating to the non-exclusiveness of those competences whose exercise is authorised in respect of enhanced cooperation, to the requirement that recourse be had to the latter only as a last resort and to not undermining the internal market.

8 In support of its action, the Italian Republic maintains that the contested decision is marred, first of all, by the fact that the Council has no competence to establish enhanced cooperation in order to create protection by a unitary patent ('the enhanced cooperation in question'), next, by misuse of powers and breach of essential procedural requirements, namely, and in particular, failure to give reasons and breach of the condition laid down in Article 20(2) TEU, that the decision authorising enhanced cooperation must be adopted as a last resort and, last, various infringements of Article 20 TEU and of Articles 118 TFEU and 326 TFEU.

9 Cases C-274/11 and C-395/11 having been joined, the arguments put forward in support of the two actions may be rearranged in five pleas in law: first, that the Council lacked competence to establish the enhanced cooperation in question; second, misuse of powers; third, breach of the condition that the decision authorising enhanced cooperation must be adopted as a last resort; fourth, infringements of Articles 20(1) TEU, 118 TEU, 326 TFEU and 327 TFEU and, fifth, disregard for the judicial system of the Union.

*The first plea in law: that the Council lacked competence to establish the enhanced cooperation in question*

Arguments of the parties

10 The Kingdom of Spain and the Italian Republic claim that the field concerned, that is to say, that of the creation of European intellectual property rights to provide uniform protection of intellectual property rights referred to in Article 118 TFEU, falls, not within the ambit of one of the competences shared by the Member States and the Union, but within that of the exclusive competence of the Union as provided for in Article 3(1)(b) TFEU, concerning 'the establishing of the competition rules necessary for the functioning of the internal market'.

11 In their opinion, the Council has, therefore, no competence to authorise the enhanced cooperation in question. Article 20(1) TFEU excludes any enhanced cooperation within the ambit of the Union's exclusive competences.

12 The applicants emphasise that the legislation on the unitary patent will define the extent and the limitations of the monopoly granted by that intellectual property right. That legislation will thus concern the drafting of rules essential to the preservation of undistorted competition.

13 Moreover, any classification of the competences conferred by Article 118 TFEU as shared competences is, they argue, gainsaid by the fact that what that provision, while making reference to the internal market and despite appearing in the chapter of the FEU Treaty that deals with the approximation of laws, confers on the Union is not the power to harmonise national legislation but a specific power to introduce European intellectual property rights.

14 The Italian Republic adds that Articles 3 to 6 TFEU do no more than set out a non-binding classification of the spheres of the Union's competences. It would, therefore, be permissible for the Court to treat as exclusive the competences conferred by Article 118 TFEU without relying on the list in Article 3(1) TFEU.

15 The Council and the parties intervening in its support argue that the rules governing intellectual property fall within the ambit of the internal market and that, in that sphere, the Union enjoys a shared competence under Article 4(2)(a) TFEU.

Findings of the Court

16 The purpose of the contested decision is to authorise the 25 Member States mentioned in the first article thereof to exercise between themselves the competences conferred by Article 118 TFEU so far as concerns the creation of protection by a unitary patent.

17 In order to determine whether those competences are non-exclusive and may, therefore, in accordance with Article 20 TFEU and subject to the conditions laid down therein and to Articles 326 TFEU to 334 TFEU, be exercised by way of enhanced cooperation, it is of importance to declare straight away that it is '[i]n the context of the establishment and functioning of the internal market' that the first paragraph of Article 118 TFEU confers the competence to create European intellectual property rights and to set up, as regards those rights, centralised, Union-wide authorisation, coordination and supervision arrangements.

18 The competence, conferred by the second paragraph of Article 118 TFEU, to establish language arrangements for those rights is closely bound up with the introduction of the latter and of the centralised arrangements referred to in the first paragraph of that article. As a result, that competence too falls within the ambit of the functioning of the internal market.

19 In accordance with Article 4(2) TFEU, competence shared between the Union and the Member States applies to, *inter alia*, the area of the 'internal market'.

20 With regard to the Kingdom of Spain and the Italian Republic's argument that the competences conferred by Article 118 TFEU fall within the ambit of the 'competition rules necessary for the functioning of the internal market' referred to in Article 3(1)(b) TFEU and, therefore, of the Union's exclusive competence, it is to be borne in mind that the area of the 'internal market' mentioned in Article 4(2)(a) TFEU refers, in accordance with the definition given in Article 26(2) TFEU, to 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. Article 26(1) TFEU provides that the Union is to 'adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'.

21 The expression 'relevant provisions of the Treaties' makes it clear that competences falling within the sphere of the internal market are not confined to those conferred by Articles 114 TFEU and 115 TFEU relating to the adoption of harmonisation measures but cover also any competence attaching to the objectives set out in Article 26 TFEU, such as the competences conferred on the Union by Article 118 TFEU.

22 Although it is true that rules on intellectual property are essential in order to maintain competition undistorted on the internal market, they do not, for all that, as noted by the Advocate General in points 58 to 60 of his Opinion, constitute 'competition rules' for the purpose of Article 3(1)(b) TFEU.

23 In this connection it may be recalled that, under Article 2(6) TFEU, the scope of, and arrangements for, exercising the Union's competences are to be determined by the provisions of the Treaties relating to each area.

24 The scope of, and arrangements for, exercising the Union's competences in the area of 'competition rules necessary for the functioning of the internal market' are determined in Part Three, Title VII, Chapter 1 of the FEU Treaty, in particular in Articles 101 TFEU to 109 TFEU. To regard Article 118 TFEU as forming part of that area would therefore be contrary to Article 2(6) TFEU and the result would be to extend unduly the scope of Article 3(1)(b) TFEU.

25 That being so, it must be concluded that the competences conferred by Article 118 TFEU fall within an area of shared competences for the purpose of Article 4(2) TFEU and are, in consequence, non-exclusive for the purpose of the first paragraph of Article 20(1) TEU.

26 It follows that the plea claiming that the Council had no competence to authorise the enhanced cooperation in question must be rejected.

#### *The second plea in law: misuse of powers*

##### Arguments of the parties

27 The Kingdom of Spain and the Italian Republic observe that all enhanced cooperation must contribute to the process of integration. In this case, however, they maintain that the true object of the contested decision was not to achieve integration but to exclude the Kingdom of Spain and the Italian Republic from the negotiations about the issue of the language arrangements for the unitary patent and so to deprive those Member States of their

right, conferred by the second paragraph of Article 118 TFEU, to oppose language arrangements they cannot approve.

28 They argue that the fact that the FEU Treaty provides, in the second paragraph of Article 118, a particular legislative basis for establishing the language arrangements for a European intellectual property right demonstrates the delicacy of this matter and the improper conduct of the Council. The short period of time elapsing between the Commission's proposal and the adoption of the contested decision is an example of that conduct.

29 The applicants conclude therefrom that the enhanced cooperation procedure was, in this instance, used in order to keep certain Member States out of difficult negotiations and to circumvent the requirement of unanimity, whereas that procedure is, they consider, designed to be used when one or more Member States is or are not yet ready to take part in a legislative action of the Union in its entirety.

30 The Kingdom of Spain adds that the unitary patent system envisaged by those taking part in the enhanced cooperation has to be analysed as being a special agreement for the purpose of Article 142 of the Convention on the grant of European patents (European Patent Convention), signed at Munich on 5 October 1973, which entered into force on 7 October 1977 ('the EPC'). The Council, while presenting the creation of a unitary patent as enhanced cooperation, actually wished, therefore, to authorise the creation of a specific category of European patent under the EPC, a creation that ought not, according to that Member State, to have taken place by means of a procedure provided for by the EU Treaty or by the FEU Treaty.

31 The Council contends that, if the Kingdom of Spain and the Italian Republic do not play a part in this enhanced cooperation, it is because they have refused to do so and not because they are excluded from it, recital 16 in the preamble to the contested decision stressing, indeed, that enhanced cooperation is open at any time to all Member States. Moreover, creating protection by a unitary patent would promote the objectives of the Union and strengthen the process of integration.

32 The parties intervening in support of the Council concur with that view. They emphasise that those areas that require unanimity are by no means excluded from the spheres in which it is permissible for enhanced cooperation to be established. What is more, the latter is a procedure that makes it possible to overcome the problems relating to blocking minorities.

#### Findings of the Court

33 A measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see, to that effect, Case C-442/04 *Spain v Council* [1998] ECR I-3517, paragraph 49 and case-law cited).

34 By their plea alleging such a misuse of power, the Kingdom of Spain and the Italian Republic claim, in essence, that the Council, by authorising the enhanced cooperation in question, circumvented the requirement of unanimity laid down by the second paragraph of Article 118 TFEU and brushed aside those two Member States' objections to the Commission's proposal on the language arrangements for the unitary patent.

35 In this connection, it must be noted that nothing in Article 20 TEU or in Articles 326 TFEU to 334 TFEU forbids the Member States to establish between themselves enhanced cooperation within the ambit of those competences that must, according to the Treaties, be exercised unanimously. On the contrary, it follows from Article 333(1) TFEU that, when the conditions laid down in Article 20 TEU and in Articles 326 TFEU to 334 TFEU have been satisfied, those powers may be used in enhanced cooperation and that, in that case, provided that the Council has not decided to act by qualified majority, it is the votes of only those Member States taking part that constitute unanimity.

36 In addition, and contrary to what is maintained by the Kingdom of Spain and the Italian Republic, Article 20 TEU and Articles 326 TFEU to 334 TFEU do not circumscribe the right to resort to enhanced cooperation solely to the case in which at least one Member State declares that it is not yet ready to take part in a legislative action of the Union in its entirety. As provided in Article 20(2) TEU, the situation that may lawfully lead to enhanced cooperation is that in which 'the objectives of such cooperation cannot be attained within a reasonable period by

the Union as a whole'. The impossibility referred to in that provision may be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement.

37 It follows that the Council's decision to authorise enhanced cooperation, having found that the unitary patent and its language arrangements could not be established by the Union as a whole within a reasonable period, by no means constitutes circumvention of the requirement of unanimity laid down in the second paragraph of Article 118 TFEU or, indeed, exclusion of those Member States that did not join in making requests for enhanced cooperation. The contested decision, provided that it is compatible with the conditions laid down in Article 20 TEU and in Article 326 et seq. TFEU, which is considered in connection with other pleas in law, does not amount to misuse of powers, but rather, having regard to its being impossible to reach common arrangements for the whole Union within a reasonable period, contributes to the process of integration.

38 What is more, this conclusion is by no means invalidated by the Kingdom of Spain's argument regarding the existence of Article 142 EPC.

39 In the words of that provision, '[a]ny group of Contracting States, which has provided by a special agreement that a European patent granted for those States has a unitary character throughout their territories, may provide that a European patent may only be granted jointly in respect of all those States'.

40 Given that every Member State of the Union is a Contracting State of the EPC, the introduction of a European patent with unitary effect between the Member States of the Union, as envisaged by the contested decision, may, as the Kingdom of Spain maintains, be effected by 'a special agreement' within the meaning of Article 142 EPC. Nevertheless, contrary to what is claimed by that Member State, it does not follow from that circumstance that the power provided for in Article 20 TEU is used for ends other than those for which it was conferred when Member States of the Union establish such a patent by a measure adopted under enhanced cooperation instead of concluding an international agreement.

41 It is clear from all the foregoing that the plea alleging misuse of powers must be rejected.

*The third plea in law: breach of the condition that a decision authorising enhanced cooperation must be adopted as a last resort*

#### Arguments of the parties

42 The applicants maintain that the condition laid down in Article 20(2) TEU, concerning the adoption of a decision authorising enhanced cooperation as a last resort, must be strictly observed. In this case, they consider that the possibilities of negotiations among all the Member States on the language arrangements had by no means been exhausted.

43 The Kingdom of Spain claims that there elapsed a period of not even six months between the proposal for language arrangements put forward by the Commission on 30 June 2010 and the proposal for enhanced cooperation put forward by that same institution on 14 December 2010. The period from the first proposal for a regulation on the Community patent put forward in August 2000 to the Commission's proposal for language arrangements cannot be taken into consideration in order to determine whether the contested decision was adopted as a last resort. On this head, that Member State explains that a common approach had been defined during the year 2003 and that the language question had not thereafter been further discussed in substance within the Council.

44 The Italian Republic acknowledges that the Council enjoys broad discretion as regards assessing the state of negotiations and that the question whether the condition relating to adoption as a last resort of a decision authorising enhanced cooperation had been satisfied may therefore be subject to only limited examination by the Court. In this instance, however, the 'legislative package' on the unitary patent was incomplete and the negotiations relating to language arrangements were brief. In those circumstances, it is clear that Article 20(2) TEU was disregarded.

45 According to the Italian Republic, the contested decision is vitiated also by failure to conduct a proper examination and failure to give reasons, in that it gives an excessively laconic explanation of the reasons why the

Council considers the conditions laid down by the EU and FEU Treaties in the sphere of enhanced cooperation to have been satisfied.

46 The Council and the parties intervening in its support draw attention to the deadlock at which the negotiations, already very lengthy, on the unitary patent and its language arrangements had arrived.

#### Findings of the Court

47 In accordance with Article 20(2) TEU, the Council may not authorise enhanced cooperation except ‘as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole’.

48 This condition is particularly important and must be read in the light of the second paragraph of Article 20(1) TEU, which provides that enhanced cooperation is to ‘aim to further the objectives of the Union, protect its interests and reinforce its integration process’.

49 The Union’s interests and the process of integration would, quite clearly, not be protected if all fruitless negotiations could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole.

50 In consequence, as explained by the Advocate General in points 108 to 111 of his Opinion, the expression ‘as a last resort’ highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.

51 The applicants claim that both at the date on which the Commission presented its proposal for authorisation to the Council and at the date of the contested decision, there still existed real chances of reaching a compromise. They maintain too that the negotiations for reaching agreement on the unitary patent and its language arrangements were not as various or as thorough as claimed by the Council and the parties intervening in its support.

52 In this respect, it is to be borne in mind that taking part in the procedure leading to the adoption of a decision authorising enhanced cooperation are the Commission, which submits a proposal to that effect, the European Parliament, which approves the proposal, and the Council, which takes the final decision authorising enhanced cooperation.

53 The Council, in taking that final decision, is best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future.

54 The Court, in exercising its review of whether the condition that a decision authorising enhanced cooperation must be adopted only as a last resort has been satisfied, should therefore ascertain whether the Council has carefully and impartially examined those aspects that are relevant to this point and whether adequate reasons have been given for the conclusion reached by the Council.

55 In this instance, the Council correctly took into account the fact that the legislative process undertaken with a view to the establishing of a unitary patent at Union level was begun during the year 2000 and covered several stages, which are set out by the Advocate General in points 119 to 123 of his Opinion and given in detail in the proposal for enhanced cooperation submitted by the Commission on 14 December 2010 (COM(2010) 790 final, pp. 3 to 6) and, more briefly, in recitals 3 and 4 of the preamble to the contested decision as well.

56 It is apparent too that a considerable number of different language arrangements for the unitary patent were discussed among all the Member States within the Council and that none of those arrangements, with or without the addition of elements of compromise, found support capable of leading to the adoption at Union level of a full ‘legislative package’ relating to that patent.

57 Furthermore, the applicants have adduced no specific evidence that could disprove the Council’s assertion that when the requests for enhanced cooperation were made, and when the proposal for authorisation was sent by

the Commission to the Council, and at the date on which the contested decision was adopted, there was still insufficient support for any of the language arrangements proposed or possible to contemplate.

58 With regard, lastly, to the reasons for the contested decision, it is to be borne in mind that, when the measure at issue was adopted in a context with which the persons concerned were familiar, summary reasons may be given (judgment of 26 June 2012 in Case C-335/09 P *Poland v Commission*, paragraph 152 and case-law cited). Having regard to the applicants' participation in the negotiations and to the detailed description of the fruitless stages before the contested decision set out in the proposal that was to lead to that decision, it cannot be concluded that that decision was vitiated by any failure to state reasons capable of resulting in its annulment.

59 Having regard to the foregoing, the plea in law alleging breach of the condition that a decision authorising enhanced cooperation is to be adopted only as a last resort must be rejected.

*The fourth plea in law: infringement of Article 20(1) TEU and of Articles 118 TFEU, 326 TFEU and 327 TFEU*

The alleged infringement of Article 20(1) TEU

– Arguments of the parties

60 According to the Kingdom of Spain and the Italian Republic, the Council was wrong to consider that the enhanced cooperation in question would pursue the objectives set out in Article 20(1) TEU by creating a higher level of integration compared to the current situation. They claim that there exists a certain level of uniformity because the legislation of all the Member States is compatible with the provisions of the EPC. Creating a unitary patent covering only part of the Union is, in their view, likely to damage that uniformity and not to improve it.

61 The Council and those parties intervening in its support observe that both national patents and European patents validated in one Member State or more confer only national protection. The unitary patent contemplated by the contested decision would give undertakings uniform protection in 25 Member States. Uniform protection throughout the Union would indeed be even more favourable to the functioning of the internal market, but enhanced cooperation would at least make it possible to draw close to that objective and would therefore result in better integration.

– Findings of the Court

62 As argued by the Council and the parties intervening in its support, European patents granted in accordance with the rules of the EPC do not confer uniform protection in the Contracting States to that convention but rather, in every one of those States, guarantee protection whose extent is defined by national law. In contrast, the unitary patent contemplated by the contested decision would confer uniform protection in the territory of all the Member States taking part in the enhanced cooperation.

63 In consequence, the applicants' argument that the protection conferred by that unitary patent would not be advantageous in terms of uniformity, and so of integration, compared to the situation created by the operation of the rules laid down by the EPC, must be rejected as unfounded.

The alleged infringement of Article 118 TFEU

– Arguments of the parties

64 The Italian Republic observes that Article 118 TFEU provides for the creation of European intellectual property rights to provide uniform protection 'throughout the Union', by means of the setting up of centralised, 'Union-wide' authorisation, coordination and supervision arrangements. However, what the Council has authorised is, precisely, the creation of a right that is not valid throughout the Union.

65 The Council and the parties intervening in its support repeat their view that the unitary patent contemplated by the contested decision allows undertakings to enjoy uniform protection in 25 Member States and so improves the functioning of the internal market.

– Findings of the Court

66 It is apparent from the first paragraph of Article 326 TFEU that the exercise, within the ambit of enhanced cooperation, of any competence conferred on the Union must comply with, among other provisions of the Treaties, that which confers that competence. The enhanced cooperation to which these actions relate must, therefore, be consistent with Article 118 TFEU.

67 Having regard to this duty to ensure accordance with Article 118 TFEU, the enhanced cooperation in question must establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights.

68 With regard, on the other hand, to the expressions ‘throughout the Union’ and ‘Union-wide’ used in Article 118 TFEU, it must be held that it is inherent in the fact that the competence conferred by that article is, in this instance, exercised within the ambit of enhanced cooperation that the European intellectual property right so created, the uniform protection given by it and the arrangements attaching to it will be in force, not in the Union in its entirety, but only in the territory of the participating Member States. Far from amounting to infringement of Article 118 TFEU, that consequence necessarily follows from Article 20(4) TEU, which states: ‘Acts adopted in the framework of enhanced cooperation shall bind only participating Member States.’

69 Consequently, the arguments alleging infringement of Article 118 TFEU are unfounded.

The alleged infringement of the second paragraph of Article 326 TFEU

– Arguments of the parties

70 The Kingdom of Spain and the Italian Republic recall the wording of the second paragraph of Article 326 TFEU, according to which enhanced cooperation ‘shall not undermine the internal market or economic, social and territorial cohesion [and] shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them’.

71 The enhanced cooperation in question would, in their opinion, jeopardise all those principles and objectives. Creating uniform protection for innovation in one part only of the Union would encourage activities relating to innovatory products to be drawn to that part of the Union, to the detriment of the non-participating Member States.

72 In addition, they claim that the enhanced cooperation in question would be the source of distortion of competition and of discrimination between undertakings by reason of the fact that trade in innovatory products will be, according to the language arrangements provided for in recital 7 of the preamble to the contested decision, made easier for undertakings working in English, French or German. The enhanced cooperation contemplated would, moreover, reduce the mobility of researchers from Member States not taking part in this cooperation or from Member States whose official language is not English, French or German, for the language arrangements provided for by the decision will make access to information on the scope of the patents difficult for those researchers.

73 Economic, social and territorial cohesion in the Union too would be damaged, they argue, in that the enhanced cooperation would prevent the coherent development of industrial policy and increase the differences between Member States from the technological point of view.

74 The Council and the parties intervening in its support take the view that this plea in law is based on premises in the realm of speculation. Furthermore, the origin of the fragmentation of the market is to be found, not in the contested decision, but in the present situation, in which the protection offered by European patents is national. What is more, inasmuch as the applicants base their arguments on the language arrangements contemplated, their actions are inadmissible, the definitive features of those language arrangements not being fixed by the contested decision.

– Findings of the Court

75 For the same reason as that set out in paragraph 68 above, it cannot validly be maintained that, by having it in view to create a unitary patent applicable in the participating Member States and not in the Union, the contested decision damages the internal market or the economic, social and territorial cohesion of the Union.

76 In so far as, in order to demonstrate such damage to the internal market and discrimination and distortion of competition as well, the applicants also make reference to the language arrangements considered in recital 7 in the preamble to the contested decision, it must be declared that the compatibility of those arrangements with Union law may not be examined in these actions.

77 As is stated in recital 7, the language arrangements there described do no more than correspond to a proposal by the Commission with the addition of certain elements of compromise proposed by the Member State presiding over the Council of the Union at the time the requests for enhanced cooperation were made. The language arrangements as set out in that recital were, therefore, only at a preparatory stage when the contested decision was adopted and do not form a component part of the latter.

78 It follows that the arguments alleging infringement of Article 326 TFEU are in part unfounded and in part inadmissible.

#### The alleged infringement of Article 327 TFEU

##### – Arguments of the parties

79 Contrary to what is prescribed by Article 327 TFEU, the enhanced cooperation in question does not, according to the Kingdom of Spain, respect the rights of the Member States not participating in it. In particular, the Kingdom of Spain and the Italian Republic's right to take part in future in this enhanced cooperation is infringed, for the Council favours language arrangements that those two Member States do not accept.

80 According to the Council and the parties intervening in its support, this plea relies on the mistaken premiss that it is impossible, *de facto* or *de jure*, for the Kingdom of Spain and the Italian Republic to take part in this cooperation.

##### – Findings of the Court

81 Under Article 327 TFEU, the enhanced cooperation authorised by the contested decision must respect 'the competences, rights and obligations' of the Kingdom of Spain and the Italian Republic as Member States not taking part in the cooperation.

82 Nothing in the contested decision prejudices any competence, right or obligation of those two Member States. In particular, the prospect, indicated by that decision, of the introduction of the language arrangements objected to by the Kingdom of Spain and the Italian Republic may not be described as prejudicial to the competences, rights or obligations of those latter States. While it is, admittedly, essential for enhanced cooperation not to lead to the adoption of measures that might prevent the non-participating Member States from exercising their competences and rights or shouldering their obligations, it is, in contrast, permissible for those taking part in this cooperation to prescribe rules with which those non-participating States would not agree if they did take part in it.

83 Indeed, the prescription of such rules does not render ineffective the opportunity for non-participating Member States of joining in the enhanced cooperation. As provided by the first paragraph of Article 328(1) TFEU, participation is subject to the condition of compliance with the acts already adopted by those Member States that have taken part in that cooperation since it began.

84 In addition, it has to be noted that the Kingdom of Spain and the Italian Republic have not disproved the matters mentioned in the second, third and fourth sentences of Recital 14 in the preamble to the contested decision.

85 It follows that the arguments alleging infringement of Article 327 TFEU are unfounded too.

86 It follows from all the foregoing that the fourth plea in law raised by the applicants in support of their actions, alleging infringement of Articles 20(1) TEU, 118 TFEU, 326 TFEU and 327 TFEU, must be rejected.

*The fifth plea in law: disregard for the judicial system of the Union*

Arguments of the parties

87 The Kingdom of Spain observes that the judicial system of the Union is composed of a whole body of means of obtaining redress and of procedures, designed to ensure review of the lawfulness of the acts of the institutions of the Union. It considers that the Council disregarded that system by authorising enhanced cooperation without specifying what the judicial system envisaged was. While it is true that it is not necessary to create, in every measure of secondary legislation, a set of judicial rules for that measure, the Kingdom of Spain takes the view that the judicial rules applicable must nevertheless be specified in a measure authorising the creation of a new European intellectual property right.

88 The Council and the parties intervening in its support argue that the Court has made it clear in paragraph 62 of Opinion 1/09 [2011] ECR I-1137 that Article 262 TFEU provides for the mere option of creating a specific legal remedy for disputes relating to the application of acts of the European Union creating European intellectual property rights, but does not require any particular judicial structure to be set up. At all events, it is in no way necessary for the decision by which enhanced cooperation is authorised to contain details of the procedures under the judicial rules to be introduced in respect of that cooperation.

Findings of the Court

89 The authorisation of enhanced cooperation challenged in these actions was granted by the Council pursuant to Article 329(1) TFEU, that is to say, on a proposal from the Commission and after obtaining the Parliament's consent.

90 The Commission's proposal was based on the requests of those Member States wishing to establish the enhanced cooperation in question. As provided for in that article, those requests must specify 'the scope and objectives of the enhanced cooperation proposed'.

91 It is clear from the documents before the Court that those details appeared both in the requests and in the Commission's proposal. They were repeated in the contested decision, in recitals 6 and 7 in particular.

92 The Council was not obliged to provide, in the contested decision, further information with regard to the possible content of the system adopted by the participants in the enhanced cooperation in question. The sole purpose of that decision was to authorise the requesting Member States to establish that cooperation. It was thereafter for those States, having recourse to the institutions of the Union following the procedures laid down in Articles 20 TEU and 326 TFEU to 334 TFEU, to set up the unitary patent and to lay down the rules attaching to it, including, if necessary, specific rules in the judicial sphere.

93 It follows that the fifth plea too must be rejected.

94 Given that none of the pleas in law relied on by the Kingdom of Spain and the Italian Republic in support of their actions may be upheld, those actions must be dismissed.

**Costs**

95 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has requested that the Kingdom of Spain and the Italian Republic be ordered to pay the costs and they have been unsuccessful, each of them must be ordered to pay, in addition to its own costs, those incurred by the Council in Case C-274/11 and Case C-295/11, respectively.

96 Pursuant to Article 140(1) of the Rules of Procedure, the Member States and institutions that have intervened in the proceedings are to bear their own costs.

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

1. **Dismisses the actions;**
2. **Orders the Kingdom of Spain to bear, in addition to its own costs, those incurred by the Council of the European Union in Case C-274/11;**
3. **Orders the Italian Republic to bear, in addition to its own costs, those incurred by the Council of the European Union in Case C-295/11;**
4. **Orders the Kingdom of Belgium, the Czech Republic, the Federal Republic of Germany, Ireland, the French Republic, the Republic of Latvia, Hungary, the Kingdom of the Netherlands, the Polish Republic, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, the European Parliament and the European Commission to pay their own costs.**

## Case C-209/13, *United Kingdom v Council*

In Case C-209/13,

APPLICATION for annulment under Article 263 TFEU, brought on 18 April 2013,

**United Kingdom of Great Britain and Northern Ireland**, represented by E. Jenkinson and S. Behzadi Spencer, acting as Agents, and by M. Hoskins QC, P. Baker QC and V. Wakefield, Barrister,

applicant,

v

**Council of the European Union**, represented by A.-M. Colaert, F. Florindo Gijón and A. de Gregorio Merino, acting as Agents,

defendant,

supported by:

**Kingdom of Belgium**, represented by J.-C. Halleux and M. Jacobs, acting as Agents,

**Federal Republic of Germany**, represented by T. Henze, J. Möller and K. Petersen, acting as Agents,

**French Republic**, represented by D. Colas and J.-S. Pilezer, acting as Agents,

**Republic of Austria**, represented by C. Pesendorfer, acting as Agent,

**Portuguese Republic**, represented by L. Inez Fernandes, J. Menezes Leitão and A. Cunha, acting as Agents,

**European Parliament**, represented by A. Neergaard and R. van de Westelaken, acting as Agents, with an address for service in Luxembourg,

**European Commission**, represented by R. Lyal, B. Smulders and W. Mölls, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.L. da Cruz Vilaça, G. Arestis and J.-C. Bonichot, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 By its application, the United Kingdom of Great Britain and Northern Ireland asks the Court to annul Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (OJ 2013 L 22, p. 11; ‘the contested decision’).

### **Background to the proceedings**

2 On 28 September 2011 the European Commission adopted a proposal (COM(2011) 594 final) for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC (‘the 2011 proposal’).

3 Article 1(2) of the 2011 proposal, the article being headed ‘Subject matter and scope’ provided:

‘This Directive shall apply to all financial transactions, on condition that at least one party to the transaction is established in a Member State and that a financial institution established in the territory of a Member State is party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction.’

4 Article 3(1) of that proposal, the article being headed ‘Establishment’, provided:

‘For the purposes of this Directive, a financial institution shall be deemed to be established in the territory of a Member State where any of the following conditions is fulfilled:

...

(e) it is party, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction, to a financial transaction with another financial institution established in that Member State pursuant to points (a), (b), (c) or (d), or with a party established in the territory of that Member State and which is not a financial institution.’

5 After three meetings of the Council of the European Union which took place on 22 and 29 June and 10 July 2012, it became apparent that it would not be possible to achieve unanimous support for the principle of a common system of financial transaction tax (‘FTT’) within the Council in the foreseeable future and, consequently, that the objective of the whole European Union adopting such a common system could not be attained within a reasonable period.

6 In those circumstances, between 28 September and 23 October 2012 11 Member States informed the Commission that they wished to establish enhanced cooperation between themselves in the area of FTT.

7 On 22 January 2013 the Council, on the Commission’s proposal, adopted the contested decision.

8 Recital 6 of the preamble to that decision reads as follows:

‘... 11 Member States, namely Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia, addressed requests to the Commission ... indicating that they wished to establish enhanced cooperation between themselves in the area of FTT. These Member States requested that the scope and objectives of the enhanced cooperation be based on the Commission proposal for a Directive of 28 September 2011. Reference was also made in particular to the need to avoid evasive actions, distortions and transfers to other jurisdictions’.

9 The contested decision contains two articles. Article 1 thereof authorises the 11 Member States referred to in the preceding paragraph of this judgment (‘the participating Member States’) to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT, by applying the relevant provisions of the Treaties. Article 2 of that decision provides that it is to enter into force on the day of its adoption.

10 On 14 February 2013 the Commission adopted a proposal for a Council Directive implementing enhanced cooperation in the area of FTT (‘the 2013 proposal’).

11 Article 3(1) of the 2013 proposal, that article being headed ‘Scope’ provides:

‘This Directive shall apply to all financial transactions, on the condition that at least one party to the transaction is established in the territory of a participating Member State and that a financial institution established in the territory of a participating Member State is party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction.’

12 Article 4(1) and (2) of the 2013 proposal, that article being headed ‘Establishment’, provide:

‘1. For the purposes of this Directive, a financial institution shall be deemed to be established in the territory of a participating Member State where any of the following conditions is fulfilled:

...

(g) it is party, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction, to a financial transaction in a structured product or one of the financial instruments referred to in Section C of Annex I of Directive 2004/39/EC issued within the territory of that Member State, with the exception of instruments referred to in points (4) to (10) of that Section which are not traded on an organised platform.

2. A person which is not a financial institution shall be deemed to be established within a participating Member State where any of the following conditions is fulfilled:

...

(c) it is party to a financial transaction in a structured product or one of the financial instruments referred to in Section C of Annex I to Directive 2004/39/EC issued within the territory of that Member State, with the exception of instruments referred to in points (4) to (10) of that Section which are not traded on an organised platform.’

#### **Forms of order sought by the parties and the procedure before the Court**

13 The United Kingdom claims that the Court should annul the contested decision and order the Council to pay the costs.

14 The Council contends that the Court should dismiss the action and order the United Kingdom to pay the costs.

15 The Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the Commission were granted leave to intervene in support of the forms of order sought by the Council.

#### **The action**

16 While recognising that its action, brought as a precautionary measure, could be considered to be premature, the United Kingdom relies on two pleas in law in support of its action. The first plea concerns a claimed infringement of Article 327 TFEU and of customary international law in so far as the contested decision authorises the adoption of an FTT which produces extraterritorial effects. The second plea, relied on in the alternative, relates to a claimed infringement of Article 332 TFEU in that that decision authorises the adoption of an FTT which will impose costs on Member States which are not participating in the enhanced cooperation (‘the non-participating Member States’).

#### *Arguments of the parties*

17 The first plea has two parts, claiming infringement of Article 327 TFEU and of customary international law respectively.

18 In the first part of that plea, the United Kingdom claims that, by authorising the adoption of an FTT with extraterritorial effects because of ‘the counterparty principle’ laid down in Article 3(1)(e) of the 2011 proposal, and the ‘issuance principle’ laid down in Article 4(1)(g) and (2)(c) of the 2013 proposal, the contested decision was in breach of Article 327 TFEU.

19 The United Kingdom claims that that decision permits the introduction of an FTT applicable, by reason of the two abovementioned principles of taxation, to institutions, persons or transactions situated or taking place in the territory of non-participating Member States, a fact which adversely affects the competences and rights of those Member States.

20 In the second part of its first plea in law, the United Kingdom claims that customary international law permits legislation which produces extraterritorial effects only on the condition that there exists between the facts or subjects at issue and the State exercising its competences thereon a sufficiently close connection to justify an encroachment on the sovereign competences of another State.

21 In this case, the extraterritorial effects of the future FTT stemming from ‘the counterparty principle’ and ‘the issuance principle’ are not justified in the light of any accepted rule of tax jurisdiction under international law.

22 By its second plea in law, the United Kingdom claims that, whereas expenditure linked to the implementation of enhanced cooperation in the area of FTT may in principle, under Article 332 TFEU, be borne only by the participating Member States, that implementation will also be the source of costs for the non-participating Member States, because of the application of Council Directives 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1) and 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

23 The United Kingdom claims that those two directives do not authorise the non-participating Member States to seek the recovery of the costs of mutual assistance and administrative cooperation linked to the application of those directives to the future FTT.

24 The United Kingdom adds, in that regard, that the concept of ‘expenditure resulting from implementation of enhanced cooperation’, within the meaning of Article 332 TFEU, covers expenditure linked to requests for assistance or cooperation based on the national legislation adopted to give effect to enhanced cooperation in the area of FTT.

25 The Council, all of the Member States intervening in its support with the exception of the Federal Republic of Germany, the European Parliament and the Commission accept, explicitly or implicitly, the admissibility of this action and of the pleas in law which underpin it. They contend however that those pleas are unfounded.

26 As regards the first plea in law, those parties state, in essence, that the principles of taxation disputed by the United Kingdom within this plea are, at this stage, purely hypothetical components of legislation which is yet to be adopted. Consequently, the arguments relied on by the United Kingdom, based on the alleged extraterritorial effects of the future FTT, are premature and speculative. Consequently, they are ineffective in the context of this action.

27 As regards the second plea in law of the action, the same parties argue, in essence, that this plea invites a premature debate on the manner in which the European Union legislature will regulate the question of liability for costs linked to the implementation of enhanced cooperation authorised by the contested decision. Further, that decision in no way regulates questions of mutual assistance for the purposes of the application of the future FTT.

28 The Council, the Republic of Austria, the Portuguese Republic and the Commission add that the second plea in support of the action rests on a misinterpretation of Article 332 TFEU. That article concerns solely operational expenditure to be borne by the European Union budget in relation to measures establishing enhanced cooperation and not the expenditure, disputed by the United Kingdom, which might be incurred by the Member States under Directives 2010/24 and 2011/16.

29 The Federal Republic of Germany, relying on an argument analogous to that mentioned in paragraphs 26 and 27 of this judgment, considers that the action is inadmissible, even manifestly inadmissible, because of a disregard of the requirements of Article 120(c) of the Court's Rules of Procedure, given that the pleas relied on by the United Kingdom in support of its action bear no relation to the subject-matter of the contested decision. Alternatively, the Federal Republic of Germany contends that the action should be dismissed as being unfounded.

#### *Findings of the Court*

30 As regards, first, the plea of inadmissibility mentioned in the preceding paragraph of this judgment, it must be recalled that, under Article 120(c) of the Rules of Procedure and the case-law relating thereto, an application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a claim (Case C-360/11 *Commission v Spain* EU:C:2013:17, paragraph 26, and Case C-545/10 *Commission v Czech Republic* EU:C:2013:509, paragraph 108).

31 It is clear, in this case, that the content of the application satisfies those requirements of clarity and precision. It enabled the Council and the Member States intervening in its support to prepare their arguments in relation to the pleas relied on by the United Kingdom and it puts the Court in a position to carry out its review of the contested decision.

32 It follows that that plea of inadmissibility must be rejected.

33 Secondly, it must be stated that, in the context of an action for the annulment of a Council decision which, like the contested decision, has as its subject-matter the authorisation of enhanced cooperation on the basis of Article 329 TFEU, the Court's review is related to the issue of whether that decision is valid as such in the light of, *inter alia*, the provisions, contained in Article 20 TEU and in Articles 326 TFEU to 334 TFEU, which define the substantive and procedural conditions relating to the granting of such authorisation.

34 That review should not be confused with the review which may be undertaken, in the context of a subsequent action for annulment, of a measure adopted for the purposes of the implementation of the authorised enhanced cooperation.

35 In this action, the purpose of the first plea in law therein is to challenge the effects which the recourse to certain principles of taxation in respect of the future FTT might have on institutions, persons and transactions situated in or taking place in the territory of non-participating Member States

36 It is clear that the objective of the contested decision is to authorise 11 Member States to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT with due regard to the relevant provisions of the Treaties. The principles of taxation challenged by the United Kingdom are, however, not in any way constituent elements of that decision. First, 'the counterparty principle' corresponds to an element in the 2011 proposal mentioned in recital 6 of that decision. Second, the 'issuance principle' first appeared in the 2013 proposal.

37 As regards the action's second plea in law, whereby the United Kingdom claims, in essence, that the future FTT will give rise to costs for the non-participating Member States because of the obligations of mutual assistance and administrative cooperation linked to the application of Directives 2010/24 and 2011/16 to that tax, which, according to the United Kingdom, is contrary to Article 332 TFEU, it must be observed that the contested decision contains no provision related to the issue of expenditure linked to the implementation of the enhanced cooperation authorised by that decision.

38 Further, and irrespective of whether the concept of 'expenditure resulting from implementation of enhanced cooperation', within the meaning of Article 332 TFEU, does or does not cover the costs of mutual assistance and administrative cooperation referred to by the United Kingdom in its second plea, it is obvious that the question of the possible effects of the future FTT on the administrative costs of the non-participating Member States cannot

be examined for as long as the principles of taxation in respect of that tax have not been definitively established as part of the implementation of the enhanced cooperation authorised by the contested decision.

39 Those effects are dependent on the adoption of ‘the counterparty principle’ and the ‘issuance principle’, which are however not constituent elements of the contested decision, as stated in paragraph 36 of this judgment.

40 It follows from the foregoing that the two pleas in law relied on by the United Kingdom in support of its action must be rejected and, accordingly, that the action must be dismissed.

#### **Costs**

41 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Council has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs. In accordance with Article 140(1) of those Rules, under which Member States and institutions which have intervened in the proceedings are to bear their own costs, the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the Commission shall bear their own costs.

On those grounds, the Court hereby:

1. **Dismisses the action;**
2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**
3. **Orders the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Republic of Austria, the Portuguese Republic, the European Parliament and the European Commission to bear their own costs.**

#### 4. BEYOND MARKET INTEGRATION: THE ECONOMIC AND MONETARY UNION

Although the internal market still comprises the core of EU integration – and also justifies and structures the EU’s institutional functioning – the European integration project was never meant only to serve the abolition of regulatory frontiers. Seeking to establish a truly common European Union, other means of integration have equally been considered. One of the major ambitions in this regard has been the establishment of a common European currency. From a mere politicians’ dream in the 1970s, the realisation of a European Economic and Monetary Union (EMU) became a constitutional reality in the wake of the 1993 Maastricht Treaty. Ever since, the EMU and its key institution, the European Central Bank, have also taken centre stage at the EU level.

The study of the European Central Bank and the Economic and Monetary Union has long been the object of even more advanced EU law courses, specialising in monetary law. In the wake of the financial crises that have struck the EU Member States in the 2008-2015 time frame, EMU law all of a sudden became a most contentious topic, often flirting with the limits of EU law. It therefore deserves to be treated in more detail in this advanced EU law course, as it demonstrates a continuous attempt to make the EU’s monetary integration project into a key feature of an ever more perfect Union between European Peoples and States.

In three lecture sessions, both the foundations of and the post-crisis developments in the EMU context will be elucidated; at the same time, the legal links between and institutional differences with the EU internal market law framework will be identified and questioned as well. The first lecture will outline the foundations of the EMU and the tasks of economic and monetary policy coordination conferred on the European Union. The European Central Bank and the European System of Central Banks play a peculiar role in this regard. We will highlight the functioning and features of the ECB as a monetary policymaker and – more recently as a result of the crisis – as a banking supervisor in its own right.

The Eurozone crisis constitutes the heart of the second lecture; confronted with the risk of Member State default and spill-over effects, the common currency has been on the brink of collapse on multiple occasions over the past seven years. In each case, however, the ECB managed to intervene in financial markets, reassuring investors to some extent. The second lecture will explore the legality of such interventions by zooming in on the recent *Gauweiler* judgment and the underlying discussion on the democratic legitimacy and EU law compatibility of ECB crisis interventions, resulting from a preliminary reference from the German Constitutional Court. It will be analysed how national and EU constitutional courts interact and engage on seemingly technical, yet highly important constitutional topics.

The crisis also triggered new regulatory and institutional initiatives that had to go above and beyond the institutional framework established by the founding EU Treaties. In order to bail out and rescue Member States and their failing banks, an intervention rescue fund had to be created. That fund, the European Stability Mechanism, has been established outside the EU legal order *sensu stricto*. We will explore the impact of this mechanism on the coherence within the EU legal order and on the future of EU law as an instrument of crisis prevention and remediation.



## LECTURE 11: FOUNDATIONS AND INSTITUTIONS OF THE ECONOMIC AND MONETARY UNION

The establishment of the Economic and Monetary Union truly took off in the wake of the Maastricht Treaty, when a title on the coordination of economic and monetary policy was inserted in the founding Treaties. That title envisaged a three-phased transition to a truly monetary Union. It resulted in new institutions being created – the European Monetary Institute, later on the European Central Bank – and a common currency – the Euro – being implemented in participating Member States. The institutional framework and functioning of the EMU are governed by familiar EU law principles, which have been tailored to the specific features of monetary policymaking. This lecture will offer an introduction to that framework. It will subsequently zoom in on the multiple functions of the European Central Bank, which has recently also become responsible for the day-to-day supervision of large banks in the Eurozone.

### Materials to read:

- Part III, Title VIII, TFEU.
- Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank.
- Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3), [2004] *O.J.* L80/42.
- General Court, 29 November 2012, Case T-590/10, *Gabi Thesing and Bloomberg Finance v European Central Bank*, ECLI:EU:T:2012:635.
  
- S. Collignon and S. Diessner, “The ECB’s monetary dialogue with the European Parliament: Efficiency and Accountability during the Euro Crisis?”, *Journal of Common Market Studies* (2016), 1-17 (preprint), (via eCampus).

### Lecture 11 outline:

- g. The gradual emergence of a monetary Union
  1. The Werner Report
  2. Beyond the Report – early steps
  3. A compromise in the wake of German reunification
  4. The Maastricht Treaty
  5. Three stages
  6. The common currency
- h. Foundations of the EMU
  1. Economic policy coordination competences
  2. Monetary policy streamlining competences
  3. Linking economic and monetary policies through convergence criteria
  4. Opt-outs and other exceptions to joining EMU
- i. Institutions of the EMU
  1. The European System of Central Banks

2. The European Central Bank
  3. The European Parliament and Member States' parliaments?
  4. The Court of Justice of the European Union?
- j. The European Central Bank
1. Institutional functioning and EU law principles
  2. Governing Council and Executive Board
  3. Decision-making procedures and judicial review
  4. Confidentiality v. transparency
  5. Access to ECB proceedings
  6. Accountability of the ECB
- k. Improving the institutional functioning of the ECB
1. Towards more transparency/openness?
  2. Towards swifter decision-making procedures?
  3. Enhanced monetary dialogue with other EU institutions
  4. Decision-making procedures in times of crisis

Questions for discussion:

- To what extent is, as a matter of EU law, the establishment and maintaining of a common currency irreversible, absent modification of the Treaties?
- Is the functioning of the ECB, which is based on the premise of confidentiality, compatible with the ever increasing openness-access to documents focus imposed on EU institutions?

## Part III, Title VIII, TFEU

### TITLE VIII ECONOMIC AND MONETARY POLICY

#### Article 119

(ex Article 4 TEC)

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

#### CHAPTER 1

### ECONOMIC POLICY

#### Article 120

(ex Article 98 TEC)

Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

#### Article 121

(ex Article 99 TEC)

1. Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120.

2. The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union, and shall report its findings to the European Council.

The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union.

On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines. The Council shall inform the European Parliament of its recommendation.

3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of

economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.

For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public.

Within the scope of this paragraph, the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

5. The President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance. The President of the Council may be invited to appear before the competent committee of the European Parliament if the Council has made its recommendations public.

6. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4.

#### Article 122

(ex Article 100 TEC)

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

#### Article 123

(ex Article 101 TEC)

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.

#### Article 124

(ex Article 102 TEC)

Any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited.

Article 125

(ex Article 103 TEC)

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

Article 126

(ex Article 104 TEC)

1. Member States shall avoid excessive government deficits.

2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline on the basis of the following two criteria:

(a) whether the ratio of the planned or actual government deficit to gross domestic product exceeds a reference value, unless:

- either the ratio has declined substantially and continuously and reached a level that comes close to the reference value,

- or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value;

(b) whether the ratio of government debt to gross domestic product exceeds a reference value, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace.

The reference values are specified in the Protocol on the excessive deficit procedure annexed to the Treaties.

3. If a Member State does not fulfil the requirements under one or both of these criteria, the Commission shall prepare a report. The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State.

The Commission may also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State.

4. The Economic and Financial Committee shall formulate an opinion on the report of the Commission.

5. If the Commission considers that an excessive deficit in a Member State exists or may occur, it shall address an opinion to the Member State concerned and shall inform the Council accordingly.

6. The Council shall, on a proposal from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists.

7. Where the Council decides, in accordance with paragraph 6, that an excessive deficit exists, it shall adopt, without undue delay, on a recommendation from the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.

8. Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public.

9. If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.

In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.

10. The rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraphs 1 to 9 of this Article.

11. As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures:

- to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities,
- to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned,
- to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has, in the view of the Council, been corrected,
- to impose fines of an appropriate size.

The President of the Council shall inform the European Parliament of the decisions taken.

12. The Council shall abrogate some or all of its decisions or recommendations referred to in paragraphs 6 to 9 and 11 to the extent that the excessive deficit in the Member State concerned has, in the view of the Council, been corrected. If the Council has previously made public recommendations, it shall, as soon as the decision under paragraph 8 has been abrogated, make a public statement that an excessive deficit in the Member State concerned no longer exists.

13. When taking the decisions or recommendations referred to in paragraphs 8, 9, 11 and 12, the Council shall act on a recommendation from the Commission.

When the Council adopts the measures referred to in paragraphs 6 to 9, 11 and 12, it shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

14. Further provisions relating to the implementation of the procedure described in this Article are set out in the Protocol on the excessive deficit procedure annexed to the Treaties.

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions which shall then replace the said Protocol.

Subject to the other provisions of this paragraph, the Council shall, on a proposal from the Commission and after consulting the European Parliament, lay down detailed rules and definitions for the application of the provisions of the said Protocol.

## CHAPTER 2

### MONETARY POLICY

#### Article 127

(ex Article 105 TEC)

1. The primary objective of the European System of Central Banks (hereinafter referred to as "the ESCB") shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations consistent with the provisions of Article 219,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.

3. The third indent of paragraph 2 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances.

4. The European Central Bank shall be consulted:

- on any proposed Union act in its fields of competence,
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129(4).

The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.

5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

6. The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

#### Article 128

(ex Article 106 TEC)

1. The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.

2. Member States may issue euro coins subject to approval by the European Central Bank of the volume of the issue. The Council, on a proposal from the Commission and after consulting the European Parliament and the European Central Bank, may adopt measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union.

Article 129

(ex Article 107 TEC)

1. The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.

2. The Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as "the Statute of the ESCB and of the ECB") is laid down in a Protocol annexed to the Treaties.

3. Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of the Statute of the ESCB and of the ECB may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. They shall act either on a recommendation from the European Central Bank and after consulting the Commission or on a proposal from the Commission and after consulting the European Central Bank.

4. The Council, either on a proposal from the Commission and after consulting the European Parliament and the European Central Bank or on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of the Statute of the ESCB and of the ECB.

Article 130

(ex Article 108 TEC)

When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.

Article 131

(ex Article 109 TEC)

Each Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.

Article 132

(ex Article 110 TEC)

1. In order to carry out the tasks entrusted to the ESCB, the European Central Bank shall, in accordance with the provisions of the Treaties and under the conditions laid down in the Statute of the ESCB and of the ECB:

- make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 and 25.2 of the Statute of the ESCB and of the ECB in cases which shall be laid down in the acts of the Council referred to in Article 129(4),

- take decisions necessary for carrying out the tasks entrusted to the ESCB under the Treaties and the Statute of the ESCB and of the ECB,

- make recommendations and deliver opinions.

2. The European Central Bank may decide to publish its decisions, recommendations and opinions.

3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 129(4), the European Central Bank shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

#### Article 133

Without prejudice to the powers of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency. Such measures shall be adopted after consultation of the European Central Bank.

### CHAPTER 3

#### INSTITUTIONAL PROVISIONS

#### Article 134

(ex Article 114 TEC)

1. In order to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market, an Economic and Financial Committee is hereby set up.

2. The Economic and Financial Committee shall have the following tasks:

- to deliver opinions at the request of the Council or of the Commission, or on its own initiative for submission to those institutions,

- to keep under review the economic and financial situation of the Member States and of the Union and to report regularly thereon to the Council and to the Commission, in particular on financial relations with third countries and international institutions,

- without prejudice to Article 240, to contribute to the preparation of the work of the Council referred to in Articles 66, 75, 121(2), (3), (4) and (6), 122, 124, 125, 126, 127(6), 128(2), 129(3) and (4), 138, 140(2) and (3), 143, 144(2) and (3), and in Article 219, and to carry out other advisory and preparatory tasks assigned to it by the Council,

- to examine, at least once a year, the situation regarding the movement of capital and the freedom of payments, as they result from the application of the Treaties and of measures adopted by the Council; the examination shall cover all measures relating to capital movements and payments; the Committee shall report to the Commission and to the Council on the outcome of this examination.

The Member States, the Commission and the European Central Bank shall each appoint no more than two members of the Committee.

3. The Council shall, on a proposal from the Commission and after consulting the European Central Bank and the Committee referred to in this Article, lay down detailed provisions concerning the composition of the Economic and Financial Committee. The President of the Council shall inform the European Parliament of such a decision.

4. In addition to the tasks set out in paragraph 2, if and as long as there are Member States with a derogation as referred to in Article 139, the Committee shall keep under review the monetary and financial situation and the general payments system of those Member States and report regularly thereon to the Council and to the Commission.

#### Article 135

(ex Article 115 TEC)

For matters within the scope of Articles 121(4), 126 with the exception of paragraph 14, 138, 140(1), 140(2), first subparagraph, 140(3) and 219, the Council or a Member State may request the Commission to make a recommendation or a proposal, as appropriate. The Commission shall examine this request and submit its conclusions to the Council without delay.

### CHAPTER 4

#### PROVISIONS SPECIFIC TO MEMBER STATES WHOSE CURRENCY IS THE EURO

#### Article 136

1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:

(a) to strengthen the coordination and surveillance of their budgetary discipline;

(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

#### Article 137

Arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group.

#### Article 138

(ex Article 111(4), TEC)

1. In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

2. The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

3. For the measures referred to in paragraphs 1 and 2, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

## CHAPTER 5

### TRANSITIONAL PROVISIONS

#### Article 139

1. Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred to as "Member States with a derogation".

2. The following provisions of the Treaties shall not apply to Member States with a derogation:

(a) adoption of the parts of the broad economic policy guidelines which concern the euro area generally (Article 121(2));

(b) coercive means of remedying excessive deficits (Article 126(9) and (11));

(c) the objectives and tasks of the ESCB (Article 127(1) to (3) and (5));

(d) issue of the euro (Article 128);

(e) acts of the European Central Bank (Article 132);

(f) measures governing the use of the euro (Article 133);

(g) monetary agreements and other measures relating to exchange-rate policy (Article 219);

(h) appointment of members of the Executive Board of the European Central Bank (Article 283(2));

(i) decisions establishing common positions on issues of particular relevance for economic and monetary union within the competent international financial institutions and conferences (Article 138(1));

(j) measures to ensure unified representation within the international financial institutions and conferences (Article 138(2)).

In the Articles referred to in points (a) to (j), "Member States" shall therefore mean Member States whose currency is the euro.

3. Under Chapter IX of the Statute of the ESCB and of the ECB, Member States with a derogation and their national central banks are excluded from rights and obligations within the ESCB.

4. The voting rights of members of the Council representing Member States with a derogation shall be suspended for the adoption by the Council of the measures referred to in the Articles listed in paragraph 2, and in the following instances:

(a) recommendations made to those Member States whose currency is the euro in the framework of multilateral surveillance, including on stability programmes and warnings (Article 121(4));

(b) measures relating to excessive deficits concerning those Member States whose currency is the euro (Article 126(6), (7), (8), (12) and (13)).

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

#### Article 140

(ex Articles 121(1), 122(2), second sentence, and 123(5) TEC)

1. At least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank shall report to the Council on the progress made by the Member States with a derogation in fulfilling their obligations regarding the achievement of economic and monetary union. These reports shall include an examination of the compatibility between the national legislation of each of these Member States, including the statutes of its national central bank, and Articles 130 and 131 and the Statute of the ESCB and of the ECB. The reports shall also examine the achievement of a high degree of sustainable convergence by reference to the fulfilment by each Member State of the following criteria:

- the achievement of a high degree of price stability; this will be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability,
- the sustainability of the government financial position; this will be apparent from having achieved a government budgetary position without a deficit that is excessive as determined in accordance with Article 126(6),
- the observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System, for at least two years, without devaluing against the euro,
- the durability of convergence achieved by the Member State with a derogation and of its participation in the exchange-rate mechanism being reflected in the long-term interest-rate levels.

The four criteria mentioned in this paragraph and the relevant periods over which they are to be respected are developed further in a Protocol annexed to the Treaties. The reports of the Commission and the European Central Bank shall also take account of the results of the integration of markets, the situation and development of the balances of payments on current account and an examination of the development of unit labour costs and other price indices.

2. After consulting the European Parliament and after discussion in the European Council, the Council shall, on a proposal from the Commission, decide which Member States with a derogation fulfil the necessary conditions on the basis of the criteria set out in paragraph 1, and abrogate the derogations of the Member States concerned.

The Council shall act having received a recommendation of a qualified majority of those among its members representing Member States whose currency is the euro. These members shall act within six months of the Council receiving the Commission's proposal.

The qualified majority of the said members, as referred to in the second subparagraph, shall be defined in accordance with Article 238(3)(a).

3. If it is decided, in accordance with the procedure set out in paragraph 2, to abrogate a derogation, the Council shall, acting with the unanimity of the Member States whose currency is the euro and the Member State concerned, on a proposal from the Commission and after consulting the European Central Bank, irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned, and take the other measures necessary for the introduction of the euro as the single currency in the Member State concerned.

#### Article 141

(ex Articles 123(3) and 117(2) first five indents, TEC)

1. If and as long as there are Member States with a derogation, and without prejudice to Article 129(1), the General Council of the European Central Bank referred to in Article 44 of the Statute of the ESCB and of the ECB shall be constituted as a third decision-making body of the European Central Bank.

2. If and as long as there are Member States with a derogation, the European Central Bank shall, as regards those Member States:

- strengthen cooperation between the national central banks,
- strengthen the coordination of the monetary policies of the Member States, with the aim of ensuring price stability,
- monitor the functioning of the exchange-rate mechanism,
- hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets,
- carry out the former tasks of the European Monetary Cooperation Fund which had subsequently been taken over by the European Monetary Institute.

Article 142

(ex Article 124(1) TEC)

Each Member State with a derogation shall treat its exchange-rate policy as a matter of common interest. In so doing, Member States shall take account of the experience acquired in cooperation within the framework of the exchange-rate mechanism.

Article 143

(ex Article 119 TEC)

1. Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of the Treaties. The Commission shall state what measures it recommends the State concerned to take.

If the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall, after consulting the Economic and Financial Committee, recommend to the Council the granting of mutual assistance and appropriate methods therefor.

The Commission shall keep the Council regularly informed of the situation and of how it is developing.

2. The Council shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:

- (a) a concerted approach to or within any other international organisations to which Member States with a derogation may have recourse;
- (b) measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries;
- (c) the granting of limited credits by other Member States, subject to their agreement.

3. If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorise the Member State with

a derogation which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.

Such authorisation may be revoked and such conditions and details may be changed by the Council.

#### Article 144

(ex Article 120 TEC)

1. Where a sudden crisis in the balance of payments occurs and a decision within the meaning of Article 143(2) is not immediately taken, a Member State with a derogation may, as a precaution, take the necessary protective measures. Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

2. The Commission and the other Member States shall be informed of such protective measures not later than when they enter into force. The Commission may recommend to the Council the granting of mutual assistance under Article 143.

3. After the Commission has delivered a recommendation and the Economic and Financial Committee has been consulted, the Council may decide that the Member State concerned shall amend, suspend or abolish the protective measures referred to above.

## **Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank**

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the European System of Central Banks and of the European Central Bank provided for in the second paragraph of Article 129 of the Treaty on the Functioning of the European Union,

HAVE AGREED upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

### CHAPTER I

#### THE EUROPEAN SYSTEM OF CENTRAL BANKS

##### Article 1

###### The European System of Central Banks

In accordance with Article 282(1) of the Treaty on the Functioning of the European Union, the European Central Bank (ECB) and the national central banks shall constitute the European System of Central Banks (ESCB). The ECB and the national central banks of those Member States whose currency is the euro shall constitute the Eurosystem.

The ESCB and the ECB shall perform their tasks and carry on their activities in accordance with the provisions of the Treaties and of this Statute.

### CHAPTER II

#### OBJECTIVES AND TASKS OF THE ESCB

##### Article 2

###### Objectives

In accordance with Article 127(1) and Article 282(2) of the Treaty on the Functioning of the European Union, the primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, it shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119 of the Treaty on the Functioning of the European Union.

##### Article 3

###### Tasks

3.1. In accordance with Article 127(2) of the Treaty on the Functioning of the European Union, the basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union;
- to conduct foreign-exchange operations consistent with the provisions of Article 219 of that Treaty;
- to hold and manage the official foreign reserves of the Member States;

- to promote the smooth operation of payment systems.

3.2. In accordance with Article 127(3) of the Treaty on the Functioning of the European Union, the third indent of Article 3.1 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances.

3.3. In accordance with Article 127(5) of the Treaty on the Functioning of the European Union, the ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

#### Article 4

##### Advisory functions

In accordance with Article 127(4) of the Treaty on the Functioning of the European Union:

(a) the ECB shall be consulted:

- on any proposed Union act in its fields of competence;

- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 41;

(b) the ECB may submit opinions to the Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.

#### Article 5

##### Collection of statistical information

5.1. In order to undertake the tasks of the ESCB, the ECB, assisted by the national central banks, shall collect the necessary statistical information either from the competent national authorities or directly from economic agents. For these purposes it shall cooperate with the Union institutions, bodies, offices or agencies and with the competent authorities of the Member States or third countries and with international organisations.

5.2. The national central banks shall carry out, to the extent possible, the tasks described in Article 5.1.

5.3. The ECB shall contribute to the harmonisation, where necessary, of the rules and practices governing the collection, compilation and distribution of statistics in the areas within its fields of competence.

5.4. The Council, in accordance with the procedure laid down in Article 41, shall define the natural and legal persons subject to reporting requirements, the confidentiality regime and the appropriate provisions for enforcement.

#### Article 6

##### International cooperation

6.1. In the field of international cooperation involving the tasks entrusted to the ESCB, the ECB shall decide how the ESCB shall be represented.

6.2. The ECB and, subject to its approval, the national central banks may participate in international monetary institutions.

6.3. Articles 6.1 and 6.2 shall be without prejudice to Article 138 of the Treaty on the Functioning of the European Union.

## CHAPTER III

### ORGANISATION OF THE ESCB

#### Article 7

##### Independence

In accordance with Article 130 of the Treaty on the Functioning of the European Union, when exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and this Statute, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

#### Article 8

##### General principle

The ESCB shall be governed by the decision-making bodies of the ECB.

#### Article 9

##### The European Central Bank

9.1. The ECB which, in accordance with Article 282(3) of the Treaty on the Functioning of the European Union, shall have legal personality, shall enjoy in each of the Member States the most extensive legal capacity accorded to legal persons under its law; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.

9.2. The ECB shall ensure that the tasks conferred upon the ESCB under Article 127(2), (3) and (5) of the Treaty on the Functioning of the European Union are implemented either by its own activities pursuant to this Statute or through the national central banks pursuant to Articles 12.1 and 14.

9.3. In accordance with Article 129(1) of the Treaty on the Functioning of the European Union, the decision making bodies of the ECB shall be the Governing Council and the Executive Board.

#### Article 10

##### The Governing Council

10.1. In accordance with Article 283(1) of the Treaty on the Functioning of the European Union, the Governing Council shall comprise the members of the Executive Board of the ECB and the governors of the national central banks of the Member States whose currency is the euro.

10.2. Each member of the Governing Council shall have one vote. As from the date on which the number of members of the Governing Council exceeds 21, each member of the Executive Board shall have one vote and the number of governors with a voting right shall be 15. The latter voting rights shall be assigned and shall rotate as follows:

- as from the date on which the number of governors exceeds 15, until it reaches 22, the governors shall be allocated to two groups, according to a ranking of the size of the share of their national central bank's Member State in the aggregate gross domestic product at market prices and in the total aggregated balance sheet of the monetary financial institutions of the Member States whose currency is the euro. The shares in the aggregate gross domestic product at market prices and in the total aggregated balance sheet of the monetary financial institutions

shall be assigned weights of 5/6 and 1/6, respectively. The first group shall be composed of five governors and the second group of the remaining governors. The frequency of voting rights of the governors allocated to the first group shall not be lower than the frequency of voting rights of those of the second group. Subject to the previous sentence, the first group shall be assigned four voting rights and the second group eleven voting rights,

- as from the date on which the number of governors reaches 22, the governors shall be allocated to three groups according to a ranking based on the above criteria. The first group shall be composed of five governors and shall be assigned four voting rights. The second group shall be composed of half of the total number of governors, with any fraction rounded up to the nearest integer, and shall be assigned eight voting rights. The third group shall be composed of the remaining governors and shall be assigned three voting rights,

- within each group, the governors shall have their voting rights for equal amounts of time,

- for the calculation of the shares in the aggregate gross domestic product at market prices Article 29.2 shall apply. The total aggregated balance sheet of the monetary financial institutions shall be calculated in accordance with the statistical framework applying in the Union at the time of the calculation,

- whenever the aggregate gross domestic product at market prices is adjusted in accordance with Article 29.3, or whenever the number of governors increases, the size and/or composition of the groups shall be adjusted in accordance with the above principles,

- the Governing Council, acting by a two-thirds majority of all its members, with and without a voting right, shall take all measures necessary for the implementation of the above principles and may decide to postpone the start of the rotation system until the date on which the number of governors exceeds 18.

The right to vote shall be exercised in person. By way of derogation from this rule, the Rules of Procedure referred to in Article 12.3 may lay down that members of the Governing Council may cast their vote by means of teleconferencing. These rules shall also provide that a member of the Governing Council who is prevented from attending meetings of the Governing Council for a prolonged period may appoint an alternate as a member of the Governing Council.

The provisions of the previous paragraphs are without prejudice to the voting rights of all members of the Governing Council, with and without a voting right, under Articles 10.3, 40.2 and 40.3.

Save as otherwise provided for in this Statute, the Governing Council shall act by a simple majority of the members having a voting right. In the event of a tie, the President shall have the casting vote.

In order for the Governing Council to vote, there shall be a quorum of two-thirds of the members having a voting right. If the quorum is not met, the President may convene an extraordinary meeting at which decisions may be taken without regard to the quorum.

10.3. For any decisions to be taken under Articles 28, 29, 30, 32 and 33, the votes in the Governing Council shall be weighted according to the national central banks' shares in the subscribed capital of the ECB. The weights of the votes of the members of the Executive Board shall be zero. A decision requiring a qualified majority shall be adopted if the votes cast in favour represent at least two thirds of the subscribed capital of the ECB and represent at least half of the shareholders. If a Governor is unable to be present, he may nominate an alternate to cast his weighted vote.

10.4. The proceedings of the meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public.

10.5. The Governing Council shall meet at least 10 times a year.

## Article 11

### The Executive Board

11.1. In accordance with the first subparagraph of Article 283(2) of the Treaty on the Functioning of the European Union, the Executive Board shall comprise the President, the Vice-President and four other members.

The members shall perform their duties on a full-time basis. No member shall engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Governing Council.

11.2. In accordance with the second subparagraph of Article 283(2) of the Treaty on the Functioning of the European Union, the President, the Vice-President and the other members of the Executive Board shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council after it has consulted the European Parliament and the Governing Council.

Their term of office shall be eight years and shall not be renewable.

Only nationals of Member States may be members of the Executive Board.

11.3. The terms and conditions of employment of the members of the Executive Board, in particular their salaries, pensions and other social security benefits shall be the subject of contracts with the ECB and shall be fixed by the Governing Council on a proposal from a Committee comprising three members appointed by the Governing Council and three members appointed by the Council. The members of the Executive Board shall not have the right to vote on matters referred to in this paragraph.

11.4. If a member of the Executive Board no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Governing Council or the Executive Board, compulsorily retire him.

11.5. Each member of the Executive Board present in person shall have the right to vote and shall have, for that purpose, one vote. Save as otherwise provided, the Executive Board shall act by a simple majority of the votes cast. In the event of a tie, the President shall have the casting vote. The voting arrangements shall be specified in the Rules of Procedure referred to in Article 12.3.

11.6. The Executive Board shall be responsible for the current business of the ECB.

11.7. Any vacancy on the Executive Board shall be filled by the appointment of a new member in accordance with Article 11.2.

## Article 12

### Responsibilities of the decision-making bodies

12.1. The Governing Council shall adopt the guidelines and take the decisions necessary to ensure the performance of the tasks entrusted to the ESCB under these Treaties and this Statute. The Governing Council shall formulate the monetary policy of the Union including, as appropriate, decisions relating to intermediate monetary objectives, key interest rates and the supply of reserves in the ESCB, and shall establish the necessary guidelines for their implementation.

The Executive Board shall implement monetary policy in accordance with the guidelines and decisions laid down by the Governing Council. In doing so the Executive Board shall give the necessary instructions to national central banks. In addition the Executive Board may have certain powers delegated to it where the Governing Council so decides.

To the extent deemed possible and appropriate and without prejudice to the provisions of this Article, the ECB shall have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB.

12.2. The Executive Board shall have responsibility for the preparation of meetings of the Governing Council.

12.3. The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.

12.4. The Governing Council shall exercise the advisory functions referred to in Article 4.

12.5. The Governing Council shall take the decisions referred to in Article 6.

#### Article 13

##### The President

13.1. The President or, in his absence, the Vice-President shall chair the Governing Council and the Executive Board of the ECB.

13.2. Without prejudice to Article 38, the President or his nominee shall represent the ECB externally.

#### Article 14

##### National central banks

14.1. In accordance with Article 131 of the Treaty on the Functioning of the European Union, each Member State shall ensure that its national legislation, including the statutes of its national central bank, is compatible with these Treaties and this Statute.

14.2. The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years.

A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

14.3. The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB, and shall require that any necessary information be given to it.

14.4. National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.

#### Article 15

##### Reporting commitments

15.1. The ECB shall draw up and publish reports on the activities of the ESCB at least quarterly.

15.2. A consolidated financial statement of the ESCB shall be published each week.

15.3. In accordance with Article 284(3) of the Treaty on the Functioning of the European Union, the ECB shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and the current year to the European Parliament, the Council and the Commission, and also to the European Council.

15.4. The reports and statements referred to in this Article shall be made available to interested parties free of charge.

## Article 16

### Banknotes

In accordance with Article 128(1) of the Treaty on the Functioning of the European Union, the Governing Council shall have the exclusive right to authorise the issue of euro banknotes within the Union. The ECB and the national central banks may issue such notes. The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Union.

The ECB shall respect as far as possible existing practices regarding the issue and design of banknotes.

## CHAPTER IV

### MONETARY FUNCTIONS AND OPERATIONS OF THE ESCB

## Article 17

### Accounts with the ECB and the national central banks

In order to conduct their operations, the ECB and the national central banks may open accounts for credit institutions, public entities and other market participants and accept assets, including book entry securities, as collateral.

## Article 18

### Open market and credit operations

18.1. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may:

- operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;
- conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral.

18.2. The ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions.

## Article 19

### Minimum reserves

19.1. Subject to Article 2, the ECB may require credit institutions established in Member States to hold minimum reserve on accounts with the ECB and national central banks in pursuance of monetary policy objectives. Regulations concerning the calculation and determination of the required minimum reserves may be established by the Governing Council. In cases of non-compliance the ECB shall be entitled to levy penalty interest and to impose other sanctions with comparable effect.

19.2. For the application of this Article, the Council shall, in accordance with the procedure laid down in Article 41, define the basis for minimum reserves and the maximum permissible ratios between those reserves and their basis, as well as the appropriate sanctions in cases of non-compliance.

## Article 20

### Other instruments of monetary control

The Governing Council may, by a majority of two thirds of the votes cast, decide upon the use of such other operational methods of monetary control as it sees fit, respecting Article 2.

The Council shall, in accordance with the procedure laid down in Article 41, define the scope of such methods if they impose obligations on third parties.

## Article 21

### Operations with public entities

21.1. In accordance with Article 123 of the Treaty on the Functioning of the European Union, overdrafts or any other type of credit facility with the ECB or with the national central banks in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the ECB or national central banks of debt instruments.

21.2. The ECB and national central banks may act as fiscal agents for the entities referred to in Article 21.1.

21.3. The provisions of this Article shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the ECB as private credit institutions.

## Article 22

### Clearing and payment systems

The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries.

## Article 23

### External operations

The ECB and national central banks may:

- establish relations with central banks and financial institutions in other countries and, where appropriate, with international organisations;
- acquire and sell spot and forward all types of foreign exchange assets and precious metals; the term "foreign exchange asset" shall include securities and all other assets in the currency of any country or units of account and in whatever form held;
- hold and manage the assets referred to in this Article;
- conduct all types of banking transactions in relations with third countries and international organisations, including borrowing and lending operations.

## Article 24

Other operations

In addition to operations arising from their tasks, the ECB and national central banks may enter into operations for their administrative purposes or for their staff.

## CHAPTER V

### PRUDENTIAL SUPERVISION

#### Article 25

##### Prudential supervision

25.1. The ECB may offer advice to and be consulted by the Council, the Commission and the competent authorities of the Member States on the scope and implementation of Union legislation relating to the prudential supervision of credit institutions and to the stability of the financial system.

25.2. In accordance with any regulation of the Council under Article 127(6) of the Treaty on the Functioning of the European Union, the ECB may perform specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

## CHAPTER VI

### FINANCIAL PROVISIONS OF THE ESCB

#### Article 26

##### Financial accounts

26.1. The financial year of the ECB and national central banks shall begin on the first day of January and end on the last day of December.

26.2. The annual accounts of the ECB shall be drawn up by the Executive Board, in accordance with the principles established by the Governing Council. The accounts shall be approved by the Governing Council and shall thereafter be published.

26.3. For analytical and operational purposes, the Executive Board shall draw up a consolidated balance sheet of the ESCB, comprising those assets and liabilities of the national central banks that fall within the ESCB.

26.4. For the application of this Article, the Governing Council shall establish the necessary rules for standardising the accounting and reporting of operations undertaken by the national central banks.

#### Article 27

##### Auditing

27.1. The accounts of the ECB and national central banks shall be audited by independent external auditors recommended by the Governing Council and approved by the Council. The auditors shall have full power to examine all books and accounts of the ECB and national central banks and obtain full information about their transactions.

27.2. The provisions of Article 287 of the Treaty on the Functioning of the European Union shall only apply to an examination of the operational efficiency of the management of the ECB.

#### Article 28

## Capital of the ECB

28.1. The capital of the ECB shall be euro 5000 million. The capital may be increased by such amounts as may be decided by the Governing Council acting by the qualified majority provided for in Article 10.3, within the limits and under the conditions set by the Council under the procedure laid down in Article 41.

28.2. The national central banks shall be the sole subscribers to and holders of the capital of the ECB. The subscription of capital shall be according to the key established in accordance with Article 29.

28.3. The Governing Council, acting by the qualified majority provided for in Article 10.3, shall determine the extent to which and the form in which the capital shall be paid up.

28.4. Subject to Article 28.5, the shares of the national central banks in the subscribed capital of the ECB may not be transferred, pledged or attached.

28.5. If the key referred to in Article 29 is adjusted, the national central banks shall transfer among themselves capital shares to the extent necessary to ensure that the distribution of capital shares corresponds to the adjusted key. The Governing Council shall determine the terms and conditions of such transfers.

## Article 29

### Key for capital subscription

29.1. The key for subscription of the ECB's capital, fixed for the first time in 1998 when the ESCB was established, shall be determined by assigning to each national central bank a weighting in this key equal to the sum of:

- 50 % of the share of its respective Member State in the population of the Union in the penultimate year preceding the establishment of the ESCB;

- 50 % of the share of its respective Member State in the gross domestic product at market prices of the Union as recorded in the last five years preceding the penultimate year before the establishment of the ESCB.

The percentages shall be rounded up or down to the nearest multiple of 0,0001 percentage points.

29.2. The statistical data to be used for the application of this Article shall be provided by the Commission in accordance with the rules adopted by the Council under the procedure provided for in Article 41.

29.3. The weightings assigned to the national central banks shall be adjusted every five years after the establishment of the ESCB by analogy with the provisions laid down in Article 29.1. The adjusted key shall apply with effect from the first day of the following year.

29.4. The Governing Council shall take all other measures necessary for the application of this Article.

## Article 30

### Transfer of foreign reserve assets to the ECB

30.1. Without prejudice to Article 28, the ECB shall be provided by the national central banks with foreign reserve assets, other than Member States' currencies, euro, IMF reserve positions and SDRs, up to an amount equivalent to euro 50000 million. The Governing Council shall decide upon the proportion to be called up by the ECB following its establishment and the amounts called up at later dates. The ECB shall have the full right to hold and manage the foreign reserves that are transferred to it and to use them for the purposes set out in this Statute.

30.2. The contributions of each national central bank shall be fixed in proportion to its share in the subscribed capital of the ECB.

30.3. Each national central bank shall be credited by the ECB with a claim equivalent to its contribution. The Governing Council shall determine the denomination and remuneration of such claims.

30.4. Further calls of foreign reserve assets beyond the limit set in Article 30.1 may be effected by the ECB, in accordance with Article 30.2, within the limits and under the conditions set by the Council in accordance with the procedure laid down in Article 41.

30.5. The ECB may hold and manage IMF reserve positions and SDRs and provide for the pooling of such assets.

30.6. The Governing Council shall take all other measures necessary for the application of this Article.

#### Article 31

##### Foreign reserve assets held by national central banks

31.1. The national central banks shall be allowed to perform transactions in fulfilment of their obligations towards international organisations in accordance with Article 23.

31.2. All other operations in foreign reserve assets remaining with the national central banks after the transfers referred to in Article 30, and Member States' transactions with their foreign exchange working balances shall, above a certain limit to be established within the framework of Article 31.3, be subject to approval by the ECB in order to ensure consistency with the exchange rate and monetary policies of the Union.

31.3. The Governing Council shall issue guidelines with a view to facilitating such operations.

#### Article 32

##### Allocation of monetary income of national central banks

32.1. The income accruing to the national central banks in the performance of the ESCB's monetary policy function (hereinafter referred to as "monetary income") shall be allocated at the end of each financial year in accordance with the provisions of this Article.

32.2. The amount of each national central bank's monetary income shall be equal to its annual income derived from its assets held against notes in circulation and deposit liabilities to credit institutions. These assets shall be earmarked by national central banks in accordance with guidelines to be established by the Governing Council.

32.3. If, after the introduction of the euro, the balance sheet structures of the national central banks do not, in the judgment of the Governing Council, permit the application of Article 32.2, the Governing Council, acting by a qualified majority, may decide that, by way of derogation from Article 32.2, monetary income shall be measured according to an alternative method for a period of not more than five years.

32.4. The amount of each national central bank's monetary income shall be reduced by an amount equivalent to any interest paid by that central bank on its deposit liabilities to credit institutions in accordance with Article 19.

The Governing Council may decide that national central banks shall be indemnified against costs incurred in connection with the issue of banknotes or in exceptional circumstances for specific losses arising from monetary policy operations undertaken for the ESCB. Indemnification shall be in a form deemed appropriate in the judgment of the Governing Council; these amounts may be offset against the national central banks' monetary income.

32.5. The sum of the national central banks' monetary income shall be allocated to the national central banks in proportion to their paid up shares in the capital of the ECB, subject to any decision taken by the Governing Council pursuant to Article 33.2.

32.6. The clearing and settlement of the balances arising from the allocation of monetary income shall be carried out by the ECB in accordance with guidelines established by the Governing Council.

32.7. The Governing Council shall take all other measures necessary for the application of this Article.

## Article 33

### Allocation of net profits and losses of the ECB

33.1. The net profit of the ECB shall be transferred in the following order:

(a) an amount to be determined by the Governing Council, which may not exceed 20 % of the net profit, shall be transferred to the general reserve fund subject to a limit equal to 100 % of the capital;

(b) the remaining net profit shall be distributed to the shareholders of the ECB in proportion to their paid-up shares.

33.2. In the event of a loss incurred by the ECB, the shortfall may be offset against the general reserve fund of the ECB and, if necessary, following a decision by the Governing Council, against the monetary income of the relevant financial year in proportion and up to the amounts allocated to the national central banks in accordance with Article 32.5.

## CHAPTER VII

### GENERAL PROVISIONS

## Article 34

### Legal acts

34.1. In accordance with Article 132 of the Treaty on the Functioning of the European Union, the ECB shall:

- make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 or 25.2 and in cases which shall be laid down in the acts of the Council referred to in Article 41;

- take decisions necessary for carrying out the tasks entrusted to the ESCB under these Treaties and this Statute;

- make recommendations and deliver opinions.

34.2. The ECB may decide to publish its decisions, recommendations and opinions.

34.3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 41, the ECB shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

## Article 35

### Judicial control and related matters

35.1. The acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice of the European Union in the cases and under the conditions laid down in the Treaty on the Functioning of the European Union. The ECB may institute proceedings in the cases and under the conditions laid down in the Treaties.

35.2. Disputes between the ECB, on the one hand, and its creditors, debtors or any other person, on the other, shall be decided by the competent national courts, save where jurisdiction has been conferred upon the Court of Justice of the European Union.

35.3. The ECB shall be subject to the liability regime provided for in Article 340 of the Treaty on the Functioning of the European Union. The national central banks shall be liable according to their respective national laws.

35.4. The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the ECB, whether that contract be governed by public or private law.

35.5. A decision of the ECB to bring an action before the Court of Justice of the European Union shall be taken by the Governing Council.

35.6. The Court of Justice of the European Union shall have jurisdiction in disputes concerning the fulfilment by a national central bank of obligations under the Treaties and this Statute. If the ECB considers that a national central bank has failed to fulfil an obligation under the Treaties and this Statute, it shall deliver a reasoned opinion on the matter after giving the national central bank concerned the opportunity to submit its observations. If the national central bank concerned does not comply with the opinion within the period laid down by the ECB, the latter may bring the matter before the Court of Justice of the European Union.

#### Article 36

##### Staff

36.1. The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2. The Court of Justice of the European Union shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.

#### Article 37 (ex Article 38)

##### Professional secrecy

37.1. Members of the governing bodies and the staff of the ECB and the national central banks shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

37.2. Persons having access to data covered by Union legislation imposing an obligation of secrecy shall be subject to such legislation.

#### Article 38 (ex Article 39)

##### Signatories

The ECB shall be legally committed to third parties by the President or by two members of the Executive Board or by the signatures of two members of the staff of the ECB who have been duly authorised by the President to sign on behalf of the ECB.

#### Article 39 (ex Article 40)

##### Privileges and immunities

The ECB shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol on the privileges and immunities of the European Union.

### CHAPTER VIII

#### AMENDMENT OF THE STATUTE AND COMPLEMENTARY LEGISLATION

#### Article 40 (ex Article 41)

## Simplified amendment procedure

40.1. In accordance with Article 129(3) of the Treaty on the Functioning of the European Union, Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of this Statute may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure either on a recommendation from the ECB and after consulting the Commission, or on a proposal from the Commission and after consulting the ECB.

40.2. Article 10.2 may be amended by a decision of the European Council, acting unanimously, either on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission, or on a recommendation from the Commission and after consulting the European Parliament and the European Central Bank. These amendments shall not enter into force until they are approved by the Member States in accordance with their respective constitutional requirements.

40.3. A recommendation made by the ECB under this Article shall require a unanimous decision by the Governing Council.

## Article 41 (ex Article 42)

### Complementary legislation

In accordance with Article 129(4) of the Treaty on the Functioning of the European Union, the Council, either on a proposal from the Commission and after consulting the European Parliament and the ECB or on a recommendation from the ECB and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of this Statute.

## CHAPTER IX

### TRANSITIONAL AND OTHER PROVISIONS FOR THE ESCB

## Article 42 (ex Article 43)

### General provisions

42.1. A derogation as referred to in Article 139 of the Treaty on the Functioning of the European Union shall entail that the following Articles of this Statute shall not confer any rights or impose any obligations on the Member State concerned: 3, 6, 9.2, 12.1, 14.3, 16, 18, 19, 20, 22, 23, 26.2, 27, 30, 31, 32, 33, 34, and 49.

42.2. The central banks of Member States with a derogation as specified in Article 139(1) of the Treaty on the Functioning of the European Union shall retain their powers in the field of monetary policy according to national law.

42.3. In accordance with Article 139 of the Treaty on the Functioning of the European Union, "Member States" shall be read as "Member States whose currency is the euro" in the following Articles of this Statute: 3, 11.2 and 19.

42.4. "National central banks" shall be read as "central banks of Member States whose currency is the euro" in the following Articles of this Statute: 9.2, 10.2, 10.3, 12.1, 16, 17, 18, 22, 23, 27, 30, 31, 32, 33.2 and 49.

42.5. "Shareholders" shall be read as "central banks of Member States whose currency is the euro" in Articles 10.3 and 33.1.

42.6. "Subscribed capital of the ECB" shall be read as "capital of the ECB subscribed by the central banks of Member States whose currency is the euro" in Articles 10.3 and 30.2.

## Article 43 (ex Article 44)

## Transitional tasks of the ECB

The ECB shall take over the former tasks of the EMI referred to in Article 141(2) of the Treaty on the Functioning of the European Union which, because of the derogations of one or more Member States, still have to be performed after the introduction of the euro.

The ECB shall give advice in the preparations for the abrogation of the derogations specified in Article 140 of the Treaty on the Functioning of the European Union.

## Article 44 (ex Article 45)

### The General Council of the ECB

44.1. Without prejudice to Article 129(1) of the Treaty on the Functioning of the European Union, the General Council shall be constituted as a third decision-making body of the ECB.

44.2. The General Council shall comprise the President and Vice-President of the ECB and the Governors of the national central banks. The other members of the Executive Board may participate, without having the right to vote, in meetings of the General Council.

44.3. The responsibilities of the General Council are listed in full in Article 46 of this Statute.

## Article 45 (ex Article 46)

### Rules of Procedure of the General Council

45.1. The President or, in his absence, the Vice-President of the ECB shall chair the General Council of the ECB.

45.2. The President of the Council and a Member of the Commission may participate, without having the right to vote, in meetings of the General Council.

45.3. The President shall prepare the meetings of the General Council.

45.4. By way of derogation from Article 12.3, the General Council shall adopt its Rules of Procedure.

45.5. The Secretariat of the General Council shall be provided by the ECB.

## Article 46 (ex Article 47)

### Responsibilities of the General Council

46.1. The General Council shall:

- perform the tasks referred to in Article 43;
- contribute to the advisory functions referred to in Articles 4 and 25.1.

46.2. The General Council shall contribute to:

- the collection of statistical information as referred to in Article 5;
- the reporting activities of the ECB as referred to in Article 15;
- the establishment of the necessary rules for the application of Article 26 as referred to in Article 26.4;

- the taking of all other measures necessary for the application of Article 29 as referred to in Article 29.4;
- the laying down of the conditions of employment of the staff of the ECB as referred to in Article 36.

46.3. The General Council shall contribute to the necessary preparations for irrevocably fixing the exchange rates of the currencies of Member States with a derogation against the euro as referred to in Article 140(3) of the Treaty on the Functioning of the European Union.

46.4. The General Council shall be informed by the President of the ECB of decisions of the Governing Council.

#### Article 47 (ex Article 48)

##### Transitional provisions for the capital of the ECB

In accordance with Article 29.1, each national central bank shall be assigned a weighting in the key for subscription of the ECB's capital. By way of derogation from Article 28.3, central banks of Member States with a derogation shall not pay up their subscribed capital unless the General Council, acting by a majority representing at least two thirds of the subscribed capital of the ECB and at least half of the shareholders, decides that a minimal percentage has to be paid up as a contribution to the operational costs of the ECB.

#### Article 48 (ex Article 49)

##### Deferred payment of capital, reserves and provisions of the ECB

48.1. The central bank of a Member State whose derogation has been abrogated shall pay up its subscribed share of the capital of the ECB to the same extent as the central banks of other Member States whose currency is the euro, and shall transfer to the ECB foreign reserve assets in accordance with Article 30.1. The sum to be transferred shall be determined by multiplying the euro value at current exchange rates of the foreign reserve assets which have already been transferred to the ECB in accordance with Article 30.1, by the ratio between the number of shares subscribed by the national central bank concerned and the number of shares already paid up by the other national central banks.

48.2. In addition to the payment to be made in accordance with Article 48.1, the central bank concerned shall contribute to the reserves of the ECB, to those provisions equivalent to reserves, and to the amount still to be appropriated to the reserves and provisions corresponding to the balance of the profit and loss account as at 31 December of the year prior to the abrogation of the derogation. The sum to be contributed shall be determined by multiplying the amount of the reserves, as defined above and as stated in the approved balance sheet of the ECB, by the ratio between the number of shares subscribed by the central bank concerned and the number of shares already paid up by the other central banks.

48.3. Upon one or more countries becoming Member States and their respective national central banks becoming part of the ESCB, the subscribed capital of the ECB and the limit on the amount of foreign reserve assets that may be transferred to the ECB shall be automatically increased. The increase shall be determined by multiplying the respective amounts then prevailing by the ratio, within the expanded capital key, between the weighting of the entering national central banks concerned and the weighting of the national central banks already members of the ESCB. Each national central bank's weighting in the capital key shall be calculated by analogy with Article 29.1 and in compliance with Article 29.2. The reference periods to be used for the statistical data shall be identical to those applied for the latest quinquennial adjustment of the weightings under Article 29.3.

#### Article 49 (ex Article 52)

##### Exchange of banknotes in the currencies of the Member States

Following the irrevocable fixing of exchange rates in accordance with Article 140 of the Treaty on the Functioning of the European Union, the Governing Council shall take the necessary measures to ensure that banknotes denominated in currencies with irrevocably fixed exchange rates are exchanged by the national central banks at their respective par values.

Article 50 (ex Article 53)

Applicability of the transitional provisions

If and as long as there are Member States with a derogation, Articles 42 to 47 shall be applicable.



**Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access  
to European Central Bank documents (ECB/2004/3)**

Decision of the European Central Bank

of 4 March 2004

on public access to European Central Bank documents

(ECB/2004/3)

(2004/258/EC)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular to Article 12.3 thereof,

Having regard to the Rules of Procedure of the European Central Bank(1), and in particular to Article 23 thereof,

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Openness enhances the administration's legitimacy, effectiveness and accountability, thus strengthening the principles of democracy.

(2) In the Joint Declaration(2) relating to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents(3), the European Parliament, the Council and the Commission call on the other institutions and bodies of the Union to adopt internal rules on public access to documents which take account of the principles and limits set out in the Regulation. The regime on public access to ECB documents as laid down in Decision ECB/1998/12 of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank(4) should be revised accordingly.

(3) Wider access should be granted to ECB documents, while at the same time protecting the independence of the ECB and of the national central banks (NCBs) foreseen by Article 108 of the Treaty and Article 7 of the Statute, and the confidentiality of certain matters specific to the performance of the ECB's tasks. In order to safeguard the effectiveness of its decision-making process, including its internal consultations and preparations, the proceedings of the meetings of the ECB's decision-making bodies are confidential, unless the relevant body decides to make the outcome of its deliberations public.

(4) However, certain public and private interests should be protected by way of exceptions. Furthermore, the ECB needs to protect the integrity of euro banknotes as a means of payment including, without limitation, the security features against counterfeiting, the technical production specifications, the physical security of stocks and the transportation of euro banknotes.

(5) When NCBs handle requests for ECB documents that are in their possession, they should consult the ECB in order to ensure the full application of this Decision unless it is clear whether or not the document may be disclosed.

(6) In order to bring about greater openness, the ECB should grant access not only to documents drawn up by it, but also to documents received by it while at the same time preserving the right for the third parties concerned to express their positions with regard to access to documents originating from those parties.

(7) In order to ensure that good administrative practice is respected, the ECB should apply a two-stage procedure,

HAS DECIDED AS FOLLOWS:

#### Article 1

##### Purpose

The purpose of this Decision is to define the conditions and limits according to which the ECB shall give public access to ECB documents and to promote good administrative practice on public access to such documents.

#### Article 2

##### Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to ECB documents, subject to the conditions and limits defined in this Decision.
2. The ECB may, subject to the same conditions and limits, grant access to ECB documents to any natural or legal person not residing or not having its registered office in a Member State.
3. This Decision shall be without prejudice to rights of public access to ECB documents which might follow from instruments of international law or acts which implement them.

#### Article 3

##### Definitions

For the purpose of this Decision:

(a) "document" and "ECB document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drawn up or held by the ECB and relating to its policies, activities or decisions, as well as documents originating from the European Monetary Institute (EMI) and from the Committee of Governors of the central banks of the Member States of the European Economic Community (Committee of Governors);

(b) "third party" shall mean any natural or legal person, or any entity outside the ECB.

#### Article 4

##### Exceptions

1. The ECB shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- the confidentiality of the proceedings of the ECB's decision-making bodies,
- the financial, monetary or economic policy of the Community or a Member State,
- the internal finances of the ECB or of the NCBs,
- protecting the integrity of euro banknotes,
- public security,
- international financial, monetary or economic relations;

(b) the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data;

(c) the confidentiality of information that is protected as such under Community law.

2. The ECB shall refuse access to a document where disclosure would undermine the protection of:

- the commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the ECB shall consult the third party concerned with a view to assessing whether an exception in this Article is applicable, unless it is clear that the document shall or shall not be disclosed.

5. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

6. The exceptions as laid down in this Article shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years unless specifically provided otherwise by the ECB's Governing Council. In the case of documents covered by the exceptions relating to privacy or commercial interests, the exceptions may continue to apply after this period.

## Article 5

### Documents at the NCBs

Documents that are in the possession of an NCB and have been drawn up by the ECB as well as documents originating from the EMI or the Committee of Governors may be disclosed by the NCB only subject to prior consultation of the ECB concerning the scope of access, unless it is clear that the document shall or shall not be disclosed.

Alternatively the NCB may refer the request to the ECB.

## Article 6

### Applications

1. An application for access to a document shall be made to the ECB(5) in any written form, including electronic form, in one of the official languages of the Union and in a sufficiently precise manner to enable the ECB to identify the document. The applicant is not obliged to state the reasons for the application.

2. If an application is not sufficiently precise, the ECB shall ask the applicant to clarify the application and shall assist the applicant in doing so.

3. In the event of an application relating to a very long document or to a very large number of documents, the ECB may confer with the applicant informally, with a view to finding a fair solution.

## Article 7

#### Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 20 working days from the receipt of the application, or on receipt of the clarifications requested in accordance with Article 6(2), the Director General Secretariat and Language Services of the ECB shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for total or partial refusal and inform the applicant of their right to make a confirmatory application in accordance with paragraph 2.

2. In the event of total or partial refusal, the applicant may, within 20 working days of receiving the ECB's reply, make a confirmatory application asking the ECB's Executive Board to reconsider its position. Furthermore, failure by the ECB to reply within the prescribed 20 working days' time limit for handling the initial application shall entitle the applicant to make a confirmatory application.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, or if the consultation of a third party is required, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Paragraph 1 shall not apply in case of excessive or unreasonable applications, in particular when they are of a repetitive nature.

#### Article 8

##### Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 20 working days from the receipt of such application, the Executive Board shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the ECB shall inform the applicant of the remedies open to them in accordance with Articles 230 and 195 of the Treaty.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the ECB may extend the time limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the ECB to reply within the prescribed time limit shall be considered to be a negative reply and shall entitle the applicant to institute court proceedings and/or submit a complaint to the European Ombudsman, under Articles 230 and 195 of the Treaty, respectively.

#### Article 9

[...]

Decision ECB/1998/12 shall be repealed.

Done at Frankfurt am Main, 4 March 2004.

## **Case T-590/10, *Gabi Thesing and Bloomberg Finance v European Central Bank***

In Case T-590/10,

**Gabi Thesing**, residing in London (United Kingdom),

**Bloomberg Finance LP**, established in Wilmington, Delaware (United States),

represented by M. Stephens and R. Lands, Solicitors, and T. Pitt-Payne QC,

applicants,

v

**European Central Bank (ECB)**, represented initially by A. Sáinz de Viqueña Barroso, M. López Torres and S. Lambrinoc, and subsequently by M. López Torres and S. Lambrinoc, acting as Agents,

defendant,

APPLICATION for annulment of the decision of the ECB's Executive Board, which was notified to Ms Thesing by letter of the President of the ECB of 21 October 2010, rejecting an application by Ms Thesing for access to two documents concerning the government deficit and debt of the Hellenic Republic,

THE GENERAL COURT (Seventh Chamber),

composed of A. Dittrich (Rapporteur), President, I. Wiszniewska-Białecka and M. Prek, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2012,

gives the following

### **Judgment**

#### **Background to the dispute**

1 The first applicant, Ms Gabi Thesing, is a journalist. She works for the second applicant, Bloomberg Finance LP, which operates in London (United Kingdom) under the name of Bloomberg News.

2 On 20 August 2010, the first applicant requested the European Central Bank (ECB) to grant access to document SEC/GovC/X/10/88a, entitled 'The impact on government deficit and debt from off-market swaps. The Greek case' ('the first document'), and to document SEC/GovC/X/10/88b, entitled 'The Titlos transaction and possible existence of similar transactions impacting on the euro area government debt or deficit levels' (the second document). Those documents concerned the use of derivative transactions in financing deficit and in government debt management.

3 By letter of 17 September 2010, the ECB's Director-General of the Secretariat and Language Services informed the first applicant of the decision not to grant access to the requested documents.

4 On 28 September 2010, the applicants sent a confirmatory application to the ECB, under Article 7(2) of Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42). That application requested that the Executive Board of the ECB review the ECB's position relating to the refusal to grant access to the documents at issue.

5 By letter of 21 October 2010, the President of the ECB informed the first applicant of the decision of the ECB's Executive Board confirming the decision contained in the letter of 17 September 2010 to refuse access to the documents at issue ('the contested decision'). That refusal was based, in the case of those two documents, on the protection of the public interest so far as concerns the economic policy of the European Union and the Hellenic Republic and on the protection of the ECB's internal deliberations and consultations, pursuant to the second indent of Article 4(1)(a) and Article 4(3) of Decision 2004/258. As regards the second document only, the refusal was also based on the protection of the commercial interests of a natural or legal person, under the first indent of Article 4(2) of that decision.

#### **Procedure and forms of order sought**

6 By application lodged at the Registry of the General Court on 27 December 2010, the applicants brought the present action.

7 By document lodged at the Registry of the General Court on 11 April 2011, Mr Athanasios Pitsiorlas applied for leave to intervene in this case in support of the form of order sought by the applicants. By order of the President of the Seventh Chamber of the General Court of 14 July 2011, the application was refused.

8 Upon hearing the report of the Judge-Rapporteur, the Court (Seventh Chamber) decided to open the oral procedure.

9 By way of measures of organisation of procedure under Article 64 of its Rules of Procedure, the Court sent a written question on 14 May 2012 to the ECB, to which the ECB was requested to reply at the hearing.

10 By way of a measure of inquiry pursuant to Article 65 of the Rules of Procedure, by order of 21 May 2012 the General Court ordered the ECB to produce the two documents at issue, and stated that they would not be disclosed to the applicants. The ECB complied with that measure of inquiry within the prescribed time-limit.

11 By letter lodged at the Registry of the General Court on 30 May 2012, the applicants requested that further evidence offered in support be placed in the file, namely the judgment of the European Court of Human Rights in *Gillberg v. Sweden* of 3 April 2012 (not yet published in the *Reports of Judgments and Decisions*). By decision of the President of the Seventh Chamber of the Court of 31 May 2012, that request was granted.

12 The parties' oral arguments and their answers to the questions put by the Court were heard at the hearing of 14 June 2012.

13 The applicants claim that the Court should:

- annul the contested decision;
- order the ECB to grant the applicants access to the documents at issue;
- order the ECB to pay the costs.

14 The ECB contends that the Court should:

- dismiss the action as inadmissible in its entirety or, in the alternative, dismiss the second applicant's action as inadmissible;
- dismiss the applicants' second head of claim as inadmissible;
- dismiss the action as unfounded;
- order the applicants to pay the costs.

#### **Law**

### *Admissibility*

15 The ECB, while not raising a plea of inadmissibility under Article 114(1) of the Rules of Procedure, contends that the action is totally or partially inadmissible. In its submission, the applicants' action is inadmissible in its entirety since the application was not signed by their lawyer. Moreover, the second applicant's action is inadmissible, first, on the ground that it does not have standing to bring legal proceedings since it did not request access to the documents at issue, and, second, on the ground that it cannot achieve the application's objective because it has no right of access to the ECB's documents. In addition, the ECB asserts that the applicants' second head of claim, requesting the Court to order the ECB to grant them access to the documents at issue, is inadmissible. Lastly, the ECB contends that the applicants' arguments, set out in the reply, relating to an alleged infringement of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), are not consistent with Article 48(2) of the Rules of Procedure and are thus inadmissible.

The alleged absence of a signature on the application by the applicants' lawyer

16 The ECB contends that the action is inadmissible on the ground that the application that it received was not signed by the applicants' lawyer. Under the first subparagraph of Article 43(1) of the Rules of Procedure, the original of every pleading must be signed by the party's agent or lawyer. In the present case, the original of the application was signed by the applicants' lawyer. The argument of the ECB by which it seeks to claim that the action is inadmissible on the ground that the application was not signed by the applicants' lawyer must therefore be rejected.

Admissibility of the second applicant's action

17 The ECB contends that the second applicant's action is inadmissible, first, on the ground that it does not have standing to bring legal proceedings since it did not request access to the documents at issue and, second, on the ground that it cannot achieve the application's objective because it has no right of access to the ECB's documents.

18 The applicants assert that the first applicant made her initial application for access to the documents at issue both on her own behalf, and on behalf of the second applicant. In any event, the second applicant was party to the confirmatory application. Moreover, the second applicant can achieve the objective referred to in the application since it operates throughout the Union and has seats in Member States other than the United Kingdom. In addition, it has an interest in the success of the first applicant's application.

19 Since the applicants have brought a single action the admissibility of which is not in doubt in relation to the first applicant – which has not moreover been contested by the ECB – it is not necessary, for reasons of procedural economy, to examine the admissibility of the action as regards the second applicant (see, to that effect, Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraph 31, and Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* [2011] ECR I-0000, paragraph 37; judgment of 7 October 2010 in Case T-452/08 *DHL Aviation and DHL Hub Leipzig v Commission*, not published in the ECR, paragraph 27, and judgment of 16 December 2010 in Case T-191/09 *HIT Trading and Berkman Forwarding v Commission*, not published in the ECR, paragraph 24).

Admissibility of the applicants' second head of claim

20 The ECB submits that the applicants' second head of claim is inadmissible inasmuch as it requests the Court to order the ECB to grant access to the documents at issue.

21 It is settled case-law that the Court is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before it, including those concerning access to documents (Case T-204/99 *Mattila v Council and Commission* [2001] ECR II-2265, paragraph 26, upheld in Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-1073, paragraph 15). When the Court annuls an act of an institution, that institution is required, under Article 266 TFEU, to take the measures necessary to comply with the Court's judgment (Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 28).

22 The second head of claim is therefore inadmissible.

Admissibility of the arguments relating to an alleged infringement of Article 10 of the ECHR

23 The applicants submit, in the reply, that the refusal to grant them access to the documents at issue is an infringement of their right to receive information under Article 10 of the ECHR. In order to avoid a breach of the rights conferred by that provision, it is necessary to construe the exceptions to the right of access referred to in Article 4 of Decision 2004/258 in the manner indicated by the applicants.

24 As regards the admissibility of those arguments, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. However, a plea or an argument which amplifies a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared admissible (Case T-252/97 *Dürbeck v Commission* [2000] ECR II-3031, paragraph 39).

25 In the present case, the pleas put forward in the application allege infringement of Article 4 of Decision 2004/258. The alleged infringement of Article 10 of the ECHR by an incorrect interpretation of Article 4 of Decision 2004/258 was raised only at the stage of the reply, and no reasons were provided for the absence of those arguments in the application.

26 However, those arguments relate, in essence, to the interpretation of the right of access to a document under Decision 2004/258. In the applicants' submission, the ECB ought, under Article 6 TEU, to have taken account of Article 10 of the ECHR when interpreting Article 4 of Decision 2004/258 in order to avoid infringing the latter provision. The applicants' arguments therefore relate to the effects of Article 10 of the ECHR in the light of the exceptions to the right of access under Article 4 of that decision. It is therefore apparent that those arguments amount to an amplification of the pleas alleging infringement of Article 4 of Decision 2004/258 in that they are closely connected with the pleas put forward in the application. They must therefore be considered admissible.

Admissibility of the arguments relating to partial access to the documents at issue under Article 4(5) of Decision 2004/258

27 In the application, the applicants did not raise the issue of partial access to the documents at issue. In the light of the ECB's assertion in the defence that the applicants did not contest, in the application, the decision not to grant partial access, the applicants invited the Court, in the reply, to consider, in the alternative, whether the ECB ought to have made partial disclosure of those documents.

28 It must be pointed out that, since the conditions for admissibility of an action and of the complaints set out therein are a matter of public policy, the Court may consider them of its own motion in accordance with Article 113 of the Rules of Procedure (see, to that effect, Case C-160/08 *Commission v Germany* [2010] ECR I-3713, paragraph 40).

29 First, it follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the application must state the subject-matter of the proceedings and contain a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure.

30 In the light of the foregoing, it must be concluded that the applicants' arguments concerning Article 4(5) of Decision 2004/258 are inadmissible, given that they were not relied upon in the application. Moreover, it must be pointed out that those arguments do not constitute an amplification of the pleas set out by the applicants in the application.

31 Article 4(5) of Decision 2004/258 is not closely connected with Article 4(1) to (3) of that decision. Although the concrete, individual examination of the exceptions referred to in Article 4(1) to (3) of Decision 2004/258 is indeed an essential condition for deciding whether to grant partial access to the documents at issue (see, by analogy, Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 56), examination of such a possibility does not concern the conditions for the application of the exceptions at issue provided for in Article 4(1) to (3) of

that decision. The requirement of such an examination flows from the principle of proportionality. In the context of Article 4(5) of Decision 2004/258, it must be considered whether the aim pursued in refusing access to the documents at issue may be achieved even if one removes only the passages which might harm one of the public interests protected by Article 4(1) and (2) of that decision or which contain opinions for internal use as part of deliberations and preliminary consultations within the ECB or with the national central banks ('the NCBs') (see, to that effect and by analogy, Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraphs 27 to 29, and Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911, paragraph 50).

32 Second, it is apparent from Article 44(1)(c) of the Rules of Procedure that, in the application, the subject-matter of the proceedings and the summary of the pleas in law must be stated sufficiently clearly and precisely to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. In order to ensure legal certainty and the sound administration of justice it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, but coherently and intelligibly, in the application itself (see order in Case T-481/08 *Alisei v Commission* [2010] ECR II-117, paragraph 89 and the case-law cited).

33 In the present case, it was in their reply that the applicants requested the Court to consider whether the ECB ought to have made partial disclosure of the documents at issue, whilst they did not put forward any arguments in this respect in the application.

34 It follows that the applicants' arguments relating to Article 4(5) of Decision 2004/258 must also be rejected as inadmissible on the ground that they do not comply with the requirements referred to in Article 44(1)(c) of the Rules of Procedure.

35 Consequently, the applicants' arguments relating to the possibility of granting partial access must be rejected as inadmissible.

#### *Substance*

36 The applicants put forward three pleas in law in support of their action. The first alleges infringement of the second indent of Article 4(1)(a) of Decision 2004/258 in so far as the ECB incorrectly interpreted the exception to the right of access relating to the protection of the public interest so far as concerns the economic policy of the Union and the Hellenic Republic. The second plea concerns the exception to the right of access relating to the protection of the commercial interests of a natural or legal person, under the first indent of Article 4(2) of that decision. The third plea alleges infringement of Article 4(3) of that decision relating to the protection of the ECB's internal deliberations and consultations.

37 With respect to the first plea, alleging infringement of the second indent of Article 4(1)(a) of Decision 2004/258, the applicants claim, in essence, that the ECB incorrectly based its refusal to grant them access to the documents at issue on the exception to the right of access provided for in that provision, given that disclosure of those documents would not undermine the protection of the public interest, so far as concerns the economic policy of the Union and the Hellenic Republic.

38 Under the second indent of Article 4(1)(a) of Decision 2004/258, the ECB is to refuse access to a document where disclosure would undermine the protection of the public interest as regards the financial, monetary or economic policy of the Union or a Member State.

39 With respect to the legal framework applicable to the right of access to ECB documents, it must be observed that the second paragraph of Article 1 TEU is devoted to the openness of the Union's decision-making process. In this respect, Article 15(1) TFEU states that, in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies are to conduct their work as openly as possible. According to the first subparagraph of Article 15(3) TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with that paragraph. Moreover, according to the second subparagraph of Article 15(3), the general principles and limits on grounds of public or private interest governing this right of access to documents are to be determined by the European Parliament and the Council of the European Union, by means of regulations, acting in accordance with the ordinary legislative procedure. In accordance with the third

subparagraph of Article 15(3) TFEU, each institution, body, office or agency is to ensure that its proceedings are transparent and is to elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph of Article 15(3) TFEU. According to the fourth subparagraph of Article 15(3) TFEU, the Court of Justice of the European Union, the ECB and the European Investment Bank are to be subject to this paragraph only when exercising their administrative tasks.

40 Decision 2004/258 seeks, as recitals 1 and 2 in the preamble thereto state, to authorise wider access to ECB documents than that which existed under the system established by Decision ECB/1998/12 of the ECB of 3 November 1998 concerning public access to documentation and the archives of the ECB (OJ 1999 L 110, p. 30), while at the same time protecting the independence of the ECB and of the NCBs, and the confidentiality of certain matters specific to the performance of the ECB's tasks. Article 2(1) of Decision 2004/258 therefore gives any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to ECB documents, subject to the conditions and limits defined in that decision.

41 That right is subject to certain limits based on reasons of public or private interest. More specifically, and in accordance with recital 4 in the preamble thereto, Decision 2004/258 provides, in Article 4, for a system of exceptions authorising the ECB to refuse access to a document where disclosure of that document would undermine one of the interests protected by Article 4(1) and (2) or where that document contains opinions for internal use as part of deliberations and preliminary consultations within the ECB or with NCBs. Since the exceptions to the right of access referred to in Article 4 of Decision 2004/258 derogate from the right of access to documents, they must be interpreted and applied strictly.

42 Thus, if the ECB decides to refuse access to a document which it has been asked to disclose under Article 4(1) of Decision 2004/258, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in that provision – upon which it is relying. Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (see, by analogy, Case C-506/08 P *Sweden v MyTravel and Commission* [2011] ECR I-0000, paragraph 76 and the case-law cited).

43 With respect to the extent of the review of the legality of an ECB decision refusing public access to a document on the basis of the exception relating to the public interest provided for in the second indent of Article 4(1)(a) of Decision 2004/258, the ECB must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by that exception could undermine the public interest. The European Union judicature's review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers (see, by analogy, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 34).

44 It is true that the European Union judicature set out those principles in relation to the extent of the review concerning the exceptions to the right of access to the documents referred to in Article 4(1)(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). However, the reasoning on which those principles are based is also valid in a case where the ECB refuses to grant access to a document under the second indent of Article 4(1)(a) of Decision 2004/258. The wording of that latter provision is identical to the wording of the fourth indent of Article 4(1)(a) of Regulation No 1049/2001. In addition, a refusal decision based on the second indent of Article 4(1)(a) of Decision 2004/258 is, just like a decision based on the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, of a complex and delicate nature which calls for the exercise of particular care and the criteria set out in those two provisions are very general (see, to that effect, *Sison v Council*, paragraph 43 above, paragraphs 35 and 36).

45 First, with respect to the applicants' arguments that the ECB incorrectly failed to take account of the public interest considerations in favour of disclosure and that there is a compelling public interest for disclosure of the documents at issue which would in fact further the public interest, the Court notes that the exceptions to the right of access to documents provided for in Article 4(1)(a) of Decision 2004/258 are framed in mandatory terms. It follows that the ECB is obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist, and no weighing up of an 'overriding public interest' is provided for in that provision, in contrast with the exceptions referred to in Article 4(2) and (3) of that decision (see, by analogy, Joined Cases T-3/00 and T-337/04 *Pitsiorlas v Council and ECB* [2007] ECR II-4779, paragraph 227 and the case-law cited).

46 Consequently, those arguments of the applicants and their arguments put forward as justification for the overriding public interest alleged must be rejected as irrelevant in the context of the examination of whether the ECB correctly applied the exception to the right of access provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

47 Second, the applicants assert that, contrary to the ECB's submission in its letters of 17 September and 21 October 2010, disclosure of the documents at issue would not undermine the protection of the public interest so far as concerns the economic policy of the Union and the Hellenic Republic. That disclosure would not bear a substantial and acute risk of misleading the public and the markets. Moreover, the fact that the European Commission was carrying out a thorough examination of the relevant issues in the framework of the excessive debt procedure does not constitute a factor against disclosure.

48 In the light of those arguments, it is therefore necessary, in respect of each document referred to in the application, to examine whether the contested decision is vitiated by a manifest error of assessment.

49 With respect to the first document, the ECB justified its refusal to grant access to that document by stating, in its letters of 17 September and 21 October 2010, that that document contained ECB staff assumptions and views regarding the impact of off-market swaps on government deficit and on government debt with a particular view to the case of the Hellenic Republic on the basis of partial data that were available at the time the document was drafted in order to give a snapshot of the situation in March 2010. In the ECB's submission, the information contained in that document was outdated at the time of the request for access. Disclosure of that information would bear the substantial and acute risk of severely misleading the public in general and the financial markets in particular. In a very vulnerable market environment, that disclosure would affect the proper functioning of the financial markets. Thus, disclosure of the information contained in that document would undermine public confidence as regards the effective conduct of economic policy in the Union and the Hellenic Republic. Moreover, as an additional element, the ECB noted, by way of justification for the refusal to grant access to that document, that the issues examined in the document at issue were then part of a thorough examination by the Commission in the framework of the excessive deficit procedure, and that the result of that examination would be published in due time.

50 The first document, submitted by the ECB in response to the measures of inquiry ordered by the Court (see paragraph 10 above), contains, in essence, a description of the manner in which the financial instrument of off-market swaps functions, ECB staff assumptions and views regarding the impact of those swaps on government debt and on government deficit with a particular view to the case of the Hellenic Republic and of possible action envisaged. In particular, that document contains an analysis of the possible impact of the operation of the financial instrument of off-market swaps on the government debt and government deficit of the Hellenic Republic on the basis of various assumptions made in accordance with data which were available at the time that that document was drafted, relating to the manner in which off-market swaps operate.

51 The first document therefore deals with aspects relating to the economic policy of the Union and the Hellenic Republic and falls within the scope of the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258; moreover, the applicants do not contest this.

52 As regards the issue whether disclosure of the first document would specifically and effectively undermine the protected interest in question, it is common ground, as the ECB stated in its letter of 21 October 2010, that, at the time of the adoption of the contested decision, the European financial markets were in a very vulnerable environment. The stability of those markets was fragile, in particular, because of the economic and financial situation of the Hellenic Republic. It is also common ground that that situation and the related sales of Greek financial assets were causing strong depreciations in the value of those assets, which also triggered losses for Greek and other European holders. The applicants did not dispute that that development had the potential of leading to negative spillover effects on the solvency and funding conditions of other issuers and countries in the euro area. In such an environment, it is clear that market participants use the information disclosed by central banks and that their analyses and decisions are considered a particularly important and reliable source to assess current and prospective financial market developments. Moreover, the ECB was entitled to find that public confidence is an essential element affecting the proper functioning of the financial markets. The ECB was not indeed contradicted in this respect by the applicants.

53 In the light of the content of the first document and the environment in which the European financial markets found themselves, as described above, the Court takes the view that the ECB did not commit a manifest error of

assessment in considering, in its letters of 17 September and 21 October 2010, that disclosure of the information contained in the first document would specifically and effectively undermine the public interest so far as concerns the economic policy of the Union and the Hellenic Republic.

54 In support of its arguments regarding the substantial and acute risk of severely misleading the public in general and the financial markets in particular in a very vulnerable market environment, the ECB asserts that assumptions and views of members of its staff regarding the impact of off-market swaps on government deficit and on government debt, which are contained in the first document, were based on partial information that was available at the time the document was drafted in order to give a snapshot of the situation in March 2010.

55 In this respect, it must be stated that it is apparent from the case-file that the first document, which is based on information that was available before the end of February 2010, was examined by the ECB's Executive Board on 2 March 2010 and submitted to the ECB's Governing Council on 3 March 2010. Since access to that document was definitively refused on 21 October 2010, and therefore more than seven months after it was drafted, it is possible to conclude that that document did not contain, at the time of the definitive refusal, updated data regarding the impact of off-market swaps on government deficit and on government debt, in particular, of the Hellenic Republic. That is corroborated by the fact that on 22 April 2010, Eurostat (the Statistical Office of the European Union) issued a press release, regarding the first notification excessive deficit procedure, presenting the deficit and debt figures for the EU Member States for 2006 to 2009 and including a reservation on the Greek data citing, inter alia, uncertainties in the recording of off-market swaps. In this respect, Eurostat also announced investigations which might lead to a revision of the deficit and debt figures.

56 None the less, the fact that, on 21 October 2010, the data contained in the first document were outdated and that they gave only a snapshot of the factual situation at the time that the document was drafted does not permit the conclusion that, in the event of disclosure of that document, financial market participants would also have regarded as outdated and therefore of no value ECB staff assumptions and views regarding the impact of off-market swaps on government deficit and on government debt which are contained in that document.

57 Although it is true that those participants are professionals who can be expected to use information taken from documents in the context of their work, the fact remains that they consider assumptions and views originating from the ECB to be particularly important and reliable for assessing the financial market. It cannot reasonably be precluded that, even if those assumptions and views were made on the basis of data available well before 21 October 2010, they would have been regarded as still valid on that date. Moreover, it can be assumed that, by relying on those assumptions and views that were based on a certain known factual situation, those professionals might have inferred, on the basis of additional data, assumptions and views allegedly held by the ECB regarding the government deficit and government debt at the time that the ECB definitively refused access to that document. In this respect, any clarification by the ECB on the disclosed version of that document, indicating that the information contained therein was no longer up to date, would not have been able to prevent disclosure of that document from misleading the public and financial market participants in particular on the situation regarding the government deficit and government debt as assessed by the ECB.

58 In the light of the very vulnerable environment in which the financial markets found themselves at the time of adoption of the contested decision, the assessment that such an error would undermine the economic policy of the Union and the Hellenic Republic cannot be rejected as manifestly incorrect. Indeed, such an error might have had negative consequences on access, in particular for that Member State, to the financial markets and might therefore have affected the effective conduct of economic policy in the Hellenic Republic and the Union.

59 The ECB was therefore entitled to base its refusal to grant access to the first document on the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

60 With respect to the second document, the ECB justified its refusal to grant access to that document by stating, in its letter of 17 September 2010, that it contained the ECB's staff assumptions and views regarding the 'Titlos' transaction, the possible existence of similar transactions impacting on the euro area government debt or deficit levels, the relevance for the Eurosystem collateral framework, associated risk control measures, and their possible revision. According to the ECB, Titlos plc is a special purpose financial vehicle that was created on 26 February 2009 by the National Bank of Greece. Titlos plc issued a certain amount in euro of asset-backed securities due in September 2039. The ECB specifies that the underlying asset for the asset-backed securities named 'Titlos' was an interest rate swap between the National Bank of Greece and the Hellenic Republic. The 'Titlos' asset was required to be eligible as collateral for Eurosystem credit operations, and this was assessed by

the central bank of another Member State after consultation with the ECB. According to the ECB's reasoning in its letter of 17 September 2010, since that document was closely connected with the first document, it also fell within the exception to the right of access referred to in the second indent of Article 4(1)(a) of Decision 2004/258. Subsequently, in its letter of 21 October 2010, the ECB no longer made a distinction between the first and second document in its statement of reasons for the refusal. According to the ECB, the reasoning set out in paragraph 49 above relating to the refusal to grant access to the first document was therefore also valid in relation to the second document.

61 The second document, which was submitted by the ECB in response to the measures of inquiry ordered by the Court (see paragraph 10 above), contains, in essence, the background to the 'Titlos' transaction as well as an examination carried out by ECB staff of the financial structure of that transaction and the possible existence of similar transactions. In this respect, the manner in which the Hellenic Republic used off-market swaps and the consequences of those swaps for existing risks were inter alia analysed. Moreover, that document contains several conclusions regarding the Hellenic Republic and the Eurosystem based on the analyses carried out.

62 That document therefore deals with aspects relating to the economic policy of the Union and the Hellenic Republic and falls within the scope of the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258; moreover, the applicants do not contest this.

63 As regards the issue whether disclosure of the second document would specifically and effectively undermine the protected interest in question, the Court notes that the content of that document is closely connected with that of the first document. In a very vulnerable environment for the financial markets such as that which existed at the time of adoption of the contested decision (see paragraph 52 above), it must be stated that the ECB's assessment that disclosure of the analyses and conclusions contained in the second document would undermine the economic policy of the Union and the Hellenic Republic is not vitiated by a manifest error. Even if those analyses and conclusions were based on the partial data available at the time that the second document was drafted, their disclosure might have influenced the financial markets and their assessment of the situation regarding the government deficit and the government debt of the Hellenic Republic in the same manner as disclosure of the first document (see paragraphs 56 to 58 above). Such repercussions might have had negative consequences on access, in particular for that Member State, to the financial markets and might therefore have affected the effective conduct of economic policy in the Hellenic Republic and the Union.

64 Consequently, the ECB was entitled to base its refusal to grant access to the second document on the exception provided for in the second indent of Article 4(1)(a) of Decision 2004/258.

65 In so far as the ECB based its refusal to grant access to the documents at issue on the exception referred to in the second indent of Article 4(1)(a) of Decision 2004/258, the contested decision is not therefore vitiated by a manifest error of assessment.

66 That conclusion is not undermined by the applicants' arguments relating to Article 10 of the ECHR.

67 The applicants claim that, in order to avoid a breach of their rights under Article 10 of the ECHR, it is necessary to construe and apply the exception referred to in the second indent of Article 4(1)(a) of Decision 2004/258 in the manner stated by the applicants. In this respect, they refer to the judgments of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary* of 14 April 2009, *Kenedi v. Hungary* of 26 May 2009 (not yet published in the *Reports of Judgments and Decisions*) and *Gillberg v. Sweden*, paragraph 11 above.

68 Article 10 of the ECHR provides, in its relevant part, that everyone has the right to freedom of expression and that this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence.

69 In this respect, the Court observes that Article 52(3) of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389; 'the Charter'), which has the same legal value as the Treaties in accordance with the first subparagraph of Article 6(1) TEU, provides that, in so far as the Charter contains rights which correspond

to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR. However, that provision is not to prevent Union law providing more extensive protection.

70 Pursuant to Article 52(7) of the Charter, the explanations drawn up as a way of providing guidance in the interpretation of the Charter, namely the Explanations relating to the Charter (OJ 2007 C 303, p. 17), are to be given due regard by the courts of the Union and of the Member States.

71 It is apparent from the Explanations relating to the Charter that Article 10 of the ECHR corresponds to Article 11 of the Charter, according to which everyone is to have the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media are to be respected.

72 According to Article 52(1) and (2) of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Rights recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties. That being so, it is clear that Article 11 of the Charter, in conjunction with Article 52(1) and (2) of the Charter, contains rights which correspond to those guaranteed by Article 10 of the ECHR. Those articles of the Charter must therefore be given the same meaning and the same scope as Article 10 of the ECHR, as interpreted by the case-law of the European Court of Human Rights (see, by analogy, Case C-400/10 PPU *McB* [2010] ECR I-8965, paragraph 53, and Case C-256/11 *Dereci and Others* [2011] ECR II-0000, paragraph 70).

73 The Court notes that, with respect to the right of access to documents of the Union's institutions, bodies, offices and agencies, the Charter provides for a special fundamental right. Under Article 42 of the Charter, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, is to have a right of access to those documents, whatever their medium. However, the applicants did not claim that there was an infringement of that special right, but merely asserted an alleged infringement of the general right of freedom of expression guaranteed by Article 10 of the ECHR and Article 11 of the Charter. In so doing, they did not explain how, in their view, the ECB's conduct could amount to an infringement of Article 10 of the ECHR and Article 11 of the Charter.

74 With respect to the issue whether, for the purposes of the application of the second indent of Article 4(1)(a) of Decision 2004/258, the ECB misconstrued the scope of the right of access as interpreted in the light of Articles 11 and 52 of the Charter and of Article 10 of the ECHR by refusing to grant access to the documents at issue, the applicants merely refer to the judgments of the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, *Kenedi v. Hungary*, paragraph 67 above, and *Gillberg v. Sweden*, paragraph 11 above.

75 However, those judgments do not permit the conclusion that, by refusing to grant access to the documents at issue, the ECB misconstrued the scope of the right of access as interpreted in the light of Articles 11 and 52 of the Charter and of Article 10 of the ECHR.

76 In *Kenedi v. Hungary*, paragraph 67 above, the European Court of Human Rights found that there had been an infringement of Article 10 of the ECHR on the ground that the measure in question in that case was not prescribed by law (see paragraph 45 of that judgment). In the present case, the refusal to grant access to the documents at issue was based on the second indent of Article 4(1)(a) of Decision 2004/258. That decision was adopted pursuant to Article 23(2) of ECB Decision 2004/257/EC of 19 February 2004 adopting the Rules of Procedure of the ECB (OJ 2004 L 80, p. 33), in conjunction with Article 12(3) of the Protocol on the Statute of the European System of Central Banks and of the ECB (OJ 1992 C 191, p. 68), and with Article 8 EC. That refusal sought to achieve the legitimate aim of protecting the public interest so far as concerns the economic policy of the Union and the Hellenic Republic.

77 Moreover, although it is true that, in *Gillberg v. Sweden*, paragraph 11 above, the European Court of Human Rights found that the applicant in that case did not, under Article 10 of the ECHR, have a negative right to refuse to make available the documents concerned (paragraph 94 of that judgment), that case can be distinguished from the present one. Whilst the documents concerned in *Gillberg v. Sweden*, paragraph 11 above, were not the property

of the person who refused to grant access to them (paragraphs 92 and 93 of that judgment), in the present case, the documents at issue requested by the applicants were the property of the ECB. Moreover, unlike in *Gillberg v. Sweden* (paragraph 93 of that judgment), the ECB's refusal to grant access to those documents was not contrary to a court decision ordering the ECB to grant access to them.

78 As regards *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, it is true that that judgment deals with the need to limit the right of access to information. However, the facts in that case are not similar to those of the present case, and that judgment cannot therefore be usefully relied upon in the present case. *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, concerned the refusal to communicate information relating to a constitutional complaint brought by a public figure on the ground of the personality rights of the latter. In that complaint, it was alleged that the opinions of public figures on public matters are related to their person and therefore constitute private data which cannot be disclosed without their consent (see paragraph 37 of that judgment). By contrast, this case does not concern alleged private data of a public figure.

79 Moreover, the Court notes that the contested decision does not contain a general prohibition on receiving ECB information relating to the government deficit and the government debt of the Hellenic Republic. In this respect, it should also be observed that, in applying the exceptions to the right of access provided for in Article 4 of Decision 2004/258, the ECB did not limit that right solely to documents falling within the exercise of its administrative tasks, as referred to in the fourth subparagraph of Article 15(3) TFEU (see paragraph 39 above).

80 With respect to the applicants' arguments that the public must have access to information regarding, first, the level of debt of the Hellenic Republic and, second, the question whether the Greek authorities provided complete and correct information to Eurostat on the Greek Government debt, including the off-market swap operations, it must be stated that, at the time of adoption of the contested decision, the Eurostat report entitled 'Report on Greek Government deficit and debt statistics' of 8 January 2010 explained the persistent weaknesses of the Greek fiscal data by reference to instances of misreporting by the Greek authorities of deficit and debt data. Moreover, in the Eurostat note entitled 'Information note on Greece – 24.02.2010', it is stated that, for the first time, the Greek authorities declared the existence of an off-market swap operation in 2001 and that Eurostat would request the Greek authorities to supply, as soon as possible, all the information necessary for a complete evaluation and recording of this operation in the next excessive deficit procedure notification. Moreover, on 22 April 2010, Eurostat issued a press release, regarding the first notification excessive deficit procedure, presenting the deficit and debt figures for the EU Member States for 2006 to 2009 and including a reservation on the Greek data citing, inter alia, uncertainties in the recording of off-market swaps.

81 In those circumstances, the applicants' arguments relating to the judgments in *Társaság a Szabadságjogokért v. Hungary*, paragraph 67 above, *Kenedi v. Hungary*, paragraph 67 above, and *Gillberg v. Sweden*, paragraph 11 above, must be rejected.

82 Consequently the first plea must be rejected.

83 Given that the ECB was entitled to base its refusal to grant access to the documents at issue on the exception to the right of access provided for in the second indent of Article 4(1)(a) of Decision 2004/258, it is no longer necessary for the Court to examine the second and third pleas concerning the exceptions to the right of access provided for in the first indent of Article 4(2), and in Article 4(3) of that decision.

84 In the light of all the foregoing, the action must be dismissed in its entirety as in part inadmissible and in part unfounded.

#### **Costs**

85 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

86 As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the ECB.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders Ms Gabi Thesing and Bloomberg Finance LP to bear their own costs and to pay those incurred by the European Central Bank (ECB).**

## LECTURE 12: ECONOMIC AND MONETARY UNION IN TIMES OF CRISIS

After having lived through a seemingly seamless first decade, the EU's common currency hit hard grounds when the sovereign debt crisis in Greece resulted in markets losing faith in the Euro as a stable currency. Commitments to safeguarding the Euro being made by important Euro area Member States such as Germany, the European Central Bank also intervened by promising to establish an outright monetary transaction (OMT) programme, buying financial instruments in the open market. The set-up of this programme was deemed problematic by German Member of Parliament Peter Gauweiler, who considered the ECB actions proposed to go against the German constitution and the EU Treaties. In an unprecedented move, the German Federal Constitutional Court – the *Bundesverfassungsgericht* – referred the matter to the Court of Justice, asking whether the establishment of the OMT programme fell within the ECB's mandate. Arguing that it did in June 2015, the *Bundesverfassungsgericht* dismissed Mr. Gauweiler's claim in on 21 June 2016. In this lecture, we will explore the legal reasoning behind and the constitutional implications of the Gauweiler case. Doing so will allow us to question how the ECB's mandate and its crisis responses have been made to fit the EU legal framework. Analysing the case will additionally allow us to reflect upon how EU Courts and national constitutional courts interact in the realisation and construction of an integrated legal space for monetary policy.

### Materials to read:

- Opinion of Advocate General Cruz Villalón of 14 January 2015 in Case C-62/14, *Peter Gauweiler and others v. Deutsche Bundestag*, ECLI:EU:C:2015:7.
- Court of Justice, 16 June 2015, *Peter Gauweiler and others v. Deutsche Bundestag*, ECLI:EU:C:2015:400.
- Bundesverfassungsgericht, Gauweiler Press Release 21 June 2016, <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html> (in English).
  
- V. Borger, “Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*”, 53 *Common Market Law Review* (2016), 139-196 (via eCampus).

### Lecture 12 outline:

- a. The Eurozone crisis and the development of an outright monetary transaction programme by the ECB
  1. The Eurozone crisis and EU law
  2. Making monetary policy work
  3. The 2012 Draghi speech: “whatever it takes”
  4. An outright monetary transaction programme still in the making
- b. The Gauweiler saga
  1. Gauweiler's appeal before the *Bundesverfassungsgericht*

2. An unprecedented reference for a preliminary ruling
  3. The Advocate General's Opinion
  4. The Court's judgment
  5. The 21 June 2016 *Bundesverfassungsgericht* judgment
- c. The limits of monetary policy in the wake of *Gauweiler*
1. Economic policy v. monetary policy
  2. The role of EU law in limiting and defining monetary policy
  3. Can the notion of monetary policy be limited by EU law?
- d. Judicial dialogues between national constitutional courts and the Court of Justice after *Gauweiler*
1. From antagonism to cooperation
  2. A new dawn for an integrated EU constitutional law regime
  3. Limits of the renewed judicial dialogue

Questions for discussion:

- What are the legal and EU constitutional limits on the ECB's monetary policy mandate? Can the Court of Justice, in your opinion, police that mandate? If so, according to which criteria?
- Is a judicial dialogue between national constitutional courts and the EU Courts necessary in order to make the EU's constitutional law regime meet its targets?

**Opinion of Advocate General Cruz Villalón of 14 January 2015 in Case C-62/14, *Peter Gauweiler and others v. Deutsche Bundestag***

1. By a press release issued after the meeting of its Governing Council on 5 and 6 September 2012, the European Central Bank gave details of a decision outlining a programme for the purchase of government bonds issued by States of the euro area — transactions which were to be known as Outright Monetary Transactions (OMTs). The press release set out the basic features of the programme for purchasing government bonds. However, adoption of the legal instruments regulating the programme was postponed and those instruments have still not been adopted today.

2. In its press release, the European Central Bank ('the ECB' or 'the Bank') gave notice of its intention to purchase on secondary markets, subject to certain conditions, government bonds issued by States in the euro area. In brief, the ECB made application of the programme conditional upon the States concerned being subject to a financial support programme of the European Financial Stability Facility or the European Stability Mechanism, provided that such a programme included the possibility of primary market purchases. It was also announced that transactions under the OMT programme were to be focused on the shorter part of the yield curve, with no *ex ante* quantitative limits being set, and that the Eurosystem accepted the same (*pari passu*) treatment as private creditors, whilst an undertaking was given that liquidity created would be fully sterilised.

3. The OMT programme was thus created in the context of, and in response to, a situation regarded as exceptional for the viability of the ECB's monetary policy. The international financial crisis which started in 2008 had, by 2010, become a sovereign debt crisis for various euro area States. In the summer of 2012, faced with investors' lack of confidence in whether the euro could survive, the financial situation of various Member States of the euro area was becoming unsustainable as a result of the apparently unstoppable increases in the risk premia applied to their government bonds. The 'reversibility' of the euro and the consequent return to national currencies seemed destined to become a self-fulfilling prophecy. It was in that precise context that the ECB made its announcement about the OMT programme, which was generally perceived as giving concrete expression to the pledge which its President, Mr Draghi, had given a few weeks beforehand to do, within the ECB's mandate, 'whatever it takes' to restore confidence in the single currency.

4. For the first time in its history the Bundesverfassungsgericht (Germany's Federal Constitutional Court; 'the BVerfG') has made a reference to the Court of Justice under Article 267 TFEU and has done so in order to raise the question of the legality of the OMT programme. As will be seen below, the questions raised by the BVerfG give rise to difficulties of interpretation of utmost importance, which the Court of Justice will have to resolve.

5. A first point that should be made about this case is that the BVerfG has made its request for a preliminary ruling in the context of what it classifies as an *ultra vires* review of European Union (EU) acts which have consequences for the 'constitutional identity' of the Federal Republic of Germany. The BVerfG's starting point is an initial finding that the act of the ECB at issue is unlawful under national constitutional law, as well as under EU law, but, before proceeding any further with its assessment, it has decided to bring the matter before the Court of Justice so that the latter may give a ruling on that act from the perspective of EU law.

6. The Court of Justice must also address a question of admissibility, which concerns the actionable nature of a decision only the basic features of which were set out in a press release. Although it may, on the face of it, appear to be a simple press release which it is hard to imagine forming the subject-matter of a review of validity, the circumstances of the present case, together with the special role played by public communication in central bank activity, might be grounds for reaching a different conclusion.

7. As regards the substance of the case, the Court of Justice is confronted with the difficulties which extraordinary circumstances have long presented for public law. Against a background of the possible disintegration of the euro area, it is faced with a question about the powers of the ECB, an institution which, unlike other central banks, is subject to a particularly restricted mandate. The ECB has argued that the OMT programme is a proper instrument for dealing with exceptional circumstances, since, despite its 'unconventional' nature and the risks it entails, its objective is merely to do what has to be done in order to restore the ECB's ability to make effective use of its monetary policy instruments. By contrast, the complainants and the applicant in the main proceedings (hereinafter referred to together as 'the applicants in the main proceedings'), like the referring court

itself, have doubts as to whether that is the real aim of the OMT programme, since in their view the ultimate objective of that programme is to transform the ECB into a ‘lender of last resort’ for the States of the euro area.

8. This situation has led the BVerfG to share with the Court of Justice its doubts as to whether the OMT programme is compatible with the Treaties. First, it asks whether that programme is an economic policy measure — and therefore beyond the scope of the ECB’s mandate — rather than a monetary policy measure. Second, it questions whether the measure in issue observes the prohibition on monetary financing laid down in Article 123(1) TFEU.

## I – Legal framework

### A – *EU legal framework*

9. Title VIII of Part Three of the FEU Treaty, which is entitled ‘Economic and Monetary Policy’, opens with the following overarching provision:

‘Article 119

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.’

10. The FEU Treaty then lays down a provision prohibiting the monetary financing of the Member States, which is worded as follows:

‘Article 123

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as “national central banks”) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.’

11. The objectives and basic tasks of the ECB are set out in the FEU Treaty in the following terms:

‘Article 127

1. The primary objective of the European System of Central Banks (hereinafter referred to as “the ESCB”) shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations consistent with the provisions of Article 219,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.

...’

12. Article 130 TFEU provides for and ensures the independence of the ECB as follows:

‘When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.’

13. Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank sets out the instruments of monetary policy available to the ECB; the following of which should be highlighted for the purposes of the present case:

‘Article 18

Open market and credit operations

18.1. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may:

- operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;
- conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral.

18.2. The ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions.’

14. In 1993, before the ECB was established and in the course of the process of transition to economic and monetary union, the Council adopted Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty [Article 123 TFEU] (OJ 1993 L 332, p. 1). For the purposes of these proceedings, attention should be drawn to the following statements and provisions of that regulation:

‘...’

Whereas Member States must take appropriate measures to ensure that the prohibitions referred to in Article 104 of the Treaty are applied effectively and fully; whereas, in particular, purchases made on the secondary market must not be used to circumvent the objective of that Article;’

...

#### Article 1

1. For the purposes of Article 104 of the Treaty:

(a) “overdraft facilities” means any provision of funds to the public sector resulting or likely to result in a debit balance;

(b) “other type of credit facility” means:

(i) any claim against the public sector existing at 1 January 1994, except for fixed-maturity claims acquired before that date;

(ii) any financing of the public sector’s obligations vis-à-vis third parties;

(iii) without prejudice to Article 104(2) of the Treaty, any transaction with the public sector resulting or likely to result in a claim against that sector.

...’

#### B – *National legal framework*

15. For the purposes of these proceedings, attention should be drawn to the following provisions of the Basic Law of the Federal Republic of Germany:

##### ‘Article 1

1. Human dignity shall be inviolable. It shall be the duty of every public authority to observe and protect it.

2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

3. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

...

##### Article 20

1. The Federal Republic of Germany is a democratic and social federal state.

2. All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

3. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

...

##### Article 23

1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law

with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its founding Treaties and in comparable regulations which amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs 2 and 3 of Article 79.

...

#### Article 79

...

3. Amendments to this Basic Law which affect the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

...

#### Article 88

The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.'

16. The BVerfG has developed a body of case-law pursuant to which it carries out a review of the constitutionality of acts of the institutions and bodies of the European Union when the acts concerned are obviously ultra vires or affect 'constitutional identity', as it results from the 'eternity clause' in Article 79(3) of the German Basic Law.

17. As regards the review of ultra vires acts, referred to as an 'ultra vires review', the BVerfG stated, in its judgment of 6 July 2010 in *Honeywell*, that it is to be conducted in a manner that is amicable to EU law. The BVerfG has also pointed out that in an ultra vires review decisions of the Court of Justice are to be recognised as a binding interpretation of EU law.

18. For the BVerfG, an ultra vires review of an EU act takes place only when it is apparent that, in adopting an act, the European institutions and bodies have acted in a way that is beyond the scope of the powers conferred on them, provided that, taking account of the principle of conferral and the principle of legality that is a feature of a State governed by the rule of law, the breaches of those powers are 'sufficiently serious'. (2)

## II – The facts and proceedings before the national court

19. Between early 2010 and early 2012, the Heads of State and Government of the European Union and of the euro area adopted a number of measures intended to counter the severe effects of the financial crisis afflicting the world economy. As the financial crisis turned into a sovereign debt crisis in various Member States, it was decided, amongst other initiatives, to establish on a permanent basis the European Stability Mechanism, the purpose of which is to safeguard the financial stability of the euro area by granting financial assistance to any of the States participating in the Mechanism.

20. Despite the efforts of the European Union ('the Union') and the Member States, the risk premia for bonds of various euro-area States rose sharply in the summer of 2012. In the face of investors' doubts about the survival of monetary union, the representatives of the Union and of the States of the euro area repeatedly stressed that the single currency was irreversible. It was at that time that the President of the ECB, in words that were subsequently repeated over and over again, stated that he would, within his mandate, do whatever it took to preserve the euro. (3)

21. Some weeks later, according to the minutes of the 340th meeting of the Governing Council of the ECB on 5 and 6 September 2012, the Council approved the main parameters of the programme of outright monetary transactions in the secondary sovereign bond markets, formally to be known as 'Outright Monetary Transactions'. As is clear from the written observations submitted by the ECB in these proceedings, approval was also given at that meeting to a draft Decision on outright monetary transactions and repealing Decision ECB/2010/5, as well as

to a draft Guideline on the implementation of outright monetary transactions. Both drafts were subsequently amended at the meetings of the Governing Council on 4 October and 7 and 8 November 2012.

22. On 6 September 2012 at the press conference after the meeting of the Governing Council, the President of the ECB gave details of the main parameters of the OMT programme, which were also set out in the press release of the same date made available in English on the ECB's website. That press release is the document in which the technical features of the OMT programme were set out; those features are described as follows:

‘As announced on 2 August 2012, the Governing Council of the European Central Bank (ECB) has today taken decisions on a number of technical features regarding the Eurosystem's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as Outright Monetary Transactions (OMTs) and will be conducted within the following framework:

#### Conditionality

A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.

#### Coverage

Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No *ex ante* quantitative limits are set on the size of Outright Monetary Transactions.

#### Creditor treatment

The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (*pari passu*) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

#### Sterilisation

The liquidity created through Outright Monetary Transactions will be fully sterilised.

#### Transparency

Aggregate Outright Monetary Transaction holdings and their market values will be published on a weekly basis. Publication of the average duration of Outright Monetary Transaction holdings and the breakdown by country will take place on a monthly basis.

#### Securities Markets Programme

Following today's decision on Outright Monetary Transactions, the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.'

23. Various German individuals brought proceedings for the protection of fundamental rights (constitutional complaints) before the BVerfG, which they based on the failure of the Federal German Government to bring an action for annulment before the Court of Justice against the announcement of 6 September 2012 concerning the OMT programme.

24. Similarly, Fraktion DIE LINKE im Deutschen Bundestag ('Die Linke'), a political group with parliamentary representation in the Bundestag, brought proceedings before the BVerfG on the ground of a conflict between constitutional bodies, seeking a declaration that the Bundestag should work to achieve the annulment of the OMT programme announced by the ECB on 6 September 2012.

#### III – The request to the Court of Justice for a preliminary ruling

25. The request for a preliminary ruling from the BVerfG, which was lodged at the Court Registry on 10 February 2014, was made in the proceedings brought by the individual applicants referred to above and by the parliamentary group Die Linke.

26. The following questions have been raised by the referring court:

'(1) (a) Is the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with Article 119 TFEU and Article 127(1) and (2) TFEU and with Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank because it exceeds the monetary policy mandate of the European Central Bank laid down in the abovementioned provisions and encroaches upon the competence of the Member States?

Is the mandate of the European Central Bank exceeded in particular because the decision of the Governing Council of the European Central Bank of 6 September 2012

(aa) is linked to economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

(bb) provides for the purchase of government bonds of selected Member States only (selectivity)?

(cc) provides for the purchase of government bonds of programme countries in addition to assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (parallelism)?

(dd) could undermine the limits and conditions laid down by assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (circumvention)?

(b) Is the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with the prohibition of monetary financing enshrined in Article 123 TFEU?

Is compatibility with Article 123 TFEU precluded in particular by the fact that the decision of the Governing Council of the European Central Bank of 6 September 2012

(aa) does not provide for quantitative limits for government bond purchases (volume)?

(bb) does not provide for a time gap between the issue of government bonds on the primary market and their purchase by the European System of Central Banks on the secondary market (market pricing)?

(cc) allows all purchased government bonds to be held to maturity (interference with market logic)?

(dd) does not contain any specific requirements for the credit standing of the government bonds to be purchased (default risk)?

(ee) provides for the same treatment of the European System of Central Banks as private or other holders of government bonds (debt cut)?

(2) In the alternative, in the event that the Court does not consider the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions, qua act of an EU institution, to be an appropriate object for a request pursuant to point (b) of the first paragraph of Article 267 TFEU:

(a) Are Article 119 TFEU and Article 127 TFEU and Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

(aa) to make government bond purchases conditional on the existence of and compliance with economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

(bb) to purchase government bonds of selected Member States only (selectivity)?

(cc) to purchase government bonds of programme countries in addition to assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (parallelism)?

(dd) to undermine the limits and conditions laid down by assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (circumvention)?

(b) Having regard to the prohibition of monetary financing, is Article 123 TFEU to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

(aa) to purchase government bonds without quantitative limits (volume)?

(bb) to purchase government bonds without a minimum time gap from their issue on the primary market (market pricing)?

(cc) to hold all purchased government bonds to maturity (interference with market logic)?

(dd) to purchase government bonds without minimum credit standing requirements (default risk)?

(ee) to accept the same treatment of the European System of Central Banks as private and other holders of government bonds (debt cut)?

(ff) to influence pricing, by communicating the intention to purchase or otherwise, coinciding with the issue of government bonds by Member States of the euro area (encouragement to purchase newly issued bonds)?

27. Written observations have been submitted by the individual complainants in the main proceedings for the protection of basic rights and by Die Linke, as well as by the Federal Republic of Germany, the Hellenic Republic, the Republic of Cyprus, the Portuguese Republic, the Republic of Poland, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Kingdom of Spain, Ireland and the Republic of Finland, the ECB, the European Parliament and the European Commission.

28. As a preliminary matter, I must point out that the European Parliament, although it has submitted written and oral observations, is not entitled to do so in proceedings such as these. Since these proceedings involve a reference for a preliminary ruling concerning validity in which the act in issue has not been adopted by the European Parliament, Article 23 of the Statute of the Court of Justice does not enable the Parliament to participate in these proceedings. I therefore take the view that the Court of Justice should not take into account the written and oral submissions put forward by the European Parliament.

29. The hearing was held on 14 October 2014. Apart from the Republic of Cyprus and the Republic of Finland, all the interested persons that had previously submitted written observations participated in the hearing.

#### **IV – Preliminary consideration: The ‘functional’ difficulty of the request for a preliminary ruling, when placed in the context of the relevant case-law of the BVerfG**

30. A singular feature of the order for reference in these proceedings is that it devotes an extensive introductory section to national legislative provisions and national case-law which are considered to be relevant. That singularity naturally does not lie in the fact that national legislation is cited — in this case a small number of constitutional provisions (Articles 20, 23, 38, 79 and 88 of the Basic Law of the Federal Republic of Germany; ‘the BL’) — but rather in the very full presentation of the BVerfG’s case-law concerning the constitutional basis and limits of the Federal Republic of Germany’s integration in the European Union. In a section of the order for reference dealing with the ‘case-law of the BVerfG’, (4) the latter interprets the scope of its own previous case-law as contained essentially in the judgments of 12 October 1993 (*Maastricht*), (5) 30 June 2009 (*Lisbon*) (6) and 6 July 2010 (*Honeywell*), (7) a direct precedent for the order under consideration here.

31. It might be thought that, as in so many other cases, this introductory section of the order for reference serves no purpose other than to help the Court of Justice to place the questions raised in their proper context. The section in question certainly does that, although it cannot be said that it confines itself to summarising the national case-law concerned. It also contains appraisals that cannot be regarded as being of minor importance. (8)

32. The fact that the background of national case-law is presented in that way, with its significance being explained as a preliminary matter to the Court of Justice, has, to my mind, immediate consequences for the *function* of the present request for a preliminary ruling. I would stress at the outset that all that case-law is sufficiently complex for me to frame my own reading of it in extremely cautious terms. The dissenting opinions that are attached to the order for reference show that there are different views on how the rules in *Honeywell* are to be applied to the present case. (9)

33. Stated in the simplest possible way, the following points may be gleaned from the section of the order for reference dealing with national case-law. In certain circumstances, which it is not essential to consider in detail at this point, when the Court of Justice answers a question raised in respect of a given EU act, as would be the case here, that answer is not necessarily a determining factor in deciding the case in the main proceedings. Rather, if the criterion constituted by EU law has been satisfied, *another* criterion for assessing validity, which is a matter for the BVerfG, could possibly be applied to the same contested act: that of the national constitution itself.

34. More specifically, a constitutional criterion of that kind, which is subsequently used by the BVerfG in its assessment, is said to consist in both the unalterable core content of the national constitution (‘constitutional identity’, as enshrined in Article 79(3) BL), and the principle of conferral of powers (with the logical consequences for ‘ultra vires’ EU acts that follow from that principle implicit in Article 23(1) BL). It seems that these two constitutional criteria, far from being mutually exclusive, are each able to provide support for the other, (10) as appears to be the case here. Such criteria for reviewing validity (the so-called ‘identity review’ and the ‘ultra vires review’), by definition, may be applied only by the BVerfG itself. (11)

35. That being so, it is not surprising that various Member States participating in these proceedings (the Kingdom of the Netherlands, the Italian Republic and the Kingdom of Spain) have, more or less emphatically, questioned, or even denied, the admissibility of the present reference. Simplifying matters once again, it is argued that a reference for a preliminary ruling is not a procedural mechanism intended to make it easier for national courts or tribunals to carry out their own review of the validity of EU acts, such as the review by the BVerfG in the present case, but is instead intended to ensure that the review of validity is carried out before the judicial body having exclusive jurisdiction for that purpose: namely the Court of Justice. In the same vein, it has been argued that, if a national court or tribunal were to reserve for itself the last word on the validity of an EU act, the

preliminary ruling procedure would then be merely advisory in nature, and its function in the scheme of actions provided for by the Treaties would thus be severely undermined. (12)

36. In short, a national court should not be able to request a preliminary ruling from the Court of Justice if its request already includes, intrinsically or conceptually, the possibility that it will in fact depart from the answer received. The national court should not be able to proceed in that way because Article 267 TFEU cannot be regarded as providing for such a possibility. (13)

37. Having thus explained what I am classifying as the ‘functional’ difficulty of the present request for a preliminary ruling, I would add that, in my view, the Court of Justice must address this difficulty when responding to the questions raised. I should, however, also point out that it must do so only in so far as is essential for the purposes of the present case, that is to say, in so far as this difficulty has consequences for whether the reference may proceed. Neither the significance nor the possible consequences of the aforementioned case-law of the BVerfG can be denied, as has long been made abundantly clear in a wide range of academic writing. (14) By way of example, it is sufficient to refer to the matters mentioned in point 30 of the order for reference, according to which the concepts of ‘constitutional identity’ and ‘ultra vires review’ are part of the constitutional traditions of many Member States.

38. As regards the last-mentioned point, it is the case that a number of national constitutional and supreme courts, in quite different ways but with an essentially precautionary aim, have found it appropriate to discuss or allude to the possibility, normally conceived of as a last resort, (15) of — stated in the most general possible terms — a breakdown in the European ‘constitutional compact’ underlying the integration process, specifically because of the conduct of one of the EU institutions.

39. As with other questions of similar significance, it does not seem to me to be essential for the purposes of these proceedings for the Court of Justice to go into the reasons why those courts have made such statements, which, I repeat, normally pertain to a situation envisaged as a last resort; nor is it necessary to go into the extent to which they are general at Member State level or the extent to which they overlap with the views put forward by the BVerfG. The cautious approach of ‘one case at a time’ (16) should also be adopted on this occasion. I shall try to explain why I believe that is so.

40. First of all, the fact that, in the course of a long history, this is the first time that the BVerfG has made a reference to the Court of Justice for a preliminary ruling does not call for particular comment on my part, except to observe that it provides confirmation of something which is starting to become more normal. The *intensification*, as it were, of the EU legal order is prompting the courts of the Member States with a specifically constitutional role to behave increasingly as courts or tribunals within the meaning of Article 267 TFEU. (17) The unique position of the constitutional court in most Member States has in the past been a sufficient explanation of why the cases in which such courts have brought matters before the Court of Justice have been exceptional, both for the purposes of judicial assistance and for the purposes of cooperation to ensure the uniform interpretation of EU law. The general picture is starting to change and the present reference perhaps bears that out.

41. At the same time, however, the introductory section of the order for reference reveals the ‘exceptional nature’ of the BVerfG’s initiative. It is not at all clear that the making of this request for a preliminary ruling is to be seen as part of the process of ‘normalisation’ in the sense I have indicated above.

42. In fact, it follows from the case-law concerned that the present request for a preliminary ruling can be said to be the inevitable consequence of a situation regarded as ‘exceptional’ which may for now, to state matters simply, be classified as *ultra vires*: namely a finding that an EU body or authority has seriously breached the limits of the competences derived from the Treaties, the basis and prior conditions for that finding being the national constitution. I shall, for the time being, confine myself to the *ultra vires* aspect of this case-law, leaving to one side the ‘constitutional identity’ aspect.

43. The present case corresponds precisely to the situation I have just described: the national court starts from a finding of principle that there has been an *ultra vires* act on the part of an EU body. (18) More specifically, under national law, it is a question of ‘an obvious and structurally significant *ultra vires* act’, (19) with additionally, in this case, consequences for core provisions of the national constitutional order. (20)

44. So far as the function of the present request for a preliminary ruling is concerned, the BVerfG had stated in *Honeywell* that, in a situation of that kind and in the framework of an ultra vires review to a certain extent already under way, the Court of Justice is to be ‘given the opportunity’ to rule on the validity of the act at issue, a ruling which the BVerfG will regard as ‘in principle ... a binding interpretation of EU law’. (21)

45. For the moment we may leave to one side the issue as to whether the referring court’s turn of phrase adequately reflects the duty incumbent on national courts of last instance under Article 267 TFEU. What matters is that proceedings before the Court of Justice concerning the validity of a contested act are in this way ‘inserted’ in a main action whose object has, since the commencement of the action, been an ultra vires review of that act. It is true that this entails recognition of the principle that it is for the Court of Justice to give its interpretation of EU law — which is binding for national courts — in the course of the review of the contested act. The issue is, however, somewhat more problematic.

46. That is because recognition of that principle does not exclude — as the case-law immediately adds (and if I have understood it correctly) — a subsequent review (‘in addition’) by the BVerfG when it is ‘obvious’ that the contested act has infringed the principle of conferral, such an infringement being taken to be ‘obvious’ when it takes place ‘in such a way as specifically infringes’ that principle, and when, in addition, the infringement may be regarded as ‘sufficiently serious’. (22) If my interpretation of the passage in question is correct, it is clear that the ‘insertion’, so to speak, of the request for a preliminary ruling in the course of a final assessment by a national court of an ultra vires act gives rise to problems which I shall describe as functional.

47. That request, which is considered to be necessary, that the Court of Justice give a preliminary ruling on the contested act, albeit solely from the perspective of EU law, is for its part presented as an expression of the ‘cooperative relationship’ which must obtain between the two courts, a notion that was created by the referring court itself.

48. This ‘cooperative relationship’ is far from being precisely defined but it is clear that it purports to be something more than the imprecise ‘dialogue’ between courts. It is said to derive ultimately from the notion that the obligation of the BVerfG to safeguard the basic order under the national constitution must always be guided by an open and receptive attitude to EU law (‘europarechtsfreundlich’), a notion which it might also have been possible to derive from the principle of sincere cooperation (Article 4(3) TEU).

49. Therein lies all the ambiguity with which the Court of Justice is faced in this reference for a preliminary ruling: there is a national constitutional court which, on the one hand, ultimately accepts its position as a court of last instance for the purposes of Article 267 TFEU, and does so as the expression of a special ‘cooperative relationship’ and a general principle of openness to the so-called ‘integration programme’ but which, on the other hand, wishes, as it makes clear, to bring a matter before the Court of Justice without relinquishing its own ultimate responsibility to state what the law is with regard to the constitutional conditions and limits of European integration so far as its own State is concerned. That ambivalence runs all through the request for a preliminary ruling, so that it is extremely difficult to disregard it entirely when analysing the case.

50. Confining myself to the problem which I am classifying as that of the function of the present request for a preliminary ruling, I think it appropriate to start by examining whether the present request is founded on the basic premisses on which the so-called preliminary ruling procedure before the Court of Justice has been developed in successive Treaties and on which the judicial guarantee of EU law has strategically been built up. (23)

51. If the only way of interpreting the present reference for a preliminary ruling were the one emphatically proposed by the Republic of Italy, (24) the only possible conclusion would be that, appearances aside, this is not *actually* an ‘Article 267’ reference for a preliminary ruling but something else — something which in any event is difficult to locate in the Treaty.

52. As some of the interested persons participating in these proceedings have rightly observed, the preliminary ruling procedure was, in fact, never conceived of as a mere ‘opportunity’ for the Court of Justice to ‘concur’ with the national court, either on a finding of ultra vires or on something else, with the possible consequence that any ‘failure to concur’ on the part of the Court of Justice could render its answer nugatory. It is also clear that that view is not invalidated by the fact that there is an attitude which is in principle receptive to an interpretation of the act at issue in conformity with EU law. Finally, in such circumstances, a request to the Court of Justice to give

a preliminary ruling could even end by having the undesirable effect of embroiling the Court in the chain of events ultimately leading to the breakdown in the ‘constitutional compact’ underlying European integration. (25)

53. If the present request for a preliminary ruling is understood in that way, the referring court appears to suggest, still within the sphere of the ultra vires review, that its criterion or benchmark for assessing the act in issue could be *different* from that of the Court of Justice (they might not ‘entirely coincide’). (26) That would mean that the dispute before the BVerfG would to some extent be *different* from the previous proceedings before the Court of Justice. However, on the basis of both the caution with which the BVerfG expresses itself and the nature of the arguments that it advances, (27) I am inclined to think that, in substantive terms, the criterion for ultra vires review would to a large extent be the same.

54. In this respect the present reference may be a good indication that that is so. Whilst the assessment of the validity of the contested decision of the ECB will to a great extent be determined by the interpretation given to the scope of the Bank’s mandate, in particular the primary objective of ‘price stability’, that concept is an integral part of both the Treaty (Article 127(1) TFEU) and the national constitution (Article 88, BL, in fine). In both cases, it would be a question of interpreting the scope of a single concept, that of ‘price stability’ as the overriding objective of the ECB, regardless of whether that concept is to be found in one or other of the basic provisions, or in both of them.

55. According to the order for reference, however, it is not only the principle of conferral (ultra vires) which is in issue in the main proceedings but also the ‘constitutional identity’ of the Federal Republic of Germany; that is so because of the consequences which the contested act is said to entail for the national constitutional body which is first and foremost responsible for expressing the will of the citizens. ‘Ultra vires review’ and ‘identity review’, to use the terms employed by the BVerfG itself, are said to converge in the main proceedings.

56. The question of the different review criteria to be applied by each of the courts arises again in this part of the order for reference. Thus, as regards specifically the ‘identity review’, the BVerfG expressly proposes that ‘in the cooperative relationship which exists, it is for the Court of Justice to interpret the measure. On the other hand, it is for the BVerfG to determine the inviolable core of constitutional identity and to review whether the measure (as interpreted by the Court of Justice) encroaches on that core’. (28)

57. At this point it would once again be appropriate to include a number of considerations of some importance. I shall merely point out, however, without it being necessary to examine other possibilities, that in the present case — in which everything seems to suggest that the ‘ultra vires review’ and the ‘identity review’ are inextricably linked — the difficulties, alluded to above, connected with recognising a difference in review criteria as between the task of the Court of Justice and that of the BVerfG remain relevant.

58. In any event, at this stage of my reflections, I should like to make two observations of a general nature.

59. The first is that it seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as ‘constitutional identity’. That is particularly the case if that ‘constitutional identity’ is stated to be different from the ‘national identity’ referred to in Article 4(2) TEU.

60. Such a ‘reservation of identity’, independently formed and interpreted by the competent — often judicial — bodies of the Member States (of which, it need hardly be recalled, there are currently 28) would very probably leave the EU legal order in a subordinate position, at least in qualitative terms. Without going into details, and without seeking to pass judgment, I think that the characteristics of the case before us may provide a good illustration of the scenario I have just outlined.

61. Second, I think it useful to recall that the Court of Justice has long worked with the category of ‘constitutional traditions common’ to the Member States when seeking guidelines on which to construct the system of values on which the Union is based. (29) Specifically, the Court of Justice has given preference to those constitutional traditions when establishing a particular culture of rights, namely that of the Union. The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a ‘community imbued with a constitutional culture’. (30) That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years

away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.

62. Returning now to the functional difficulty of the request for a preliminary ruling, I consider that the risk of the latter being ‘manipulated’, in the context of a *national* assessment in the event of an ‘*ultra vires* review’ in conjunction with an ‘identity review’, is sufficiently real to ask whether an alternative interpretation would be possible which would allow the difficulty in question to be overcome. In my view, an alternative reading would be possible, having regard to what appears to have been at the origin of this line of case-law, whilst at the same time making use of the possibilities afforded by the principle of sincere cooperation (Article 4(3) TEU). Ultimately, it would involve taking advantage of the virtues of the ambiguity that seems to be inherent in the request for a preliminary ruling, to which I have already alluded.

63. It must be borne in mind that the commitment, so to speak, to refer a question to the Court of Justice for a preliminary ruling appears to have been an innovation introduced in the judgment of the BVerfG of 6 July 2010 (*Honeywell*) with the intention, as has been widely acknowledged, of keeping open the dialogue between the courts, in such a way that that dialogue may continue as long as the importance of the case requires. (31) Seen in that light, the fact of providing for a reference for a preliminary ruling to be made could be said to entail a sincere intention that the interpretation that may be given by the Court of Justice of EU law should serve as a sufficient basis for resolving the claims raised in the proceedings before the national court. It is to be hoped that, in the end, any subsequent review on the basis of the constitutional criteria would not, in the circumstances of the case, reach conclusions that were in open contradiction with the answer given by the Court of Justice.

64. Furthermore, it is clear that the principle of sincere cooperation also applies to courts and tribunals, including the two courts concerned in these important proceedings. (32) That mutual loyalty is all the more important in those cases in which the supreme court of a Member State, responsibly exercising its constitutional jurisdiction, and without going into other considerations, raises, in a spirit of sincere cooperation, its concern about a given decision of an EU body. The principle of sincere cooperation is of course binding on the national court, as it is part of its own responsibility to give that principle form and effect. As far as the Court of Justice is concerned, that principle, in the circumstances of this case, entails a two-fold obligation.

65. In the first place, substantively, that principle requires the Court of Justice to respond in the greatest spirit of cooperation possible to a question which has itself been referred to it in the same spirit; there cannot be the least doubt about that. In particular, if the national court, in explaining the extent to which the act in question causes it to have serious doubts as to validity or interpretation, has been particularly plain-spoken, that will have to be interpreted as an expression of its level of concern in that regard. I understand that that is the sense of the German Government’s appeal for ‘constructive’ treatment of the present case. (33)

66. In the second place, and this is above all what is in issue now, the principle of sincere cooperation requires a particular effort on the part of the Court of Justice to provide an answer on the substance to the questions referred, notwithstanding all the difficulties to which ample reference has been made here. That would require the Court of Justice to proceed on the basis of a particular assumption regarding the ultimate fate of its answer.

67. In concrete terms, that means that the Court of Justice, rather than immediately excluding such a possibility, would in fact trust the national court — once it has considered the answer provided by the Court of Justice to the question raised and without prejudice to the exercise of its own duties — to accept that answer as decisive in the proceedings before it. Sincere cooperation involves an element of trust and that trust may take on a particular meaning in this case. It must be borne in mind that the present request for a preliminary ruling appears to have been cast by the BVerfG in terms which permit the Court of Justice to expect, within the limits of what is reasonable, that the BVerfG will accept as sufficient and final the answer it receives and as providing it with sufficient criteria to enable it to decide on the claims raised in the main proceedings. (34) The ‘road map’ which the BVerfG itself outlined in *Honeywell* could support this approach. (35)

68. In so far as that analysis of the situation is acceptable, I take the view that the Court of Justice should, in approaching the functional problem to which this request for a preliminary ruling gives rise, disregard possibilities other than the one I have just outlined, inasmuch as they can only be regarded as extreme cases, scarcely conceivable, and, ultimately, an insufficient basis for refusing to give an answer on the substance in response to the questions raised in the present request for a preliminary ruling.

69. Accordingly, as an intermediate conclusion, I propose that the Court of Justice should declare that this request for a preliminary ruling may be answered on the substance.

#### V – Admissibility

70. A number of Member States, as well as the institutions which have submitted observations in the present case, have raised the issue of admissibility in relation to the BVerfG's principal questions, maintaining that they concern a question of validity that affects an act, the OMT programme, which does not have legal effects vis-à-vis third parties.

71. Stated very briefly, those interested parties emphasise the non-final, even 'preparatory', nature of the act of 6 September 2012, by which the Governing Council decided to adopt the essential criteria that would govern the OMT programme and whose final adoption is still pending. As the ECB has confirmed, certain criteria were decided upon at that meeting but not the OMT programme as such. It will be possible to review the validity of that programme only when the Governing Council formally adopts the programme and publishes it, in accordance with the rules pertaining to legal acts laid down in the Statute of the ESCB and of the ECB.

72. It is argued that the case-law of the Court of Justice lends support in principle to that interpretation. The case-law concerning actions for annulment precludes challenges to acts which have no legal effects. (36) In the precise context of references for preliminary rulings, the Court of Justice has in the past declared inadmissible references entailing a review of the validity of an 'atypical' act, which has not been published and which does not have binding effects. (37) Various parties participating in these proceedings submit that that is the case of the OMT programme, which was announced by the President of the ECB at the press conference on 6 September 2012 and whose principal technical features were subsequently described in a press release.

73. For the reasons which I shall set out below, it none the less seems to me that the OMT programme is an act whose validity may be examined in preliminary ruling proceedings. There are two separate reasons for that conclusion. In the first place, I believe that it is decisive that the act in question is one which sets out the broad features of a general programme for action by an EU institution. In the second place, it seems to me necessary to take into account the particular importance which public communication has assumed for the ECB in the implementation of monetary policy today.

74. From the very beginning the Court of Justice has required that, for an act to be actionable, two conditions must be met: the act must be binding and must be capable of producing legal effects. (38) Those conditions are cumulative, although sometimes, for example when the validity of recommendations is reviewed in preliminary ruling proceedings, they are presented as alternatives. (39)

75. I consider, however, that those two conditions are assessed differently depending on who is the direct addressee of the contested act. As I shall now explain, the case-law has, in the application of those conditions, adopted a more flexible approach where the impugned act is a measure outlining a general programme of action, intended to bind the actual authority which is the author of the decision, than where the act contains a measure which creates rights and obligations with regard to third parties. The reason for that is that general action programmes of public authorities may take atypical forms and yet still be capable of having a very direct impact on the legal situation of individuals. On the other hand, measures whose direct addressees are individuals must meet particular conditions as to substance and form if they are not to be treated as non-existent.

76. A general programme of action, such as that at issue here, may be presented using atypical techniques, it may be addressed to the authority which is itself the author of the act, it may be in formal terms non-existent so far as concerns the world outside the authority, but the fact that it is capable of having a decisive impact on the legal situation of third parties justifies taking a non-formalistic approach when considering whether it should be treated as an 'act'. Otherwise, there would be a risk that an institution could undermine the system of acts and the corresponding judicial safeguards by disguising acts that are intended to produce external effects as general programmes.

77. The case-law of the Court of Justice has been particularly flexible when dealing with general action programmes of this kind which are capable of producing external effects.

78. The judgment in *Commission v Council* ('ERTA'), (40) given in 1971, is an important starting point since it considers, inter alia, the status of the proceedings of the Council relating to the negotiation and conclusion by the Member States of an international agreement. In the Council's view, those proceedings did not constitute, either by their form or by their subject-matter or content, an act open to legal challenge but were nothing more than a coordination of policies amongst Member States within the framework of the Council, without any intention to create rights, impose obligations or alter any legal position.

79. When it analysed the Council's arguments the Court of Justice stated that judicial review must be available in the case of 'all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'. (41) Having examined the decision in issue, the Court of Justice principally drew attention to two characteristics: first, it was not simply the expression of a voluntary coordination, but reflected a course of action that was binding; (42) and, second, the provisions adopted in that decision were capable of 'derogating ... from the procedure laid down by the Treaty'. (43)

80. Similarly, and as a supplement to its ruling on the substance in the *ERTA* judgment (EU:C:1971:32), the Court of Justice took particular account of the *circumstances* in which the contested act was adopted. In addition to the objective aspect referred to above, the context in which an act is adopted may provide further indications which confirm either the author's intention that the act should produce effects vis-à-vis third parties or the fact that the author was aware of the potential external impact of the measure. The significance of the surrounding circumstances was highlighted by the Court of Justice in *France v Commission*, (44) in which it was accepted that an action could be brought in respect of an internal Commission instruction because it was distinguished from an ordinary service instruction 'both by the circumstances in which it was adopted and by the conditions under which it was prepared, drawn up and published'. (45)

81. Against the background of that case-law, I shall now go on to consider whether the act whose validity is questioned by the referring court is open to legal challenge.

82. At least in terms of its formal presentation, the OMT programme is a measure with atypical features. It was drawn up in the Governing Council of the ECB on 5 and 6 September 2012 and was recorded in the minutes of that meeting, which indicated that a description of its technical features would subsequently be given in a press release. Thus, details of the programme's technical features were given at a press conference held by the President of the ECB and a press release was subsequently published in English on the ECB's website. The publication and disclosure of the programme on the internet is the only 'official' written text available about the OMT programme if one discounts the draft Decision and Guideline, which the ECB has produced to the Court in these proceedings but which are still internal Bank documents awaiting final adoption and subsequent publication in the *Official Journal*. Those drafts describe in detail what had been spelled out in general terms, albeit with considerable precision, in the press release.

83. There is no doubt that the OMT programme is a decision with specific content, which was the subject of discussion over two days, and that the principal features of the programme were adopted within the Governing Council. Furthermore, the fact that the basic features of the programme were made public, both at the press conference and in written form on the ECB's website, confirms the obvious willingness of the ECB to make public what had previously been decided upon within the Governing Council. The measure in question is a general programme of action since it lays down the conditions on which the ECB will act in a situation in which the monetary policy transmission channels have become blocked but it is also a measure which aims to have an immediate external effect. Otherwise, it would not have been announced with the widest publicity possible at a press conference and its technical features would not have been published on the ECB's website.

84. Moreover, the circumstances surrounding the OMT programme appear to confirm that the ECB's objective was to 'intervene' in the markets, perhaps in an unconventional way, solely by making an announcement about the programme. The speech given by the President of the ECB on 26 July 2012 in London, referred to above, which stated that all the necessary measures would be taken to 'save the common currency', the press conference on 2 August 2012 following the meeting of the Governing Council of the same day and the situation affecting the government bond markets of various Member States at that time all confirm that the ECB's intention in making an announcement about the OMT programme was not just to give an account of internal work on an initiative that was still at the discussion stage but also to produce an effect by making an announcement about the creation of a potentially ambitious programme intended, so it is claimed, to put an end to some of the difficulties that the monetary policy transmission mechanism was experiencing at that time. The proof of that is the significant impact

which there is every indication that that announcement of the programme had on the financial markets, an impact which, according to the ECB and the Commission, is still being felt more than two years later.

85. It is also important to point out that the OMT programme entailed not the publication of a simple individual act but rather the announcement of a full normative programme, for the future, which included relatively precise conditions and whose purpose was regulatory. In view of the content of the programme, it may be added that on 6 September 2012 the ECB was not making an announcement about some decision of little consequence. On the contrary, details were published on that day of a measure which was clearly of great significance for the euro area and which was intended, although it was not yet complete, to last over time.

86. At this point it is appropriate to refer to the second of the circumstances which seem to me relevant for the purpose of rejecting the objections to admissibility. Account must be taken of the fact that the present case concerns an act of public communication on the part of a central bank, under which approval is given to a monetary-policy programme. Central bank communications are not comparable to those of other institutions, whether they be political or technical. Over the last 30 years, central banks have undergone significant developments that have affected their instruments of monetary policy, which the experts all agree now include public communication.

87. It is a fact that the communications strategy of central banks has become one of the central pillars of contemporary monetary policy. Given the impossibility of predicting rational behaviour on the markets, an effective way of managing expectations and, therefore, of ensuring the effectiveness of monetary policy is to exploit all the possibilities of public communication (communications strategies) open to central banks. (46) Taking account not only of the reputation of central banks and the information available to them but also of the powers afforded them by conventional monetary policy instruments, announcements, opinions or statements by the representatives of central banks generally play a crucial role in the development of monetary policy today. (47)

88. There is no doubt that the ECB now also includes communication among its key monetary policy tools. The ECB has in the past acknowledged that itself and nobody would deny that the regular communication to the public by the ECB of the broad lines of its policy, or of particular opinions which may indicate future courses of action on its part, represents a central pillar of its activities. (48) To my mind, this element, which is very particular to the ECB and characteristic of it, plays a highly significant role in defining the nature of an act like the announcement of the OMT programme on 6 September 2012.

89. Finally, and in view of the great importance of the ECB's communication strategy, it is appropriate to bear in mind that the alternative — namely declaring an act such as the OMT programme not to be actionable — would entail the risk of excluding a significant number of decisions of the ECB from all judicial review merely on the ground that they have not been formally adopted and published in the Official Journal. If a measure does not need to be published officially in its standard form in order to produce effects — because it is enough to publicise it at a press conference or through a press release for it to have an impact outside the institution —, the system of acts and judicial review provided for in the Treaties could be seriously undermined if it were not possible to review the legality of that measure.

90. Accordingly, I take the view that, in the specific case of actions of this kind by the ECB, in which acts of public communication assume special significance for the effectiveness of monetary policy, an act such as the one called in question by the BVerfG, as it was announced on 6 September 2012, constitutes — having regard not only to its content and the actual effects that it may produce but also to the circumstances in which the measure was adopted — an act of an institution whose validity may be called in question in the framework of proceedings for a preliminary ruling under Article 267 TFEU.

91. I therefore consider that the objections to admissibility raised against the questions referred for a preliminary ruling on validity must be rejected. It will therefore not be necessary to rule on the question on interpretation which the referring court has put forward in the alternative.

## **VI – The questions referred for a preliminary ruling**

*A – The first question referred: Articles 119 TFEU and 127(1) and (2) TFEU and the limits of the ECB's monetary policy*

92. By its first question, the BVerfG airs its doubts about the validity of the OMT programme announced by the ECB on 6 September 2012, specifically asking the Court of Justice whether it is a measure that is incompatible with Articles 119 TFEU and 127(1) and (2) TFEU and whether it encroaches upon the competence of the Member States.

93. In its order for reference, the BVerfG, after extensive and detailed reasoning, concludes that there are sufficient grounds to support the view that the ECB has adopted an economic policy measure rather than a monetary policy measure. The BVerfG also finds there to be an ultra vires act in breach of the principle of conferral, which must determine the ECB's conduct. The BVerfG points to four aspects of the OMT programme which, in its view, confirm the aforementioned ultra vires act: conditionality, selectivity, parallelism and circumvention. The concerns of the referring court highlight, in more general terms, the question of the limits to which the powers of the ECB are subject in exceptional circumstances such as those of the summer of 2012.

#### 1. Position of the interested parties

94. All the applicants in the main proceedings in essence concur that the Treaties should be interpreted as meaning that a programme such as that announced by the ECB on 6 September 2012 constitutes a measure of economic policy. In their opinion, the OMT programme disregards the mandate which primarily constrains the ECB to the objective of maintaining price stability, since it is a measure that has a direct impact on the financing sources of the Member States concerned, which places it in the area of economic policy. In their submissions, they refer repeatedly to the judgment in *Pringle*, (49) in which the Court stated that the creation of the ESM was an economic policy measure and refused to classify it as a monetary policy. The applicants in the main proceedings submit that, in view of the features common to the ESM and a programme such as OMT, the latter must also be classified as an economic policy measure.

95. Both Mr Gauweiler and Mr Huber place particular emphasis on the fact that the true objective of the OMT programme is, in their view, not to re-establish the monetary policy transmission channels but rather to 'save the euro' by means of the 'communitisation' or pooling of the debt of certain Member States, which in their submission is incompatible with the Treaties since it puts some Member States at risk of assuming the debts of other Member States. They submit that such a measure clearly goes beyond the 'support' for the economic policies of the Union and the Member States which the ECB may give under the Treaties.

96. Mr von Stein rejects the proposition that interest rates on sovereign debt markets were at artificial levels in the months preceding the announcement about the OMT programme. He submits that those interest rates merely reflected a genuine market price, in respect of which the ECB intervened, manipulating that price artificially, by announcing its willingness to buy the bonds of certain Member States. He argues that distorting the market in that way is not consistent with the mandate which the Treaties confer on the ECB, which is to maintain price stability.

97. Mr Bandulet emphasises that the OMT programme cannot make up for the structural shortcomings in the design of monetary union. He argues that that is not at all a competence that has been conferred on the ECB since, if it were otherwise, the democratic principle and the principle of the sovereignty of the people would be infringed.

98. The parliamentary group Die Linke also disputes that the ECB is competent to adopt the OMT programme, although it deploys different arguments. Die Linke emphasises the economic consequences which have followed from the successive financial assistance programmes in various Member States. The group maintains that those effects confirm that the ECB, in supporting those rescue packages through the implementation of the OMT programme, is involving itself in the economic policy of the Member States. Die Linke also invokes various provisions of the Charter of Fundamental Rights of the European Union in order to challenge the intervention of the Union and the ECB in the States that are subject to financial assistance programmes.

99. All the States that have participated in these proceedings, together with the ECB and the Commission ('the States and the institutions'), submit, in variously nuanced ways, that the OMT programme, as it was made known through the press release, is a monetary policy measure that is compatible with the competences conferred on the ECB by the Treaties.

100. The States and the institutions are also agreed on the fact that the ECB enjoys a broad discretion in the definition and implementation of monetary policy. The Court of Justice should acknowledge that broad discretion and recognise the objectives which the ECB set forth when announcing its OMT programme. The States and the

institutions accept that, in the framework of those objectives, the ECB may adopt unconventional monetary policy measures, provided that that is strictly necessary to achieve the objectives set. Specifically, both the Republic of Poland and the Kingdom of Spain submit that the OMT programme is consistent with the various aspects of the principle of proportionality.

101. The States and the institutions also all deny, contrary to the view expressed by the referring court, that it follows from the judgment in *Pringle* (EU:C:2012:756) that the OMT programme is an economic policy measure. In their view, *Pringle* recognises that economic policy and monetary policy are closely linked, with the result that an economic policy measure may have an impact on monetary policy and vice versa, without that altering the nature of the measure. In the present case, the fact that the OMT programme may have an impact on economic policy does not, in itself, convert that programme into an economic policy measure.

102. As regards the fact that the OMT programme may bring about artificial changes in prices on the government bond market, the Government of the Republic of Poland, the Commission and the ECB submit that all monetary policy has the aim of altering prices since it is an inherent function of monetary policy to have an effect on the markets by means of measures that modify certain patterns of behaviour, although always with the objective of fulfilling the mandate conferred on the Bank, in this case the maintenance of price stability.

103. The Federal Republic of Germany defends in principle the position that the OMT programme in the terms in which it is known is lawful. It has, however, stressed that currently all that exists is an announcement giving notice of that programme and that it will be necessary to wait until the programme is actually implemented in order to determine whether it is in fact a measure of economic policy or monetary policy. In any event, the Federal Republic of Germany submits that the ECB enjoys a broad discretion and that a measure would transgress the boundaries set by the Treaties only if it was obviously an economic policy measure. It also suggests that it would be helpful if the Court of Justice were to provide criteria that would permit the OMT programme to be implemented in a way compatible with the Treaties and, so far as possible, with the fundamental constitutional structures of the Federal Republic of Germany.

104. The ECB defends the legality of the OMT programme by referring to the events that occurred in the summer of 2012. At that time fears that the euro was reversible were spreading among investors, bringing about a marked spike in the interest rates paid in respect of the government bonds of various Member States. In that situation the ECB argues that it had lost its ability to implement monetary policy through the usual channels for monetary policy transmission. The resulting fragmentation of the sovereign debt markets, together with the financing difficulties experienced by various Member States (and also, by extension, the financial institutions of those States), was preventing the proper transmission of the ‘impulses’ or signals which the ECB normally sends out. In the ECB’s submission, those circumstances were grounds for adopting an unconventional monetary policy measure, such as the OMT programme. In short, the aim of the programme, according to the ECB, is not to facilitate the financing conditions of certain Member States, or to determine their economic policies, but rather to ‘unblock’ the ECB’s monetary policy transmission channels.

105. The ECB denies that the technical features of the OMT programme mask an economic policy measure. The programme’s ‘conditionality’ is, in the Bank’s view, essential in order to prevent implementation of the programme providing an incentive to the States concerned to cease carrying out the structural reforms necessary to improve their economic fundamentals. Similarly, the ECB argues that the ‘selectivity’ of the measures is inherent in the OMT programme since the disruption of the monetary policy transmission channels arose as a result of increases in the interest rates for the government bonds of certain Member States. In short, the ECB submits that the OMT programme contains safeguards that ensure it is linked to monetary policy and remains within the scope of the powers which the Treaties confer on the Bank.

## 2. Analysis

### a) Preliminary observations

106. Before embarking on the analysis specific to the question raised by the BVerfG, it is appropriate to pause to consider two decisive aspects of the present case: (i) the status and mandate of the ECB, as defined in the Treaties, and (ii) the concept of ‘unconventional monetary policy measures’. Those two areas will provide us with the basic elements for assessing the legality of a programme such like OMT, which, according to the ECB, is among those unconventional monetary policy measures.

i) The status and mandate of the ECB

107. The ECB is the institution on which the Treaties confer responsibility for the exercise of the Union's exclusive competence in respect of monetary policy. The ECB and the national central banks constitute the ESCB, whose principal task, notwithstanding any measures that may be taken in 'support of economic policy', is to ensure 'price stability'. (50) Therefore, unlike other central banks, the ECB is characterised by the fact that it is constrained to a clear mandate that is closely linked to anti-inflationary goals. Both the *travaux préparatoires* relating to the Treaty of Maastricht (51) and studies of the history of monetary policy (52) confirm the importance of that mandate in the negotiations that culminated in the creation of the ECB.

108. Besides the fact that it must strictly adhere to the objective of ensuring price stability, a further characteristic of the ECB is that it has a high degree of functional as well as organic independence. (53) The Treaties stress on numerous occasions the independent nature of all the actions undertaken by the ECB, which should be considered in conjunction with the fact that the Statute of the ESCB and of the ECB is very difficult to amend, something which differentiates the Bank from the central banks around it, whose regulatory framework may be amended by the relevant national Parliaments. (54) That is not the case of the ECB, since any amendment of its Statute requires amendment of the Treaties. (55)

109. Just as is the case with national central banks, the ECB's independence is also intended to ensure that it is kept away from the political debate, there being an absolute prohibition on any instructions from other institutions or from the Member States. (56) Moreover, that detachment from political activity is necessary because of the extremely technical nature and high degree of specialisation characteristic of monetary policy. (57)

110. In fact, the Treaties confer on the ECB sole responsibility for framing and implementing monetary policy, for which purpose it is given substantial resources with which to undertake its functions. On account of those resources the ECB also has access to knowledge and particularly valuable information, which permits it to perform its tasks more effectively whilst also, over time, bolstering its technical expertise and reputation. Those features are essential for ensuring that monetary policy signals actually reach the economy since, as has previously been stated, one of the functions of central banks today is the management of expectations, and technical expertise, reputation and public communication are basic tools for carrying out that function.

111. The ECB must accordingly be afforded a broad discretion for the purpose of framing and implementing the Union's monetary policy. (58) The Courts, when reviewing the ECB's activity, must therefore avoid the risk of supplanting the Bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB. Therefore, the intensity of judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution. (59)

112. Finally, it is important to point out that the ECB's monetary policy is implemented, as has been noted, through various 'transmission channels or mechanisms', by means of which the Bank intervenes in the market and fulfils its mandate of ensuring price stability. (60) In order to carry out its monetary policy, the ECB controls the monetary base of the euro area economy, which it does by transmitting the appropriate 'impulses' or signals, chiefly through the setting of interest rates, which will subsequently pass from the financial sector to firms and households. (61)

113. In this respect, to ensure the proper functioning of these transmission channels, the Statute of the ESCB and of the ECB confers on the ESCB an express competence to adopt a set of 'monetary functions and operations'. Of those operations, the ones provided for in Article 18(1) of the Statute are particularly relevant for the purposes of this case: Article 18(1) permits the ECB and the national central banks to 'operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals'.

114. However, as will be seen, a programme like OMT cannot be said to be among the ECB's ordinary monetary policy instruments. The OMT programme formally deploys one of the monetary operations mentioned above, but does so in a sufficiently unusual manner to warrant classification as an 'unconventional monetary policy measure'. I shall explain below to what that concept more specifically refers, how it has been justified by the ECB and the extent to which it is a means duly provided for in the Treaties.

ii) Unconventional monetary policy measures and classification of the OMT programme as such

– The ECB’s view of unconventional monetary policy measures

115. The ECB defends the lawfulness of the OMT programme on the basis that it is a measure intended to ‘unblock’ the Union’s monetary policy transmission channels. As has been explained above, those monetary policy transmission channels do not function as mechanisms producing immediate effect but as a framework through which the ECB sends out a series of ‘impulses’ or signals with a view to them reaching the real economy. According to the ECB, monetary policy may be affected by factors external to the transmission channels, factors which are liable to disrupt the proper functioning of the signals sent out by the ECB: an international political or economic crisis, or a significant change in oil prices, amongst other factors, may severely interfere with the ‘impulses’ that the ECB sends out via the monetary policy transmission channels.

116. When a situation of that kind occurs, the ECB considers it has competence to intervene using its own instruments with the aim of ‘unblocking’ those channels. In such a case the actions it takes are different from those which are part of the ECB’s normal practice, since they can be said not to involve so much a ‘standard’ operation but rather an operation to ‘unblock’ and subsequently restore monetary policy instruments properly so-called. (62)

117. Both the ECB and the Member States that have participated in these proceedings maintain that it is legitimate to have recourse to unconventional measures of this kind as part of monetary policy. In fact, according to the documents before the Court, intervention of this sort has been used by the majority of central banks throughout the international financial crisis that began in 2008, (63) including, as is apparent from the present proceedings, by the ECB itself. (64) In the view of the ECB and those Member States, the Treaties do not prevent the ECB from exercising its powers to restore its monetary policy instruments when circumstances arise which significantly disrupt the normal functioning of the transmission channels. In the Commission’s submission, action of that kind is compatible with the Treaties, provided that it is carried out prudently and is subject to safeguards.

118. On the basis of the foregoing considerations, it is appropriate to consider the precise nature of the OMT programme, as it was announced in the press release of 6 September 2012.

– The OMT programme as an unconventional monetary policy measure

119. The OMT programme belongs, formally, among the operations provided for in Article 18.1 of the Statute of the ESCB and of the ECB. It is clear that, in conferring power on the ESCB to buy claims and marketable instruments, that provision seeks, first and foremost, to ensure that tools are available to the ECB for controlling the monetary base, as a conventional means of maintaining price stability.

120. It should, however, immediately be added that the OMT programme uses the powers set out in Article 18.1 of the Statute in a way which is at some remove from the ECB’s standard practice in carrying out its operations. It is clear that a selective measure, which is directed at one or more States of the euro area and which entails purchasing their bonds, without any previous quantitative limit being set, in the expectation that market financing conditions will improve, is at some remove from the ECB’s standard practice.

121. As is stated in the press release of 6 September 2012, the OMT programme provides for intervention by the ECB on the secondary government bond market, enabling the Bank to purchase government bonds of euro area States that are subject to a financial assistance programme and that are presumably experiencing difficulties in raising loans. The premiss on which the OMT programme is based is the occurrence of an exogenous shock that disrupts the monetary policy transmission channels. That disruptive factor comprises, so the ECB reasons, a relatively sudden and virtually unbearable increase in the risk premia of certain euro area States, an increase which in principle does not reflect the macroeconomic reality of those States and which, as a result, prevents the ECB from transmitting its signals effectively and, therefore, from fulfilling its price stability mandate.

122. In view of the foregoing, I therefore consider that the OMT programme may be classified as an unconventional monetary policy measure, with the consequences that that will entail for the purposes of reviewing the measure.

b) The ECB’s competences and the OMT programme

123. Having made the foregoing observations, I shall focus on two matters to which consideration must be given if the first question raised by the BVerfG is to be answered comprehensively.

124. In the first place it is necessary to consider whether a programme such as OMT may be classified as a monetary policy measure or is, instead, an economic policy measure and, therefore, prohibited so far as the ECB is concerned. In undertaking that assessment, the technical features pointed out by the BVerfG will each be individually considered. Thereafter, if it is possible to classify the OMT programme as a monetary policy measure, as I shall propose, it will be necessary to examine the programme in the light of the principle of proportionality within the meaning of Article 5(4) TEU.

i) The OMT programme and the economic policies of the Union and the Member States as a limit on the ECB's competences

– The Union's economic and monetary policies

125. As I have indicated, the BVerfG is asking whether the ECB, in approving the OMT programme, adopted an economic rather than a monetary policy measure, thereby encroaching upon the competence which Article 119(1) TFEU confers on the Council and the Member States.

126. If we consider primary EU law, Article 119(1) TFEU gives a brief description of the main components of the economic policy of the Union, stating that it is to be based 'on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition'. Although the provision is general and thus ambiguous, it none the less provides the basic, defining, elements of those aspects of economic policy which fall within the Union's competence.

127. The Treaties are silent, however, when it comes to defining the exclusive competence of the Union in relation to monetary policy. The Court of Justice established that in its judgment in *Pringle* when it found itself obliged to use, as the sole point of reference, the monetary policy objectives laid down by the FEU Treaty. (65) The primary objective of EU monetary policy, price stability, and support for the general economic policies in the Union, form the principal criterion for defining monetary policy (Articles 127(1) TFEU and 282(2) TFEU). The Court of Justice confirmed that this was so in *Pringle*, in which the objectives ascribed to that policy were the sole criterion it used when determining whether or not an amendment of the Treaty fell within the sphere of monetary policy.

128. Despite the fact that, on the face of it, the Treaties provide only limited criteria, EU law has a number of useful interpretative tools at its disposal for the purpose of determining whether a decision falls within the sphere of the Union's economic policy or its monetary policy.

129. Although it may appear self-evident, it is important to make the point that monetary policy forms part of general economic policy. The division that EU law makes between those policies is a requirement imposed by the structure of the Treaties and by the horizontal and vertical distribution of powers within the Union, but in economic terms it may be stated that any monetary policy measure is ultimately encompassed by the broader category of general economic policy. That connection between the two policies was highlighted by the Court of Justice itself, and by Advocate General Kokott in her View, in *Pringle*, when it was stated that an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the euro. (66) That reasoning is entirely valid if turned around, as has been pointed out by the ECB, the Commission and the majority of the Member States that have participated in these proceedings, since a monetary policy measure does not become an economic policy measure merely because it may have indirect effects on the economic policy of the Union and the Member States.

130. The fact that the Treaty refrains from providing a precise definition of the monetary policy of the Union is consistent with a functional view of the role of monetary policy, according to which every measure that is given effect through monetary policy instruments constitutes monetary policy. Therefore, if a measure belongs to the category of instruments which the law provides for carrying out monetary policy, there is an initial presumption that such a measure is the result of the Union's monetary policy being carried out. That is clearly a presumption that could be rebutted if, for example, the measure were to pursue objectives other than those specifically listed in Articles 127(1) TFEU and 282(2) TFEU.

131. Similarly, other provisions of the Treaty that relate to monetary policy provide relevant indications which serve to define that policy more fully. Thus, Articles 123 TFEU and 125 TFEU, which I shall consider more closely when addressing the second question referred for a preliminary ruling, lay down strict prohibitions of the financing of States, whether by means of monetary financing measures or by means of transfers between Member States. Those prohibitions confirm that monetary union, although it is an integral part of a Union founded on the value of solidarity (Article 2 TEU), (67) also seeks to maintain financial stability, for which purpose it is based on a principle of fiscal discipline and the principle that there is no shared financial liability (the ‘no-bailout’ rule). (68)

132. Therefore, in order for a measure of the ECB actually to form part of monetary policy, it must specifically serve the primary objective of maintaining price stability and it must also take the form of one of the monetary policy instruments expressly provided for in the Treaties and not be contrary to the requirement for fiscal discipline and the principle that there is no shared financial liability. If there are isolated economic-policy aspects to the measure at issue, the latter will be compatible with the ECB’s mandate only as long as it serves to ‘support’ economic policy measures and is subordinate to the ECB’s overriding objective.

– The OMT programme in the light of the criteria for defining the Union’s economic and monetary policies

133. Focusing now on the criteria which have been discussed above, it is appropriate to consider whether the OMT programme is, in nature, a monetary policy measure or an economic policy measure. The referring court has drawn attention to a number of matters that could show that the measure in question is one of economic policy and I shall focus individually on each of them. However, as a preliminary point, it is important to consider the objectives which the ECB has advanced to justify the OMT programme and which have been called in question by the BVerfG and rejected by the applicants in the main proceedings. After considering those grounds and how they should be classified legally, I shall examine the matters singled out by the referring court: conditionality, parallelism, selectivity and circumvention.

– The objectives of the OMT programme

134. As the ECB has explained in detail in its written observations, in the summer of 2012 a number of exceptional circumstances converged in the euro area economy: excessive risk premia applied to various Member States, high volatility in government bond markets, fragmentation of credit on the interbank market and an increase in the financing costs of firms as a result of all the foregoing factors. Those events were also strongly influenced by the increased nervousness of the markets in the face of a possible disintegration of the single currency, whether as a result of one or more of the countries of the euro area leaving the currency or as a result of the direct dissolution of the euro and a return to national currencies. Those facts have not, in essence, been denied by the parties that have participated in these preliminary ruling proceedings.

135. According to the ECB, the circumstances described above disrupted the conventional instruments of monetary policy. Interest rates on government bonds were being set on the basis not of the quality of the security, but of the location of the debtor. Territorial fragmentation of the interest rates applied to bonds issued by States of the euro area, on conditions that in some cases did not reflect the underlying macroeconomic situation of the States concerned, was, so the ECB argues, a serious obstacle to its monetary policy, which depended on the use of various means or channels of transmission. When the sovereign debt market, one of the central monetary policy transmission channels, was so seriously disrupted, the ECB claims that it lost a lot of the scope available to it for carrying out the task conferred on it by the Treaties.

136. In view of the situation mentioned above, the OMT programme has, so the ECB continues, a two-fold objective, the first direct or immediate and the other indirect: in the first place the aim is to reduce the interest rates demanded for a Member State’s government bonds in order, subsequently, to ‘normalise’ the interest rate differentials and thus restore the ECB’s monetary policy instruments.

137. Some of the applicants in the main proceedings contend that the ECB’s objective was not as described above but was rather to ‘save the single currency’ by making the ECB into a lender of last resort for the Member States, thereby redressing some of the design faults of monetary union. I do not believe that there are conclusive arguments which support that contention. The fact that in the ECB’s *Monthly Bulletin* for August 2012, attention was drawn, in connection with the measures that were subsequently announced on 6 September 2012, to the relationship between the programme and the ‘irreversibility of the euro’ does not appear to me sufficient to call

in question the ECB's defence of the objectives of the OMT programme which it put forward when the programme was announced and which it has consistently restated up to the time of these proceedings. (69)

138. Consequently, in view of the facts and the objectives put forward by the ECB, there are, to my mind, sufficient grounds for considering that the stated objectives of the OMT programme may in principle be accepted as legitimate. Both the events of the summer of 2012 and the situation of various States on the sovereign debt markets appear to be beyond dispute: it should also be acknowledged that, in any evaluation of its assessments as to matters of fact, the ECB should be afforded a considerable degree of deference.

139. Accordingly, I take the view that the objectives of the OMT programme as they are explained by the ECB may be accepted, starting from the acknowledgement that, in announcing the OMT programme, it was the ECB's intention to pursue a monetary policy objective. Whether an analysis of the content of the OMT programme will lead to the opposite conclusion is another matter. The BVerfG draws attention in that regard to various matters which, in its view, mean that the OMT programme is an economic policy measure: I shall now turn my attention to those matters.

– Conditionality and parallelism

140. The BVerfG deals with two aspects that may be examined together. The fact that the OMT programme is made conditional upon the existence of a financial assistance programme of which one or more States whose bonds will be purchased on the secondary market are beneficiaries, with the ECB linking the objectives of the OMT programme to those of the financial assistance programme, confirms, according to the BVerfG, that the ECB's action falls within the sphere of economic policy and not that of monetary policy. (70) That is the stance taken by all the applicants in the main proceedings and although their reasoning is not always the same, they are agreed as to the conclusion.

141. The ECB argues that the OMT programme will be activated only if a euro area State is subject to an ESM or EFSF financial assistance programme, so that the conditionality imposed in that programme will ensure that implementation of the OMT programme does not lead Member States to be dilatory in adopting the necessary structural reforms, a phenomenon commonly described as 'moral hazard'. (71) According to the ECB, it will not be possible to interpret the purchase of government bonds in the secondary market as a measure offering unconditional support because, in essence, the ECB's intervention will take place only as long as the structural reforms prescribed by the relevant financial assistance programme are being undertaken. For the ECB, any risk of interference in economic policy is offset by the neutralising effect on the 'moral hazard' to which a substantial intervention by the ECB on the secondary government bond market might give rise.

142. The argument of the applicants in the main proceedings is not without merit. Although the ECB has argued that linking the OMT programme to compliance with the financial assistance programmes is a condition that is set by the ECB itself, from which it is possible to be released at any time, the applicants in the main proceedings, particularly Die Linke, have stressed that the ECB is not referring simply to compliance with an assistance programme from which it is wholly detached. On the contrary, the ECB actively takes part in those financial assistance programmes. Those applicants submit that the ECB's argument is seriously undermined by its 'dual role', as (i) holder of a claim the basis for which is a government bond issued by a State and (ii) supervisor and negotiator of a financial assistance programme applied to the same State, with macroeconomic conditionality included.

143. I am substantially in agreement with that position. Although in the press release of 6 September 2012 the ECB links implementation of the OMT programme to effective compliance with the obligations in the context of a financial assistance programme, the ECB's role in such programmes goes beyond its simply unilaterally endorsing them. The rules of the ESM, (72) but also the experience of financial assistance programmes which have been implemented or which are still ongoing, amply demonstrates that the ECB's role in the design, adoption and regular monitoring of those programmes is significant, not to say decisive. (73) Moreover, as Die Linke have submitted in their written and oral arguments, the conditionality imposed in the framework of the financial assistance programmes which have hitherto been granted and in which the ECB has been actively involved has had a considerable macroeconomic impact on the economies of the States concerned, as well as in the euro area as a whole. That finding confirms, so Die Linke argues, that the ECB, in participating in the assistance programmes concerned, has been actively involved in measures which, in certain circumstances, might be perceived as going beyond 'support' for economic policy.

144. The ESM Treaty does in fact confer multiple responsibilities on the ECB in the course of a financial assistance programme, including participation in negotiations and monitoring. (74) The ECB is therefore involved in the elaboration of the conditionality imposed on the State requesting assistance whilst, subsequently, it also takes part in the task of monitoring compliance with conditionality, which is crucial if the programme is actually to continue and eventually to come to an end. The ECB shares this task with the Commission, although it is the latter on which the ESM Treaty confers even more important functions.

145. For the OMT programme to be classified as a monetary policy measure, it is essential, as has already been pointed out, that the objectives come within the framework of that policy and that the instruments used are those proper to monetary policy. Linking the OMT programme to compliance with financial assistance programmes may be justified by the, undoubtedly legitimate, interest there is in eliminating any hint of ‘moral hazard’ that may result from a significant intervention by the ECB on the government bond market. However, the fact that the ECB plays an active part throughout the course of financial assistance programmes may make the OMT programme, inasmuch as it is unilaterally linked to those programmes, into something more than a monetary policy measure. Unilaterally making the purchase of government bonds subject to compliance with conditions when those conditions have been set by a third party is not the same as doing so when the ‘third party’ is not really a third party. In those circumstances, the purchase of debt securities subject to conditions may become another instrument for enforcing the conditions of the financial assistance programmes. The mere fact that the purchase may be perceived in that way — as an instrument which serves macroeconomic conditionality — may be sufficient in its impact to detract from or even distort the monetary policy objectives that the OMT programme pursues.

146. It is true that the ECB will always be able to bring pressure to bear on a State subject to a financial assistance programme by making, albeit unilaterally, the OMT programme subject to compliance with the conditionality agreed under the ESM. However, it is necessary to draw a distinction between (i) a measure intended to exclude ‘moral hazard’, such as a unilateral requirement to comply with the conditionality imposed in a financial assistance programme, and (ii) a measure which, when considered in its context, includes the ECB as one of the institutions negotiating and, above all, directly co-supervising that conditionality. (75)

147. In short, in so far as the OMT programme is part of the broader context in which the ECB participates in financial assistance programmes agreed under the ESM, I consider that the ECB, in creating and announcing the OMT programme, did not properly weigh up the impact of its involvement in those financial assistance programmes on the monetary nature of the OMT programme.

148. That being so, it is appropriate to consider what immediate consequences follow for the classification of the OMT programme as part of the monetary policy of the Union.

149. To my mind, the conclusion reached above does not prevent the ECB from regularly participating in financial assistance programmes as they are provided for in the ESM Treaty. The fact that a financial assistance programme is adopted in no way predetermines the future existence of the necessary conditions for the ECB to activate the OMT programme.

150. However, if exceptional circumstances were to arise which were grounds for activating the OMT programme, it would, for that programme to retain its function as a monetary policy measure, be essential for the ECB to detach itself thenceforth from all direct involvement in the monitoring of the financial assistance programme applied to the State concerned. Nothing would prevent the ECB from being kept informed and even from being heard, (76) but under no circumstances would it be possible for the ECB, in a situation in which a programme such as OMT is under way, to continue to take part in the monitoring of the financial assistance programme to which the Member State is subject when, at the same time, that State is the recipient of substantial assistance from the ECB on the secondary government bond market. Accordingly, it is my view that this functional distance between the two programmes must be maintained if the OMT programme is to retain its character of a monetary policy measure, aimed exclusively at restoring the monetary policy transmission channels.

151. In sum, and from the angle that has just been analysed, I consider that the OMT programme is to be regarded as a monetary policy measure, provided that the ECB refrains — once the time has come to put that programme into effect — from any direct involvement in the financial assistance programmes of the ESM or the EFSF.

– Selectivity

152. The second feature which casts doubt on the monetary nature of the OMT programme is, according to the BVerfG, the programme's so-called 'selectivity', which is taken to mean a measure that is applicable to one or more States, but in any event not to all the States of the euro area. This feature is not consistent with the usual practice of the ECB, whose measures are directed at the euro area as a whole and are not targeted at territorial segments of the economy. Moreover, selectivity, according to the BVerfG, will distort financing conditions on the market, which may place the government bonds of other Member States at a disadvantage.

153. I do not find that objection convincing since it does not demonstrate that selectivity in itself makes the OMT programme an economic policy measure. The ECB has argued persuasively that interest rate differentials with the capacity to block the monetary policy transmission channels were to be found in the government bonds of one group of States. That situation is at the basis of the OMT programme since otherwise it would not be necessary to link implementation of OMT to a financial assistance programme. Therefore, selectivity is merely the logical consequence of a programme seeking to remedy a situation in which the monetary policy transmission channels are blocked in various Member States. The fact that there may be changes in the market or that the government bonds of other States may be placed at a disadvantage does not affect the classification of the OMT programme as a monetary policy measure, since it is only by targeting the programme at the bonds of the States concerned that the efficacy of the programme can be ensured.

154. I therefore consider that the fact that the OMT programme applies selectively to one or more States of the euro area does not call in question the programme's classification as monetary policy within the meaning of Article 127(1) TFEU and Article 282(2) TFEU.

– Circumvention

155. Finally, the BVerfG considers that the OMT programme may circumvent the requirements and conditions laid down in the financial assistance programmes, since the requirements to which the ESM's purchase of government bonds in the secondary market are subject, which are laid down in Articles 18 and 14 of the ESM Treaty, are stricter than those imposed by the OMT programme. In the BVerfG's view, that permits the ECB to purchase government bonds in market conditions that are more advantageous for the State concerned, thereby circumventing the conditions to which the ESM is subject.

156. It is difficult to accept that argument in the wake of the examination of the objections relating to conditionality and parallelism that has been undertaken above. Once it has been shown, as I have done above, that the independence of the OMT programme vis-à-vis the financial assistance programmes, as described above, operates as an element guaranteeing the monetary-policy nature of the measure in question, it is logical, as a consequence of that guarantee, that it should be the ECB which establishes its own requirements in respect of the purchase of government bonds.

157. In my view, problems may arise not so much from the abstract fact that the requirements may be different for each institution but rather from the specific requirements that the ECB may establish. However, considered exclusively from the perspective which the BVerfG has adopted, it is my view that the fact that the ECB is not subject to the same requirements as those to which the ESM is subject does not convert the OMT programme, as a matter of principle, into an economic policy measure.

– Intermediate conclusion

158. In the light of the reasoning set out, I take the view that the OMT programme, as described in the press release of 6 September 2012, falls within the monetary policy for which the Treaty makes the ECB responsible and does not constitute an economic policy measure, provided that, throughout the whole period of implementation of any OMT programme, the ECB refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked.

ii) Review of the proportionality of the OMT programme (Article 5(4) TEU)

159. The conclusion that the OMT programme, as it has been announced, is an integral part of the ECB's monetary policy says nothing about whether the measure is proportionate. In that regard, a number of the parties taking part in these proceedings have defended the programme, referring to the constituent elements of the proportionality test.

160. Where a competence is exercised in a way that is recognised to be unconventional, two conditions, as a minimum, must be met. In the first place, that exercise, above all, must not infringe other provisions of primary law. The answer to the second question referred, which concerns the prohibition of monetary financing of the Member States, will focus on that issue.

161. In the second place, a review of whether the principle of conferral has been complied with from the perspective of the principle of proportionality (Article 5(4) TEU) is essential in the case of a measure which is presented as unconventional and as being justified on account of exceptional circumstances. Whilst the Union must always observe the principle of proportionality when exercising its competences deriving from the principle of conferral (Article 5(4) TEU), observance of the principle of proportionality is particularly important in a case which concerns the exercise of competences that are being exercised on account of exceptional circumstances.

162. That said, the point should be made here that the present case gives rise to a particular difficulty when it comes to assessing the proportionality of the measure at issue. As has been explained above, the OMT programme is a measure that is *incomplete*, not only because its formal adoption has been put off until an unspecified point in the future, but also because, apart from that consideration, the measure has not yet actually been implemented in an individual case. It is true that the basic features of the programme are available to us, but it is clear that they are far from achieving the degree of completeness that would be appropriate if they were regulated in a legal act. A full review of proportionality will be possible only in the light of any such regulation.

163. That being so, the review which the Court of Justice carries out in this regard will have to focus principally on the measure as it was announced in September 2012, although it may on occasion be necessary to give certain pointers, in relation to the technical features set out by the ECB, to address the possibility of the OMT programme actually being put into effect.

164. Having made those observations, I shall begin my analysis by drawing attention to a matter which to my mind is fundamental and must be addressed prior to the review of proportionality: the statement of reasons that is essential for the OMT programme. Only after that shall I conduct a thorough analysis of the technical features of the OMT programme in the light of the three components of the principle of proportionality: suitability, necessity and proportionality *stricto sensu*.

– Statement of the reasons concerning the circumstances justifying the OMT programme, the premiss of proportionality

165. All the EU institutions have a duty to state the reasons on which their legal acts are based (Article 296(2) TFEU). Underlying that duty are reasons of transparency but also reasons relating to judicial review: effective judicial review will be possible only if there is an explanation of the reasons on which a public decision is based. The Court of Justice has referred on many occasions to the dual purpose of the duty to state reasons, (77) which is also applicable in the case of a measure such as that in issue in these proceedings.

166. In fact, the ECB, if it is to apply a programme like OMT in conformity with the principle of proportionality, will have to present all the elements necessary to justify the Bank's intervention on the secondary government bond market. In other words, it is essential that the ECB starts by identifying the exceptional and extraordinary circumstances that led it to adopt an unconventional measure such as the one with which we are concerned here.

167. In that respect, the ECB will, in the first place, have to provide precise information showing there to be a significant change in market conditions giving rise to external disruption affecting the monetary policy transmission channels. Likewise, the ECB has to show to what extent its transmission channels have been blocked, it not being sufficient merely to make a statement to that effect. The ECB must put forward matters which show that such a blockage exists. Finally, it is necessary to make those reasons publicly known, ensuring that the aspects which are strictly necessary and whose disclosure might jeopardise the effectiveness of the programme remain confidential, but starting from the basis that, as a general rule, the reasoning will be fully transparent.

168. Those criteria will have to be scrupulously observed by the ECB, as they form the essential basis for any subsequent judicial review.

169. Applying those criteria, it is clear that the press release of 6 September 2012, which in essence is intended to describe the features of the OMT programme, includes almost no references to the specific circumstances that

justify adopting a programme such as OMT. It is only the introductory remarks with which the President of the ECB, Mr Draghi, opened the press conference on 6 September 2012 which make it possible to ascertain what the emergency is that might justify adopting the programme. (78) That means that, as regards the reasons stated for the measure as it was announced, we shall have to work with the data which were made available at that time. For the rest, the ECB has, in the context of the present proceedings, provided ample additional information on the emergency with which it claimed to be confronted, as has been described in points 115, 116, 117, 134, 135 and 136 of this Opinion.

170. Accordingly, for the purposes of the review of the proportionality of the OMT programme, I shall use the information that has been provided in these proceedings, subject to the important caveat that, should the programme be implemented, both the legal act which gives it form, and its implementation, must satisfy the requirements relating to the statement of reasons, as they have been described in points 166 and 167 of this Opinion.

– The suitability test

171. Turning now to the individual components of the principle of proportionality, it should first be ascertained whether an unconventional measure such as the OMT programme is, objectively, an appropriate measure for achieving the monetary policy aims which it pursues. It is therefore a question of examining the coherence of the measure, taking account of the causal connection between the means and the objectives. (79)

172. None of the parties that have participated in these proceedings has denied that the announcement of the OMT programme brought about a significant reduction in the interest rates for the bonds of certain Member States. That consequence confirms, in their view, the suitability of the programme, since, if the mere announcement of its existence produced an almost immediate effect in the markets, it is to be expected that implementation of the OMT programme in one or more Member States would have at least a similar impact. That assertion is obviously subject to all kinds of contingencies, which at this time it is impossible to predict, but, as a starting point, the effect of the announcement of the OMT programme is an indication of the effectiveness of the measure.

173. It is clear, however, that the effects of the announcement of the OMT programme cannot form the sole criterion by reference to which the appropriateness of the measure is to be assessed, since they are only indicative, although of some significance. It is therefore necessary to examine in greater detail (whilst recognising that the ECB has a broad discretion) whether the various components of the OMT programme are objectively appropriate for achieving the objectives sought.

174. While the immediate objective of the OMT programme is the reduction of the interest rates paid in respect of the government bonds of certain Member States, the means employed is a purchase of the government bonds of certain States of the euro area on the conditions set out in the press release of 6 September 2012. The purchase in question is subject to the precondition that either a full or a precautionary financial assistance programme is already in existence and the ECB restricts itself to buying bonds on the shorter part of the yield curve, in particular those with a maturity of between one and three years.

175. Looked at objectively, a programme like the OMT programme, which is centred on the purchase of government bonds, is, to my mind, appropriate for achieving a reduction in the interest rates on the government bonds of the States concerned. None of the parties taking part in these proceedings has denied that that is so. The reduction in question permits the States concerned to return to some degree of financial normality and, as a result, the ECB is able to carry out its monetary policy in conditions of greater certainty and stability. That finding does not mean that such financial normality does not entail risks, a matter which will be considered below. However, what falls to be analysed in the appropriateness test is the logical coherence between the means and the objective, something which, in my view, has been achieved in the present case.

176. I therefore consider that the OMT programme, as it was announced on 6 September 2012, is an appropriate measure for achieving the objectives pursued by the ECB.

– The necessity test

177. Although the measure under consideration here may pass the suitability test, the means used may none the less be excessive if compared with the other options that would have been available to the ECB. (80) Considered

from this angle, it is appropriate to examine whether the ECB has adopted a measure that was strictly necessary in order to achieve the objectives set by the OMT programme.

178. In the first place, the fact that the OMT programme is confined solely to those cases in which a Member State has had recourse to a financial assistance programme lends credence to the idea that the measure in question is limited and restricted to specific cases. The OMT programme is not a measure for intervening generally and in every circumstance in the secondary government bond market. Even when the monetary policy transmission channels have become blocked, it will be possible to activate the OMT programme only when a Member State is subject to a macroeconomic adjustment programme or a precautionary programme of the EFSF/ESM. That condition already considerably limits the number of possible cases in which the ECB will take action in the secondary government bond market: that is consistent with the fact that we are dealing here with an unconventional monetary policy measure, which is in itself exceptional and restricted to specific cases. The fact that the ECB has made activation of the programme conditional upon the previous adoption of a financial assistance programme confirms the exceptional nature of the measure and, moreover, makes it conditional — in my view correctly — upon a situation which is also exceptional.

179. Moreover, it is apparent from the documents before the Court that implementation of the OMT programme will, because of the very nature of the programme, be limited in time. As the French Republic has rightly pointed out, a programme such as OMT can only be short term in nature. (81) It is clear both from the press release and from the ECB's observations that the programme will apply, should the need arise, throughout the period of time necessary for the interest rates of the State or States concerned to return to the levels regarded as normal market levels. (82) The purpose of the OMT programme is not simply to reduce a State's financing costs but rather to return them to levels that reflect the macroeconomic reality of that State. Once that objective has been achieved, and once the transmission channels have been unblocked, implementation of the OMT programme comes to an end, in keeping with the fact that the measure is to be used only when strictly necessary.

180. Moreover, in a situation as delicate as the one in issue here, any change in the circumstances and, therefore, in their exceptional nature assumes significance for the purposes of the necessity test. In that respect, I take the view that the ECB's conduct in September 2012, which was limited to announcing the technical features of the programme, reflects an assessment of the development of the situation on the financial markets which is consistent with the requirements of the necessity test.

181. Finally, reference should be made to the possibility mentioned by the BVerfG that the OMT programme, if interpreted in conformity with EU law, could be subject to different technical characteristics from those set out in the press release of 6 September 2012, which could dispel the referring court's doubts as to the validity of the measure. It is appropriate to consider that possibility at this juncture, when applying the necessity test, since the existence of other, less restrictive, measures, such as those suggested by the referring court in point 100 of its order for reference, would result in the OMT programme failing that test.

182. It seems to me, however, that the other options suggested by the BVerfG would entail the risk of seriously calling into question the effectiveness of the OMT programme. As the ECB and the Commission have explained, it has to be accepted that setting an *ex ante* quantitative limit on purchases of government bonds would seriously undermine the effects which the intervention on the secondary market seeks to achieve, with the risk of triggering speculation.

183. Similarly, it seems to be correct that, if the status of preferential creditor were granted to the ECB, that would call into question the position of other creditors and, indirectly, the final impact on the value of the bonds on the secondary market. As the Commission has pointed out, the fact that the bonds of the State concerned are attractive to investors, rather than the opposite, would also increase demand for the bonds, with the resulting reduction in interest rates. Acknowledgment that the ECB does not have preferential creditor status contributes to ensuring a more effective normalisation of market prices for government bonds, which, in turn, contributes to ensuring their solvency in the medium and long term, with the resulting reduction in the risks entailed.

184. I therefore consider that the precautions introduced by the ECB are sufficient to support the conclusion that the OMT programme, in the terms described in the aforementioned press release, passes the necessity test, independently of the question whether the legal act that may ultimately adopt the programme confirms that finding.

– The test of proportionality *stricto sensu*

185. Lastly, it is appropriate to consider whether all the components of the measure at issue have been properly weighed up against one another, so as to ensure that the measure is not disproportionate.

186. In applying the test of proportionality *stricto sensu*, this third stage calls for a weighing-up exercise which, in the circumstances of the case, requires an analysis of whether the ‘benefits’ of the measure at issue outweigh the ‘costs’. (83) It obviously involves an examination that requires an assessment of all the benefits and costs, which may be represented as follows: on the one hand, the OMT programme permits the ECB to intervene in an exceptional situation in order to restore its monetary policy instruments and thus ensure that its mandate is effective; on the other hand, it is a measure which exposes the ECB to a financial risk, together with the moral hazard arising from the artificial alteration of the value of the bonds of the State concerned.

187. I would once again recall that the review of proportionality that is to be carried out in this case must acknowledge that the ECB enjoys a broad discretion. That means — particularly at the third stage of the review of proportionality — that the weighing-up exercise which the ECB is required to undertake in a situation such as that to which the OMT programme gives rise allows the ECB a broad margin of assessment, provided that no imbalance arises which is obviously disproportionate.

188. It must also be observed that it will be possible to make a definitive assessment of the proportionality *stricto sensu* of a programme such as OMT only once the programme has been activated and, in particular, in the light of the scale it may have. The observations made below are based on the information about the programme which was given in the press release.

189. The applicants in the main proceedings, like the BVerfG, have emphasised that implementation of the OMT programme exposes the ECB, and, in the last resort, the taxpayers of the Member States, to an excessive risk which could ultimately even lead to the institution becoming insolvent. That is obviously a high and extremely heavy cost which is capable of outweighing the benefits of the OMT programme.

190. As Mr Gauweiler’s representative has explained in some detail, implementation of the OMT programme would entail the ECB including in its balance sheet very large quantities of securities of dubious credit standing which, in the event of default, would lead to the ECB becoming insolvent. Thus, in placing no cap at all on the purchase of bonds, the OMT programme, so it is argued, makes that hypothesis into a real possibility, which confirms the disproportionate nature of the measure.

191. In that regard the ECB has argued in both its written and oral submissions that its intervention in the secondary government bond market will be subject to quantitative limits, albeit limits that are not set in advance or previously determined by law. According to the ECB, the OMT programme cannot be presented as a channel for limited purchases, since, if it were, that would contribute to provoking a bout of speculation which would severely undermine the programme’s objective. Likewise, if the ECB were to announce *ex ante* the exact volume of purchases, the measure would also be emasculated. Therefore, the ECB’s solution is to announce that no *ex ante* quantitative limits will be established as regards the volume of purchase, although without prejudice to the fact that it has its own quantitative limits internally, the amount of which cannot be disclosed for strategic reasons which, in essence, seek to ensure that the OMT programme is effective.

192. From the point of view of proportionality *stricto sensu*, I consider that the absence of any *ex ante* quantitative limit is not a factor which is sufficient in itself for the measure to be considered disproportionate.

193. Indeed, every transaction on a financial market involves a risk, which is assumed by all the actors taking part in the transaction. The returns which the financial markets offer investors are proportionate to the risks assumed, which are generally related to the scale of the likely success or failure of the investment. The government bond market, like any other financial market, is subject to the same logic. All the investors who are active on that market know that the success of their investment may depend on uncertain and unpredictable factors.

194. It is common knowledge that the central banks intervene in the sovereign debt market, since purchases of government bonds, or repurchase agreements in respect of those bonds, are among the monetary policy instruments which are a means of controlling the monetary base. When they intervene in that market, the central

banks always assume a degree of risk, a risk which was also assumed by the Member States when they decided to create the ECB.

195. On that basis, the objections concerning the excessive risk assumed by the ECB would be founded if the Bank were to undertake a volume of purchases that would *inevitably* lead it to a situation in which it is facing insolvency. However, for reasons which I shall now go on to explain, it does not seem that that is a situation to which the OMT programme will give rise.

196. As the OMT programme is designed, the ECB is admittedly exposed to a risk, but not necessarily to a risk of insolvency. A risk undoubtedly exists because the Bank will buy the bonds of a State which is in financial difficulties and whose capacity to meet the obligations on its debts is compromised. It is clear that the ECB assumes a risk when it acquires bonds from a State that is in such a situation but, to my mind, that risk is not, qualitatively, any different from other risks which the ECB may assume at other times in the course of its usual activity.

197. It is widely accepted that the fact that a State has liquidity problems does not necessarily mean that it is going to default on its debt. A State may be subject to temporary liquidity problems and, at the same time, be a solvent State. The successive crises throughout the 1980s and 1990s confirm that that is the case. (84) Therefore, the fact that the OMT programme is targeted at bonds issued by a State or States that are subject to a financial assistance programme does not automatically mean that those States are going to default, in full or in part, on their debt. The fact that the States concerned are subject to a conditionality intended to improve their macroeconomic fundamentals, together with the fact that they are integrated in an internal market in the framework of a Union based on a spirit of cooperation and loyalty amongst its members, rather tends to confirm that a financial assistance programme provides the State concerned with sufficient support to enable it to meet its obligations in the future.

198. Moreover, the indirect objective of the OMT programme, the repair of the monetary policy transmission mechanism, is achieved by the interest rates on government bonds being reduced to levels regarded as consistent with the market and the macroeconomic situation of the State concerned. The ECB has stated on many occasions that the objective of the OMT programme is not to reduce interest rates on government bonds to a point where they are on a par with those of other Member States but rather to reduce them to levels regarded as consistent with the market and the macroeconomic situation, which, in turn, will permit the ECB to make effective use of its monetary policy instruments. That means that, precisely because of activation of the OMT programme, it may be assumed that the State concerned will be able to issue debt on terms which are more sustainable for its finances and which, as a consequence, will increase its chances of meeting its obligations. In other words, the ECB's intervention should contribute, objectively, to ensuring that the State is able to meet its financial obligations in the future, thereby reducing the risk which the ECB assumes in activating the OMT programme.

199. Finally, the existence of objective quantitative limits on the volume of purchases would tend to confirm the limited scale of the risk. As the ECB itself has acknowledged, those limits will exist; they are not made public for strategic reasons but they serve to reduce the Bank's exposure. Similarly, the ECB has made clear that if it detects an excessive increase in the volume of debt issued by a Member State covered by the OMT programme, it will suspend operations under the programme. In other words, if a State decides to take advantage of the opportunity afforded it by the ECB's secondary-market bond purchases to take on excessive debt — albeit on conditions that are more advantageous than those obtaining before the ECB's intervention —, the Bank will not assume that risk. All that tends to confirm that, if the ECB itself were facing possible insolvency, the OMT programme would be discontinued. In other words, the ECB will not assume risks which expose it to the danger of insolvency.

200. Obviously that is an assessment that relates to a scenario in which the OMT programme is implemented. However, I consider it essential, if the strict proportionality of that programme is to be confirmed, that the limitation of risks as explained by the ECB should actually be put into practice once the time comes to implement the programme.

201. That said, and taking account of the reasoning set out above, I consider that the ECB, in announcing the OMT programme, weighed up the benefits and costs appropriately.

– Intermediate conclusion

202. In summary, and in view of the considerations set out above, the OMT programme decided upon by the ECB, as it results from the technical features described in the press release, does not infringe the principle of proportionality. Accordingly, the OMT programme may be considered lawful, provided that, should the programme be implemented, the requirements regarding the statement of reasons and proportionality are strictly complied with.

c) Answer to the first question referred for a preliminary ruling

203. Accordingly, in response to the first question referred by the BVerfG, I consider the OMT programme to be compatible with Article 119 TFEU and Article 127(1) and (2) TFEU, provided that, in the event of that programme being implemented, the ECB

– refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked, and

– complies strictly with the obligation to state reasons and with the requirements deriving from the principle of proportionality.

B – *The second question referred: compatibility of the OMT programme with Article 123(1) TFEU (prohibition of monetary financing of the States of the euro area)*

204. By its second question, the BVerfG asks whether the OMT programme, in authorising the purchase on the secondary market by the ECB of bonds of States that are members of the euro area, infringes the prohibition laid down in Article 123(1) TFEU, under which the purchase directly from the Member States of debt instruments is prohibited.

205. According to the BVerfG, although the OMT programme formally complies with the condition expressly set out in Article 123(1) TFEU, which concerns solely the purchase of debt instruments in the primary market, the programme none the less, in its view, may circumvent the prohibition concerned, since the ECB's interventions on the secondary market, just like purchases on the primary market, in fact represent financial assistance by means of monetary policy. In support of that view, the BVerfG refers to various technical features of the OMT programme: the waiver of rights, the risk of default, the retention of the bonds until maturity, the possible time of purchase and the encouragement to purchase in the primary market. According to the BVerfG, those are all clear indications that the effect is to circumvent the prohibition laid down in Article 123(1) TFEU.

1. Position of the parties taking part in these proceedings

206. The applicants in the main proceedings submit, deploying arguments which to a large extent coincide, that the OMT programme infringes Article 123(1) TFEU. In that respect, they share the doubts of the referring court concerning those specific aspects of the programme which are said to confirm that the programme circumvents the prohibition laid down in Article 123(1) TFEU.

207. Mr Huber's particular concern is that the purchase of government bonds on the secondary market gives rise to circumvention of the prohibition in Article 123(1) TFEU, specifically the prohibition in the last part of the provision. Mr Bandulet stresses what he regards as the excessive risk assumed by the ECB in making purchases such as those provided for in the OMT programme, whilst also criticising the 'collectivisation' of losses that it involves, which entails a breach of the Treaties and of the 'no bail-out principle'.

208. Mr von Stein also contends that the effect of the programme is to circumvent the prohibition, further pointing to the impact of a measure such as the OMT programme on the EU market. He submits that a massive purchase of government bonds would distort competition in the internal market and would also entail an infringement of Article 51 TFEU and of Protocol No 27 on the internal market and competition.

209. All the States that have participated in these proceedings, together with the Commission and the ECB, contend that the OMT programme is compatible with Article 123(1) TFEU, maintaining that purchases of government debt instruments are expressly provided for in the Treaties. They point out that Article 123(1) TFEU prohibits only purchases of government debt instruments directly from a Member State, whilst Article 18.1 of the

Protocol of the ESCB and of the ECB expressly empowers the ECB and the central banks of the Member States to carry out operations of that kind.

210. At the same time, however, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland and the Portuguese Republic, together with the Commission and the ECB, recognise that the final part of Article 123(1) TFEU also includes a prohibition on circumvention, in other words a prohibition on entering into transactions which have the same effect as a direct purchase of government bonds. That interpretation is confirmed, so they argue, by Regulation No 3603/93, specifically by the seventh recital in the preamble thereto.

211. In that respect, various States, such as the Republic of Poland, the French Republic and the Kingdom of the Netherlands, together with the Commission submit that the ECB would not circumvent the prohibition in Article 123(1) TFEU if it were guaranteed that the bond issued by the State concerned had reached a price under market conditions. In those circumstances, provided that the measure had a monetary policy objective, there would be no infringement of Article 123(1) TFEU.

212. In that respect, the States participating in these proceedings, the Commission and the ECB deny that the features of the OMT programme referred to result in the programme being incompatible with Article 123(1) TFEU. The terms in which those technical features are described in the press release and the drafts of a decision concerning the OMT programme which the ECB has drawn up but whose adoption is still pending, confirm the ECB's particular concern to avoid any distortion of the market contrary to Article 123(1) TFEU. Specifically, attention is drawn, as evidence of the precautions taken by the ECB, to the fact that the purchase of debt is subject to the requirements of monetary policy, to the fact that there is no prior announcement indicating the time or the volume of the purchase, to the fact that it is possible to suspend or limit purchases depending on the volume of debt issued by the State concerned, to the ECB's refusal to accept debt restructurings and to the existence of an 'embargo period' between the issue date and the date of purchase by the ECB on the secondary market.

213. Finally, the Federal Republic of Germany seeks from the Court of Justice an interpretation of Article 123(1) TFEU which may be reconciled with the constitutional identity of the Member States. After drawing attention to the context in which this reference has been made, the Federal Republic of Germany submits that the interpretation of Article 123(1) TFEU must also comply with the constitutional requirements of the Member States.

## 2. Analysis

214. Taking a similar approach to the one adopted in my answer to the previous question, I shall start by placing the prohibition in Article 123(1) TFEU in the broader context of its position in the scheme of economic and monetary union. I shall then address the question of the compatibility of the OMT programme with that provision, considering individually each of the technical features to which the referring court draws attention.

a) The prohibition of monetary financing of the Member States (Article 123(1) TFEU) and the purchase of government bonds by the ECB

215. The economic and monetary union which comprises the Union today is governed by a set of principles relating both to its objectives and to its boundaries, which overall represent its 'constitutional framework'. Because of the significance of those principles, the Treaties expressly entrench them, making them into mandatory provisions that are inviolable by the institutions and the Member States, which may be amended only by means of an ordinary Treaty-amendment procedure. Although, from among those objectives, attention should be drawn to the mandate of maintaining price stability and achieving financial stability (Articles 127(1) TFEU and 282 TFEU), the most relevant restrictions are the prohibition on assuming the commitments of Member States (Article 125 TFEU) and the prohibition of monetary financing of the Member States (Article 123 TFEU).

216. It is the second of those prohibitions with which we are concerned here but, obviously, a precise understanding of that prohibition can be achieved only if consideration is given to its origin, the system of which it forms part and the objectives which underlie it. I shall briefly consider matters below, while drawing for support on the findings which the Court of Justice and the Advocate General (EU:C:2012:675) have already made in respect of Article 123 TFEU in the *Pringle* case (EU:C:2012:756).

217. The preparatory documents which culminated in the Treaty of Maastricht, in which the provision that is now Article 123 TFEU (formerly Article 104 of the Treaty establishing the European Community) first appeared, show

that the main concern of the negotiators responsible for fashioning the institutional framework of economic and monetary union was the maintenance of sound budgetary discipline which would not undermine the smooth functioning of the single currency. (85) The possibility of there being Member States with very fragile public finances was regarded as a situation that was scarcely compatible either with stable growth in the euro area or with the limited monetary policy tools available to the ECB. As the States of the euro area transferred their monetary policy competences to a common institution whilst at the same time retaining their competences in economic matters, it was essential to provide for the means necessary to ensure strict financial discipline in the States of the euro area. (86) That concern gave rise to the rules on budgetary discipline provided for in Article 126 TFEU, whereby the Member States are subject to certain budgetary deficit objectives, and also to the prohibitions in Articles 125 TFEU and 123 TFEU, which prevent, respectively, the financing of Member States by other States or their financing by the ECB or the central banks of the Member States.

218. Article 123 TFEU therefore reflects a very real concern on the part of those who drew up the institutional framework for economic and monetary union, which is why it was decided to introduce into primary law an absolute prohibition on any forms of financing States which could jeopardise the objectives of fiscal discipline laid down in the Treaties. One of those prohibited forms is so-called 'monetary financing', whereby a central bank, the institution with power to issue money, purchases a State's debt instruments. It is clear that this form of financing may jeopardise that State's ability to meet its financial obligations in the medium and long term, while it may also be a significant source of price inflation. Since a common economic and monetary policy presupposes the existence of States with healthy public finances and a policy whose priority is the maintenance of price stability, it is obvious that, in such circumstances, a monetary financing mechanism significantly impairs those objectives.

219. The foregoing considerations lead me to think that the prohibition of monetary financing contributes, at Union level, as the Court of Justice has already stated in *Pringle* when referring to Article 125 TFEU, 'to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'. (87) In short, the prohibition in question assumes the status of a fundamental rule of the constitutional framework that governs economic and monetary union, exceptions to which must be interpreted restrictively.

220. Similarly, a reading of Article 123 TFEU in its context confirms not only the importance of the principle underpinning the prohibition, but also its restrictive nature. In contrast with Article 125 TFEU, which prohibits Member States from being 'liable for' or 'assuming' the commitments of another Member State, Article 123 TFEU is drafted in stricter terms. That contrast between the two provisions was highlighted by the Court of Justice in *Pringle*, (88) which confirmed the compatibility with Article 125 TFEU of measures for the granting of credit between Member States, an activity which, by contrast, is expressly prohibited by Article 123 TFEU, as it rules out 'overdraft facilities or any other type of credit facility'.

221. However, when Article 123 TFEU is interpreted contextually, that also results in a significant qualification regarding the scope of the prohibition. That concerns, as will be explained below, the particular treatment prescribed for transactions whereby the ECB and the central banks of the Member States purchase government bonds of the Member States.

222. An issue of government securities is one of the principal financing sources available to a State. A person who acquires government bonds from an issuing State is, by definition, financing that State, directly or indirectly, and does so for consideration that makes the legal transaction into a sort of loan. The holder of the government bond has a right to seek repayment of a debt from the issuing State, thus converting it into a creditor of the State. The State issues the instrument subject to an interest rate initially set at the time of issue and determined on the basis of supply and demand. The transaction entered into by the two parties, the issuing State and the purchaser of the government bond, therefore has the same structure as the granting of a loan. All that explains sufficiently why Article 123(1) TFEU includes a final clause, which also prohibits 'the purchase directly from [the Member States] by the European Central Bank or national central banks of debt instruments'.

223. That part of the provision was originally added in the final stage of the drafting of the Treaty of Maastricht, (89) and its inclusion can be understood only if regard is had to Article 18.1 of the Statute of the ESCB and of the ECB. As has been explained above, that provision of the Statute enables the ECB and the central banks to operate in the financial markets by buying and selling outright or under repurchase agreement and by lending or borrowing claims and marketable instruments. Operations of that kind are fundamental and essentially serve the purpose of control by the ESCB of the monetary base of the euro area; they include operations relating to the purchase of government bonds in the secondary market. (90)

224. Therefore, the final part of Article 123(1) TFEU must — as the ECB affirmed in response to questions raised at the hearing — be interpreted in conjunction with Article 18.1 of the Statute of the ESCB and of the ECB, since only in that way is there legal cover for a traditional monetary policy measure consisting in the purchase of government bonds on the secondary market. Without the final part of Article 123(1) TFEU, Article 18.1 of the Statute of the ESCB and of the ECB would have to be interpreted as precluding transactions in government bonds on the secondary market, which would deprive the Eurosystem of a vital tool for the ordinary conduct of monetary policy.

225. That said however, it is clear that, given the importance of Article 123 TFEU, it would not be sufficient for the ECB to confine itself to purchasing government bonds on the secondary market in order to avoid infringing the prohibition in that provision. I rather take the view that, in the interpretation of Article 123 TFEU, the focus must be particularly on the substance of the measure. That approach, frequently used by the Court of Justice in interpreting provisions of the Treaties, should also be applied in the case of Article 123 TFEU, as has, moreover, been acknowledged by all the Member States participating in these proceedings, by the Commission and by the ECB itself.

226. That concern is also reflected in secondary legislation, specifically in Regulation No 3603/93, which was adopted before the establishment of the ECB and which makes express mention of the prohibition on circumventing the rule in the provision concerned. The seventh recital to Regulation No 3603/93 states that the Member States must take appropriate measures to ensure, in particular, that ‘purchases made on the secondary market [are not] used to circumvent the objective of that Article’. (91)

227. Accordingly, I take the view that Article 123(1) TFEU not only prohibits direct purchases on the primary market but also prevents the ECB and the national central banks from undertaking operations on the secondary market whose effect is to circumvent the abovementioned prohibition. In other words, the Treaty does not prohibit operations on the secondary market but it does require that, when the ECB intervenes on that market, it does so with sufficient safeguards to ensure that its intervention does not fall foul of the prohibition of monetary financing.

228. Having clarified those points, consideration should now be given to whether the OMT programme, under which the ECB intervenes on the secondary government bond market, may, despite observing the letter of the final part of Article 123(1) TFEU, entail a measure which circumvents the prohibition set out in that provision.

b) The OMT programme and its compatibility with the prohibition laid down in Article 123(1) TFEU

229. As a preliminary point, before examining the OMT programme specifically from the angle of the prohibition on monetary financing of the Member States laid down in Article 123(1) TFEU, I should like to make clear that this answer starts from the assumption that, in any future implementation of the OMT programme, the principle of proportionality will, as I have explained in my proposed answer to the first question, be observed. That is the basis on which a number of the considerations which I put forward below are to be understood.

230. As I have already noted, the BVerfG, like the applicants in the main proceedings, is of the view that the OMT programme infringes Article 123(1) TFEU since it circumvents the prohibition laid down therein. In that regard, the referring court points to a series of technical features which, in its view, bear out that conclusion. The States participating in these proceedings, the Commission and the ECB challenge the BVerfG’s assessment, relying on those very same technical features.

231. As will be seen below, the doubts of the BVerfG are based on a particular interpretation of the press release of 6 September 2012. The ECB has rejected that interpretation and has produced evidence in support of its arguments. In its view, the point of those technical features is in fact that they should operate as a set of guarantees intended to prevent circumvention of Article 123 TFEU.

232. Having made those points, I shall now examine individually the technical features to which the referring court has drawn attention.

i) Waiver of rights and *pari passu* status

233. The full or partial waiver of claims securitised in government bonds of the State subject to the OMT programme is the first feature which, according to the BVerfG, could render the programme contrary to

Article 123(1) TFEU. In the referring court's view, as in that of a number of the applicants in the main proceedings, the fact that the ECB and the central banks do not have the status of preferential creditor but rank *pari passu* and may be obliged to accept a full or partial waiver in the context of a restructuring agreement, (92) makes the measure into an indirect means of financing the debtor State.

234. I do not find that argument convincing. In the first place, it must be borne in mind that the risk of a full or partial waiver relates only to a future and hypothetical situation entailing the restructuring of the debtor State's debt and is not, so to speak, an intrinsic component of the OMT programme. As I have already explained in points 193 and 194 of this Opinion, the assumption of risk is inherent in a central bank's activity, so that an event such as that described by the referring court cannot become, merely because it might conceivably occur, a necessary consequence of implementation of the programme.

235. Moreover, the ECB has stated in its written observations that, in the context of a restructuring subject to CACs, it will always vote against a full or partial waiver of its claims. In other words, the ECB will not actively contribute to bringing about a restructuring but will seek to recover in full the claim securitised on the bond. The fact that the ECB acts with a view to preserving its claim in full confirms that the aim of its conduct is not to grant a financial advantage to the debtor State but to ensure that the latter meets the obligation it has entered into.

236. Finally, I think that the point should also be made that a purchase by the ECB, as a non-preferential creditor, of the debt securities of a Member State will inevitably involve a degree of distortion of the market, which appears to me, however, to be tolerable from the point of view of the prohibition in Article 123(1) TFEU. By contrast, as has been explained in point 183 of this Opinion, purchases made with the status of preferential creditor deter other investors, since they send out the message that a significant creditor, in this case a central bank, will be given preference over other creditors in the recovery, with the impact that that will have on demand for bonds. Accordingly, I take the view that *pari passu* clauses may be regarded as a means that seeks to ensure that the ECB disrupts the normal functioning of the market as little as possible, which, ultimately, involves a further guarantee of compliance with Article 123(1) TFEU.

237. I therefore consider that the fact that the ECB might be obliged — in the hypothetical event of a restructuring of a Member State's debt — to waive, in full or in part, its claims securitised in government bonds, as a result of the OMT programme being activated, does not mean that the programme amounts to a monetary financing measure contrary to Article 123(1) TFEU.

ii) Default risk

238. The BVerfG also points out that a purchase of government bonds with a, to some extent foreseeably, low credit rating exposes the ECB to an excessive default risk and is therefore incompatible with Article 123(1) TFEU. Although the referring court itself recognises that the assumption of risk is inherent to the activity of a central bank, it considers that the Treaties do not authorise exposure to losses of a significant amount.

239. Once again, I refer to the reasoning set out in points 193 to 198 of this Opinion, in which I dealt in some detail with the assumption of risks by the ECB. To my mind, that reasoning may perfectly well be applied to the present aspect of the case, since, as has been observed above, the fact that there is a possibility — which purely on principle cannot be discounted — of the ECB's insolvency or a Member State's default does not convert the risk, on that ground alone, into a certainty. The fact that a programme for the purchase of government bonds exposes the ECB to a risk is, as one might expect, inherent in this kind of operation and, consequently, doubts as to legality need arise only when the technical conditions of the programme, or its subsequent specific implementation, confirm that the ECB is clearly faced with a default scenario.

240. In fact, the technical features of the OMT programme do not suggest that the ECB is exposed, with any degree of foreseeability, to a scenario like the one depicted by the BVerfG. It should be recalled that the central objective of the OMT programme is to stabilise the interest rates applicable to certain government bonds with the ultimate aim of restoring the instruments of monetary policy. However, the immediate objective (the reduction of the financing costs of the State concerned) itself contributes to that State recovering its ability to meet its obligations in the medium and long term. The framework in which the OMT programme would be accorded is intended to eliminate or at least reduce such a risk. As I have already pointed out in point 197 of this Opinion, the fact that, considered as a whole, the transactions announced in the OMT programme confirm the ECB's intention of guarding against or preventing more or less irrational processes which generate or significantly increase risks,

tends to establish that a measure such as that at issue does not entail circumvention of the prohibition in Article 123 TFEU.

241. I consider, in short, that that intention on the part of the ECB has been sufficiently established for it to be concluded that a purchase of government bonds — even ones with a low credit rating — which may expose the ECB to a degree of risk of default, is not as such contrary, in the circumstances described, to the prohibition of monetary financing laid down in Article 123(1) TFEU.

iii) Holding the bonds until maturity

242. The BVerfG also asserts that holding government bonds until maturity may conflict with Article 123(1) TFEU, since it reduces the number of bonds circulating on the secondary market, thereby disrupting the normal development of market prices.

243. It is true, as the BVerfG has argued, that if the ECB were to purchase government bonds under an obligation to hold them until maturity, that would give rise to a significant distortion on the secondary market for government securities. The secondary government bond market would have to reckon with the presence of an investor — the ECB — holding a substantial portfolio of government bonds which would not circulate on that market, regardless of the way in which their market price developed.

244. The ECB has, in response, emphasised that at no point in the press release of 6 September 2012 is it stated that government bonds purchased under the OMT programme will be held until maturity. (93)

245. The ECB's arguments appear to me to be conclusive. That is not only because the Bank has declared that it is not its intention to hold the government bonds it purchases until maturity but also because it is established that that was the practice followed in earlier programmes in which the ECB was active on the secondary government bond market. (94) It is logical that that should be the case, since the ECB has explained that intervention on the secondary market must be characterised by a considerable degree of flexibility, which permits it to implement the OMT programme and, at the same time, carry out transactions which do not result in it making losses and which do not distort the market overmuch. To my mind, the flexibility with which the ECB wishes to proceed, as it is described in the draft Decision, is consistent with the requirements referred to above. Furthermore, the fact that the OMT programme concerns exclusively transactions in bonds with a maturity of between one and three years tends to confirm that the ECB has taken precautions to avoid both the risk of losses and the distortion of the market.

246. Finally, it is clear that the OMT programme in the form we know it does not contain anything which suggests that there is an express obligation, either in the press release of 6 September 2012 or in the event of the programme being implemented, to hold the government bonds until maturity. The BVerfG's misgivings in that regard are thus unfounded.

iv) Time of purchase

247. The referring court also points out that the fact that the ECB purchases government bonds on the secondary market on a large scale and only a short time after their issue has an effect similar to that of a direct purchase in the primary market: it submits that that is contrary to Article 123(1) TFEU.

248. Admittedly, a purchase on the secondary market that is made seconds after the issue of the bonds on the primary market could completely blur the distinction between the two markets, although, formally, the purchase has taken place on the secondary market. This is not a possibility that can entirely be ruled out, since, as has been explained in various written and oral observations submitted in these proceedings, a transaction on the secondary market may in fact take place barely moments after the purchase made directly from the issuing State.

249. The ECB has insisted that the BVerfG's concern in this regard is unfounded since transactions under the OMT programme will be subject to a so-called 'embargo period', by virtue of which the Eurosystem will not carry out any transactions until a given number of days have passed since the issue, although that number will not be announced in advance. The ECB argues that the embargo period permits a market price to form for the relevant bonds and that it will thus not intervene at the time of issue but some days later, once a market price has formed.

250. It seems to me that the BVerfG's concern is not unfounded in view of the possibility, to which Mr Bandulet alludes, of the transactions taking place at virtually the same time: proceeding in that way would, in practice, circumvent the prohibition in Article 123(1) TFEU. The ECB itself appears to share that view, as it has repeatedly asserted that it has not made purchases of that kind in the past and that it will not make them under the OMT programme. (95)

251. There is nothing in the press release, however, which permits the conclusion to be drawn that a particular 'embargo period' will be observed.

252. In my view, any implementation of the OMT programme must, if the substance of Article 123(1) TFEU is to be complied with, ensure that there is a real opportunity, even in the special circumstances in issue here, for a market price to form in respect of the government bonds concerned, in such a way that there continues to be a real difference between a purchase of bonds on the primary market and their purchase on the secondary market.

253. Lastly, however, the point should be made that it is not essential for the 'embargo period' in question to be precisely determined and publicised in advance. On the other hand, as the ECB has rightly pointed out, while it is necessary to avoid an extremely short period which would contravene Article 123(1) TFEU, it is also necessary to avoid a period that is too prolonged, which might result in an overlap with other ongoing operations, with the result that the OMT programme would be rendered much less effective. It seems permissible that the ECB should have a broad discretion with regard to the precise definition of those periods, provided that those periods actually provide an opportunity for the price of the bonds to be substantially in line with market values.

254. It is therefore my view that, if the OMT programme is to be compatible with Article 123(1) TFEU, it must, in the event of it being activated, be implemented in such a way that it is possible for a market price to form in respect of the government bonds concerned.

v) Encouragement to purchase newly issued bonds

255. Finally, the BVerfG points out that an announcement that the OMT programme is to be activated in a particular case will have the effect of encouraging purchases of newly issued bonds, thus acting as a magnet to investors, which would make the ECB into a 'lender of last resort', with the consequent assumption of the risks which that would entail.

256. Both the ECB and the Commission contend that this assessment is based on an incorrect premiss, since it presupposes that there will be a public announcement before the ECB starts buying bonds. The press release of 6 September 2012 does not indicate that the ECB will proceed in that way; it is rather the reverse, since a prior, detailed announcement specifying the exact point at which such purchases are to be undertaken would severely undermine the objectives of the OMT programme.

257. I concur with the position taken by the ECB and the Commission. There is nothing in the press release of 6 September 2012 which indicates that the ECB will give detailed notice in advance either of the features of the specific programme it intends to implement or of the exact point at which its operations will commence. On the contrary, the previous practice of the ECB in the context of similar programmes, as well as the part of the draft Decision on the OMT programme concerning 'embargo periods', show that the Bank will proceed with particular caution when intervening on the secondary market, in order to forestall speculative behaviour that would severely undermine the efficacy of the OMT programme.

258. The referring court's objection could be more readily accepted if the ECB were actually pursuing a strategy of detailed public communication which would provoke immediate changes on the market at a given time, as the result of the ECB's previous announcement. In my view it is unlikely that that course of action will be taken and the ECB's previous practice bears that out.

259. That said, it should, however, be pointed out again that it is almost inevitable, in view of the characteristics of the OMT programme, that implementation of the programme to some extent includes an incentive to investors to purchase bonds on the primary market. Although the immediate objective of the OMT programme is to reduce to normal levels the interest rates required of certain Member States, with the indirect aim, of course, of unblocking the monetary policy transmission channels, it is obvious that such normalisation presupposes an increased demand on the primary market. That is why the incentive to purchase is practically inherent in the OMT programme.

260. It is thus of fundamental importance that such effects on economic operators are compatible with the objective which the OMT programme, were it implemented, would be expected to achieve: that brings us once again to the importance of compliance with the principle of proportionality, including from the perspective of the prohibition under consideration here.

261. Accordingly, I consider that, on the basis of the press release of 6 September 2012, there are not sufficient grounds to suggest that putting the OMT programme into effect will, as a result of its activation and announcement, amount to a disproportionate encouragement to purchase newly issued bonds.

3. Answer to the second question referred for a preliminary ruling

262. In conclusion, and in response to the second question referred by the BVerfG, I consider that the OMT programme is compatible with Article 123(1) TFEU, provided that, in the event of the programme being implemented, the timing of its implementation is such as to permit the actual formation of a market price in respect of the government bonds.

## VII – Conclusion

263. In the light of the foregoing, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Bundesverfassungsgericht as follows:

(1) The Outright Monetary Transactions (OMT) programme of the European Central Bank, announced on 6 September 2012, is compatible with Article 119 TFEU and Article 127(1) and (2) TFEU, provided that, in the event of that programme being implemented, the ECB

– refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked, and

– complies strictly with the obligation to state reasons and with the requirements deriving from the principle of proportionality.

(2) The OMT programme is compatible with Article 123(1) TFEU, provided that, in the event of the programme being implemented, the timing of its implementation is such as to permit the actual formation of a market price in respect of the government bonds.

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1 Original language: Spanish.

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2 Judgment 126, 286, pp. 303 and 304.

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3 The actual wording of Mr Draghi's speech was as follows: 'When people talk about the fragility of the euro and the increasing fragility of the euro, and perhaps the crisis of the euro, very often non-euro area Member States or leaders underestimate the amount of political capital that is being invested in the euro.'

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And so we view this, and I do not think we are unbiased observers, we think the euro is irreversible ...

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But there is another message I want to tell you.

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Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.'

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For the full text of Mr Draghi's speech, see <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

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4 Points 17 to 32.

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5 BVerfGE, 89, 155 (1992).

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6 123 BVerfGE 267 (2009).

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7 2 BvR 2661/06.

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8 It is enough to refer, by way of example, to the arguments explaining why the concept of ‘constitutional identity’ under national law cannot be equated with ‘national identity’ under Article 4(2) TEU (point 29 of the order for reference).

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9 See the dissenting opinions of Judge Lübbe-Wolff and Judge Gerhardt in respect of the decision to make the present reference for a preliminary ruling. In particular, see the arguments of Judge Lübbe-Wolff (point 28) and those of Judge Gerhardt (points 14 to 18)

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10 Point 25 of the order for reference.

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11 Points 26 and 27 of the order for reference.

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12 To this effect, see also the observation made in point 11 of the dissenting opinion of Judge Lübbe-Wolff, referred to above.

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13 The Court of Justice has stated on many occasions that the preliminary ruling procedure cannot be used as a procedure for the delivery of advisory opinions. According to the case-law, the rationale for a request for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, inter alia, judgments in *Djabali*, C-314/96, EU:C:1998:104, paragraph 19, *Alabaster*, C-147/02, EU:C:2004:192, paragraph 54, and *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 42).

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14 See, inter alia, Craig, P., ‘The ECJ and ultra vires action: A conceptual analysis’, *Common Market Law Review* (2011) 48; Kumm, M., ‘Who Is the Final Arbiter of Constitutionality in Europe?’, *Common Market Law Review* (1999), 36; Millet, F.-X., ‘L’Union européenne et l’identité constitutionnelle des États membres’, LGDJ, Paris, 2013; Payandeh, M., ‘Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice’, *Common Market Law Review* (2011) 48.

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15 See, inter alia, in addition to the decisions of the BVerfG cited above in footnotes 5 to 7, the judgments of the French Constitutional Council of 27 July 2006 and 9 June 2011 (Decisions Nos 2006-540 DC and 2011-631); the declaration of the Spanish Constitutional Court of 13 December 2004, 1/2004; the judgments of the Italian Constitutional Court 183/1973 and 168/1991; the judgment of the Danish Supreme Court of 6 April 1998 (I 361/1997); the judgment of 11 May 2005 of the Polish Constitutional Court (K 18/04) or the judgment of the Supreme Court of the United Kingdom of 22 January 2014 ([2014] UKSC 3).

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16 Sunstein, C., *One Case at a Time. Judicial Minimalism on the Supreme Court*, Ed., Harvard University Press, Cambridge, 2001.

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17 On this point, see Martinico, G., ‘Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?’, in Fontanelli, F., Martinico, G., and Carrozza, P., *Shaping Rule of Law through Dialogue: International and Supranational Experiences*, Europa Law Publishing, Groningen, 2010; Alonso García, R., *Justicia Constitucional y Unión Europea*, 2nd ed.,

Thomson-Civitas, Madrid, 2014; Ukrow, J., ‘Von Luxemburg lernen heißt Integrationsgrenzen bestimmen (Anmerkungen zur Vorlage-Entscheidung des Bundesverfassungsgerichts vom 14. Januar 2014)’, *Zeitschrift für Europarechtliche Studien*, 2014, p. 122; Mayer, F., ‘Multilevel Constitutional Jurisdiction’, in Bogdandy, A., and Bast, J. (ed.), *Principles of European Constitutional Law*, 2nd ed., Hart-Beck-Nomos, 2010; and Komárek, J., ‘The Place of Constitutional Courts in the EU’, (2013) *9 European Constitutional Law Review*.

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18 See the case-law of the BVerfG cited in point 24 of the order for reference.

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19 Point 33 of the order for reference.

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20 Point 28 of the order for reference and the references therein to ‘constitutional identity’.

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21 This is the literal wording of *Honeywell*, as reproduced by the referring court in point 24 of its order for reference.

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22 *Honeywell*, paragraph 61.

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23 On the reference for a preliminary ruling and its role in the EU judicial system, see Lecourt, R., *L’Europe des juges*, Bruylant, Brussels, 2008, and Ruiz-Jarabo Colomer, D., *La Justicia de la Unión Europea*, Thomson-Civitas, Madrid, 2011.

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24 Points 5 to 12 of the Italian Government’s written observations.

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25 See Funke, A., *Virtuelle verfassungsgerichtliche Kontrolle von EU-Rechtsakten: der Schlussstein?: Anmerkung zu BVerfGE 126, 286 (Honeywell bzw. Mangold-Urteil EuGH)*, *Zeitschrift für Gesetzgebung*, 26, No. 2, 2011, p. 172. See also Hobe, S., ‘Abkehr von Solange? — Die Entscheidungen des Bundesverfassungsgerichts zur Vorratsdatenspeicherung und zu Honeywell’, in Sachs, M., and Siekmann, H., *Der grundrechtsgeprägte Verfassungsstaat Festschrift für Klaus Stern zum 80. Geburtstag*, Duncker & Humblot, Berlin, 2012, p. 753.

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26 Point 26 of the order for reference.

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27 According to the BVerfG, in ‘borderline cases’ of transgressions of competence by the Union, the perspectives of each of those courts may not ‘fully’ coincide given that, on the one hand, the Member States remain the ‘masters of the Treaties’ and, on the other, EU law does not have a position (primacy or priority application) which is the same as that of the law of the Federal State vis-à-vis that of the Länder (supremacy).

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28 Point 27 of the order for reference.

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29 See Pizzorusso, A., *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2012, Chapters IV and V.

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30 See Vosskuhle, A., ‘Der Europäische Verfassungsgerichtsverbund’, *TranState Working Papers No 16, Staatlichkeit im Wandel – Transformations of the State*, Bremen, 2009, p. 22, citing Häberle, P., *Europäische Verfassungslehre*, 6th Ed., Nomos, Baden-Baden, 2009, p. 478 et seq.

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31 See the initiative taken some months ago by a group of 35 lawyers proposing that a provision be included in the Law on the BVerfG as a reaction to the fact that no reference was made to the cooperative relationship in the judgment of 30 June 2009. That proposal is available at [www.europa-union-de/fileadmin/files\\_eud/Appell\\_Vorlagepflicht\\_BVerfG.pdf](http://www.europa-union-de/fileadmin/files_eud/Appell_Vorlagepflicht_BVerfG.pdf).

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32 See, to this effect, Streinz, R., 'Der Kontrollvorbehalt des BVerfG gegenüber dem EuGH nach dem Lissabon-Urteil und dem Honeywell-Beschluss', in Sachs, M., and Siekmann, H., *Der grundrechtsgeprägte Verfassungsstaat, Festschrift für Klaus Stern zum 80. Geburtstag*, Duncker & Humblot, Berlin, 2012, p. 978.

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33 That is how the German Government has expressed itself in its written and oral submissions in these proceedings when emphasising the need for the Court of Justice to interpret the Treaties in this case in such a way that a conflict is avoided between the essential components of the constitutional order of the Member States and EU law.

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34 The effects of the clause concerning respect for national identity (Article 4(2) TEU) in the context of a possible reference for a preliminary ruling from the BVerfG are a matter of debate (see Dederer, H.-G., 'Die Grenzen des Vorrangs des Unionsrechts', *JuristenZeitung*, 7/2014). See, in this regard, the Commission's suggestion concerning a precautionary extension of the European framework for review, perhaps by means of a further reference for a preliminary ruling in the unlikely event that the BVerfG, even if the legality of the EU act were confirmed by the Court of Justice's answer, should decide to declare that act ultra vires (point 37 of the Commission's observations).

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35 In this regard, the BVerfG considers (point 66 of *Honeywell*) that the ultra vires review should not be detrimental to the principle of integration and should be exercised, to use its own words, 'cautiously' or 'moderately' ('zurückhaltend'). Above and beyond that, the particular nature of the interpretive methods of the Court of Justice should lead the national court itself not to substitute its own interpretive methods for those of the Court of Justice. That is the sense of the national court's statement that it would be legitimate for the Court of Justice to have an 'expectation' that possible mistakes should, to a certain degree, be tolerated ('Anspruch auf Fehlertoleranz').

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36 See, inter alia, judgments in *CBR and Others v Commission* (8/66 to 11/66, EU:C:1967:7), paragraph 91; *Sucrimex and Westzucker v Commission* (133/79, EU:C:1980:104), paragraphs 12 to 19; and *Gauß Ingenieure v Commission* (182/80, EU:C:1982:78), paragraph 18.

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37 Judgment in *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312), paragraphs 38 to 41.

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38 See the case-law cited in footnote 36.

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39 See the judgments in *Grimaldi* (322/88, EU:C:1989:646), paragraphs 8 and 9, and *Deutsche Shell* (C-188/91, EU:C:1993:24), paragraph 18.

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40 22/70, EU:C:1971:32.

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41 *Ibid.*, paragraph 42.

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42 *Ibid.*, paragraph 53.

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43 *Ibid.*, paragraph 54.

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44 C-366/88, EU:C:1990:348.

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45 *Ibid.*, paragraph 10.

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46 See Blinder, A.S., Ehrmann, M., Fratzscher, M., de Hann, J., Jansen, D.-J., *Central Bank Communication and Monetary Policy. A Survey of Theory and Evidence*, and Woodford, M., *Fedspeak: Does It Matter How Central Bankers Explain Themselves?*, Columbia University, April 2013.

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47 In the opinion of the current Chairman of the United States Federal Reserve, Ms Yellen, ‘The effects of monetary policy depend critically on the public getting the message about what policy will do months or years in the future’. Speech at the Society of American Business Editors and Writers 50th Anniversary Conference, Washington D.C., available at <http://www.federalreserve.gov/newsevents/speech/yellen20130404a.htm>.

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48 Central European Bank, *The Monetary Policy of the ECB*, Frankfurt, 2011, p. 94 et seq.

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49 C-370/12, EU:C:2012:756.

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50 Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU and Articles 2 and 3, paragraph 3.3, of the Statute of the ESCB and of the ECB.

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51 In particular, see the *Report on Economic and Monetary Union in the European Community*, better known as the *Delors Report*, of 17 April 1989, in particular point 32.

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52 See, inter alia, Dyson, K., and Featherstone, K., *The Road to Maastricht. Negotiating Economic and Monetary Union*, Oxford University Press, Oxford, 1999, p. 378 et seq., Ungerer, H., *A Concise History of European Monetary Integration. From EPU to EMU*, Quorum Books, Westport-London, 1997, p. 209 et seq., and Viebig, J., *Der Vertrag von Maastricht. Die Positionen Deutschlands und Frankreichs zur Europäischen Wirtschafts- und Währungsunion*, Schäffer-Poeschel, 1999, p. 150 et seq.

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53 Article 282(3) TFEU: ‘The European Central Bank shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.’

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54 De Grauwe, P., *Economics of Monetary Union*, 10th ed., Oxford University Press, Oxford, 2014, pp. 156 to 159.

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55 See Sparve, R., ‘Central bank Independence under European Union and other international standards’ in *Legal Aspects of the European System of Central Banks. Liber Amicorum Paolo Zamboni Garavelli*, ECB, Frankfurt am Main, 2005.

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56 Ibid.

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57 Concerning the independence of the ECB and its limits, see, in particular, Zilioli, C., and Selmayr, M., ‘The European Central Bank: An Independent Specialised Organisation of Community Law’, *Common Market Law Review*, No 37, 3, 2000, p. 591 et seq.; Dervede, I., *Autonomie der Europäische Zentralbank. Im Spannungsfeld zwischen demokratischer Legitimation der Europäischen Union und Währungsstabilität*, Dr. Kovac, Hamburg, 2002; and, for a comparative perspective, Amtenbrink, F., *The Democratic Accountability of Central Banks. A Comparative Study of the European Central Bank*, Hart, Oxford-Portland, 1999.

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58 See, although in different spheres from monetary policy, the judgments in *Sison v Council* (C-266/05 P, EU:C:2007:75), paragraphs 32 to 34, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728), paragraph 57, and *Vodafone and Others* (C-58/08, EU:C:2010:321), paragraph 52.

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59 In this regard, see Louis, J.-V., *L’Union européenne et sa monnaie, Commentaire J. Mégret*, 3rd ed., Université de l’Université de Bruxelles, Brussels, 2009, p. 211; Craig, P., ‘EMU, the European Central Bank and Judicial Review’, in Beaumont, P., and Walker, N. (eds.), *Legal Framework of the Single European Currency*, Hart, Oxford-Portland, 1999, pp. 97 to 114, and Malatesta, A., *La Banca Centrale Europea*, Giuffrè, Milan, 2003, p. 183 et seq.

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<sup>60</sup> ‘The process through which monetary policy decisions affect the economy in general, and the price level in particular, is known as the transmission mechanism of monetary policy.’ *The Monetary Policy of the ECB*, ECB, Frankfurt am Main, 2011, p. 62. In this respect, see Angeloni, I., Kashyap, A., and Mojon, B. (eds.), *Monetary Policy Transmission in the Euro Area*, Cambridge University Press, Cambridge, 2003, and Suardi, M., ‘Monetary Policy Transmission in EMU’, in: Buti, M., and Sapir, A., *EMU and Economic Policy In Europe. The Challenge of the Early Years*, E. Elgar, Cheltenham-Northampton, 2002.

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<sup>61</sup> ‘The transmission of monetary impulses to the real sector involves a number of different mechanisms and actions by economic agents at various stages of the process. As a result, monetary policy action usually takes a considerable time to affect price developments. Furthermore, the size and strength of the different effects can vary according to the state of the economy, which makes the precise impact difficult to estimate. Taken together, central banks typically see themselves confronted with long, variable and uncertain lags in the conduct of monetary policy’, *The Monetary Policy of the ECB*, ECB, Frankfurt am Main, 2011, pp. 62 and 63. See also Angeloni, I., Kashyap, A. and Mojon, B. (eds.), *op. cit.*

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<sup>62</sup> On this point, see Cour-Thimann, P., and Winkler, B., ‘The ECB’s Non-Standard Monetary Policy Measures. The Role of Institutional Factors and Financial Structure’, *Oxford Review of Economic Policy*, 2012, 28, p. 72 et seq.

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<sup>63</sup> See the comparison carried out by Lenza, M., Pill, H., and Reichlin, L., ‘Monetary Policy in Exceptional Times’, *Economic Policy* (62) 2010, and García-Andrade, J., ‘El sistema Monetario en una Unión Europea de Derecho’, in Salvador Armendáriz, M.A. (Ed.), *Regulación bancaria: transformación y Estado de Derecho*, Aranzadi, Cizur Menor, 2014.

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<sup>64</sup> The ECB has used various unconventional measures in the past, such as a fixed-rate liquidity injection with full allotment, extension of the list of assets accepted as a guarantee, a longer-term liquidity injection or the purchase of specific debt securities. Concerning these measures, see Hinarejos, A., *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, Oxford, 2014, Chapter 3, point 3.1.

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<sup>65</sup> *Pringle* (EU:C:2012:756), paragraph 55.

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<sup>66</sup> *Pringle* (EU:C:2012:756), paragraph 56, and View of Advocate General Kokott (EU:C:2012:675), point 85.

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<sup>67</sup> View of Advocate General Kokott in *Pringle* (EU:C:2012:675), points 142 and 143.

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<sup>68</sup> *Pringle* (EU:C:2012:756), paragraph 135, states that ‘[c]ompliance with [budgetary] discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union’.

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<sup>69</sup> As the Commission points out in its written observations, the ECB’s *Monthly Bulletins* for September and October 2012 affirm on more than one occasion that the ultimate objective of the OMT programme is to restore the monetary policy transmission channels.

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<sup>70</sup> In so far as the conditions to which the purchase of bonds is subject may not be the same as those set by the EFSF/ESM, the programme is said to operate as a sort of ‘parallel rescue’. It is therefore my understanding that the two areas of uncertainty may be examined together.

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<sup>71</sup> According to Krugman and Wells, the expression ‘moral hazard’ refers to how, when making decisions, individuals are prepared to take greater risks when a third party, rather than they themselves, assumes responsibility for the possible negative consequences of their acts. On this point and in greater detail, see Krugman, P. and Wells, R., *Microeconomics*, 3rd ed., Worth Publishers, 2012.

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<sup>72</sup> See, specifically, Articles 4(4), 5(3) and (5)(g), 6(2), 13(1), (3) and (7) and 14(6) of the Treaty establishing the ESM.

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73 For the ECB's institutional role in bailouts, see Beukers, T., 'The new ECB and its relationship with the eurozone Member States: Between central bank independence and central bank intervention', *Common Market Law Review* (2013) 50, Issue 6, p. 1588 et seq.

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74 See, specifically, Article 13(3) and (7) of the ESM Treaty.

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75 See, by way of example, the general terms for financial assistance agreements, adopted by the ESM Board of Directors on 22 November 2012 (available at [www.esm.europa.eu](http://www.esm.europa.eu)), confirming the ECB's supervisory role in financial assistance programmes (see, specifically, Articles 3.3.2, 3.4.2, 5.3.4, 5.12.1, 6.2.6, 9.6, 9.8.2 and 12.2).

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76 In fact, the literal wording of the ESM Treaty would permit action of that kind. The words 'in liaison with the ECB', used by the ESM Treaty in Articles 13 and 14, would allow the ECB to undertake a wide range of actions in the course of a financial assistance programme, including the 'passive' ones advocated here.

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77 According to the case-law of the Court of Justice, the obligation to state reasons provided for in the Treaty does not entail 'merely taking formal considerations into account, but seeks to give an opportunity to the parties of defending their rights, to the Court of Justice of exercising its supervisory function, and to Member States and all interested nationals of ascertaining the circumstances in which the [institution] has applied the Treaty'. See, inter alia, judgments in *Germany v Commission* (24/62, EU:C:1963:14), p. 69, and *DIR International Film and Others v Commission* (C-164/98 P, EU:C:2000:48), paragraph 33.

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78 Statement by the President of the ECB, Mr Draghi, at the press conference on 6 September 2012, available at <http://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html>.

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79 See, to this effect, judgments in *National Panasonic v Commission* (136/79, EU:C:1980:169), paragraphs 28 to 30, and *Roquette Frères* (C-94/00, EU:C:2002:603), paragraph 77.

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80 See, inter alia, judgments in *Fédesa and Others* (C-331/88, EU:C:1990:391), paragraph 13, and *Netherlands v Commission* (C-180/00, EU:C:2005:451), paragraph 103.

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81 Written observations of the French Republic, which refer to the 'targeted and provisional' ('*ciblée et provisoire*') nature of the OMT programme (point 40).

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82 The press release of 6 September 2012, as well as referring to the conditionality attached to the financial assistance programmes as a 'necessary condition', draws attention to the fact that suspension of the OMT programme will be decided upon by the Governing Council 'in full discretion' but 'in accordance with its monetary policy mandate'.

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83 See Tridimas, T., *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford, 2010, Chapter 3.

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84 In that regard, see Sunkel, O., and Griffith-Jones, S., *Debt and Development Crises in Latin America: The End of an Illusion*, Oxford University Press, Oxford, 1989.

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85 See the Delors Report, cited in footnote 51, in particular point 30.

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86 See Siekmann, H., 'Law and Economics of Monetary Union', in Eger, T., and Schäfer, H.-B., *Research Handbook, on the Economics of European Union Law*, E. Elgar, Cheltenham-Northampton, 2012, p. 370 et seq.

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87 *Pringle* (EU:C:2012:756), paragraph 135.

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88 Ibid., paragraph 132.

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89 Compare the proposed wording of what was then Article 104a(1)(a) of the draft Treaty amending the Treaty establishing the European Economic Community with a view to establishing economic and monetary union, *Bulletin of the European Communities*, supplement 2/91, with the final wording of the provision, which is the same as the wording currently in force in Article 123 TFEU. Concerning the negotiations that culminated in the wording of the current Article 123 TFEU, see Conthe, M., ‘El Tratado de la Unión Europea: la Unión Económica y Monetaria’, in VVAA, *España y el Tratado de la Unión Europea. Una aproximación al Tratado elaborada por el equipo negociador en las Conferencias Intergubernamentales sobre la Unión Política y la Unión Económica y Monetaria*, Colex, 1994, pp. 295 to 297.

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90 Concerning open market operations authorised by Article 18.1 of the Statute, see the Guideline of the ECB of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem (recast) (ECB/2011/14).

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91 Article 1(1)(b) of Regulation No 3603/93 adds, in point (ii), that ‘other type of credit facility’ is also to include ‘any financing of the public sector’s obligations vis-à-vis third parties’.

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92 Under the collective action clauses (‘CAC’) provided for in the event of restructuring, the restructuring is subject to the approval of a majority of the creditors. See, concerning CACs and the role of the ECB, Hofmann, C., ‘Enfranchisement and Disenfranchisement in Collective Action Clauses’, in Bauer, K-A., Cahn, A., and Kenadjian, S. (eds.), *Collective Action Clauses and the Restructuring of Sovereign Debt*, Institute for Law and Finance Series, De Gruyter, 2013, p. 56 et seq.

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93 According to the ECB, not only is no obligation to hold the bonds until maturity laid down but, rather, the draft Decision relating to OMTs expressly provides for the possibility of the ECB selling the bonds at an earlier point.

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94 That is the case, according to the ECB, of the *Securities Market Programme* (‘SMP’), under which securities were not necessarily held until maturity.

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95 The ECB has stated in its written observations that the SMP programme, which predates the OMT programme, also provided for an embargo period.



**Case C-62/14, *Peter Gauweiler and others v. Deutsche Bundestag***

In Case C-62/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverfassungsgericht (Germany), made by decision of 14 January 2014, received at the Court on 10 February 2014, in the proceedings

**Peter Gauweiler,**

**Bruno Bandulet and Others,**

**Roman Huber and Others,**

**Johann Heinrich von Stein and Others,**

**Fraktion DIE LINKE im Deutschen Bundestag**

v

**Deutscher Bundestag,**

intervener:

**Bundesregierung,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen (Rapporteur), T. von Danwitz, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, J. Malenovský, E. Levits, A. Arabadjiev, M. Berger, A. Prechal, E. Jarašiūnas, C.G. Fernlund and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 October 2014,

after considering the observations submitted on behalf of:

- Mr Gauweiler, by W.-R. Bub, Rechtsanwalt, and D. Murswiek,
- Mr Bandulet and Others, by K.A. Schachtschneider,
- Mr Huber and Others, by H. Däubler-Gmelin, Rechtsanwältin, and by C. Degenhart and B. Kempen,
- Mr von Stein and Others, by M.C. Kerber, Rechtsanwalt,
- Fraktion DIE LINKE im Deutschen Bundestag, by H.-P. Schneider and A. Fisahn and by G. Gysi, Rechtsanwalt,
- the Deutscher Bundestag, by C. Calliess,
- the German Government, by T. Henze and J. Möller, acting as Agents, and by U. Häde,

- Ireland, by E. Creedon, G. Hodge and T. Joyce, acting as Agents, and by M. Cush and N.J. Travers, Senior Counsels, and M.J. Dunne and D. Moloney, Barristers-at-Law,
- the Greek Government, by S. Charitaki, S. Lekkou and M. Skorila, acting as Agents,
- the Spanish Government, by A. Rubio González, A. Sampol Pucurull and E. Chamizo Llatas, acting as Agents,
- the French Government, by F. Alabrune, G. de Bergues, D. Colas and F. Fize, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,
- the Cypriot Government, by K.K. Kleanthous and N. Ioannou, acting as Agents,
- the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,
- the Polish Government, by B. Majczyna, C. Herma and K. Maćkowska, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, P. Machado and M.L. Duarte, acting as Agents,
- the Finnish Government, by J. Heliskoski and H. Leppo, acting as Agents,
- the European Parliament, by A. Neergaard, U. Rösslein and E. Waldherr, acting as Agents,
- the European Commission, by B. Martenczuk, C. Ladenburger, B. Smulders and J.-P. Keppenne, acting as Agents,
- the European Central Bank (ECB), by C. Zilioli and C. Kroppenstedt, acting as Agents, and H.-G. Kamann, Rechtsanwalt,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2015,

gives the following

### **Judgment**

1 This request for a preliminary ruling concerns the validity of the decisions of the Governing Council of the European Central Bank (ECB) of 6 September 2012 on a number of technical features regarding the Eurosystem’s outright monetary transactions in secondary sovereign bond markets (‘the OMT decisions’) and the interpretation of Articles 119 TFEU, 123 TFEU and 127 TFEU and of Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (OJ 2012, C 326, p. 230; ‘the Protocol on the ESCB and the ECB’).

2 The request has been made in the context of a series of constitutional actions and dispute resolution proceedings between constitutional bodies, which concern the participation of the Deutsche Bundesbank (German Central Bank) in the implementation of the OMT decisions and the alleged failure, of the Bundesregierung (Federal Government) and the Deutscher Bundestag (Lower House of the German Federal Parliament), to act with regard to those decisions.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

#### *The OMT decisions*

3 According to the minutes of the 340th meeting of the Governing Council of the ECB (‘the Governing Council’) on 5 and 6 September 2012, that body ‘approved the main parameters of Outright Monetary

Transactions (OMT), which would be set out in a press release [(“the press release”)] to be published after the meeting’.

4 The press release is worded as follows:

‘As announced on 2 August 2012, the [Governing Council] has today taken decisions on a number of technical features regarding the Eurosystem’s [OMTs] in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as [OMTs] and will be conducted within the following framework:

#### Conditionality

A necessary condition for [OMTs] is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider [OMTs] to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of [OMTs] in full discretion and acting in accordance with its monetary policy mandate.

#### Coverage

[OMTs] will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No *ex ante* quantitative limits are set on the size of [OMTs].

#### Creditor treatment

The Eurosystem intends to clarify in the legal act concerning [OMTs] that it accepts the same (*pari passu*) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through [OMTs], in accordance with the terms of such bonds.

#### Sterilisation

The liquidity created through [OMTs] will be fully sterilised.

#### Transparency

Aggregate [OMT] holdings and their market values will be published on a weekly basis. Publication of the average duration of [OMT] holdings and the breakdown by country will take place on a monthly basis.

#### Securities Markets Programme

Following today's decision on [OMTs], the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.'

*The main proceedings and the order for reference*

5 Several groups of individuals, including a group supported by more than 11 000 signatories, have brought various constitutional actions concerning the OMT decisions and the alleged failure of the Bundesregierung and the Deutscher Bundestag to act with regard to those decisions. In addition the Fraktion DIE LINKE im Deutschen Bundestag (The Left Party Parliamentary Group in the German Bundestag) has made an application, in dispute resolution proceedings between constitutional bodies, for a declaration that the Deutscher Bundestag is under certain obligations with regard to the OMT decisions.

6 In support of those actions, the applicants in the main proceedings submit (i) that the OMT decisions form, overall, an ultra vires act inasmuch as they are not covered by the mandate of the ECB and infringe Article 123 TFEU and (ii) that those decisions breach the principle of democracy entrenched in the German Basic Law (Grundgesetz) and thereby impair German constitutional identity.

7 The Bundesverfassungsgericht (Federal Constitutional Court) states that if the OMT decisions exceed the mandate of the ECB or infringe Article 123 TFEU it will have to uphold these various actions.

8 In that regard the referring court observes in particular, alluding to the principle of conferral of powers provided for in Article 5(1) and (2) TEU, that the mandate assigned to the ESCB must be strictly limited in order to meet democratic requirements and that compliance with the limits concerned must be subject to comprehensive judicial review. The referring court observes that the Court of Justice has held that the independence of the ECB does not preclude such review since that independence relates only to the powers that the Treaties confer on the ECB, but not to the definition of the extent and scope of its mandate.

9 The referring court further observes that even if it were established that the OMT decisions are to be regarded as merely an announcement of the adoption of future acts, that would not of itself render the proceedings brought before it inadmissible, since preventive legal protection may be necessary, pursuant to national procedural rules, in order to avoid irreparable consequences.

10 In those circumstances, the Bundesverfassungsgericht decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Is the decision of the Governing Council of the ECB of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with Article 119 TFEU and Article 127(1) and (2) TFEU and with Articles 17 to 24 of the Protocol on the ESCB and the ECB because it exceeds the monetary policy mandate of the ECB laid down in the abovementioned provisions and encroaches upon the competence of the Member States?

Is the mandate of the ECB exceeded in particular because the decision of the Governing Council of the ECB of 6 September 2012:

- (i) is linked to economic assistance programmes of the EFSF or of the ESM (conditionality)?
- (ii) provides for the purchase of government bonds of selected Member States only (selectivity)?
- (iii) provides for the purchase of government bonds of programme countries in addition to assistance programmes of the EFSF or of the ESM (parallelism)?
- (iv) could undermine the limits and conditions laid down by assistance programmes of the EFSF or of the ESM (circumvention)?

(b) Is the decision of the Governing Council of the ECB of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with the prohibition of monetary financing enshrined in Article 123 TFEU?

Is compatibility with Article 123 TFEU precluded in particular by the fact that the decision of the Governing Council of the ECB of 6 September 2012:

- (i) does not provide for quantitative limits for government bond purchases (volume)?
- (ii) does not provide for a time gap between the issue of government bonds on the primary market and their purchase by the European System of Central Banks (ESCB) on the secondary market (market pricing)?
- (iii) allows all purchased government bonds to be held to maturity (interference with market logic)?
- (iv) does not contain any specific requirements for the credit standing of the government bonds to be purchased (default risk)?
- (v) provides for the same treatment of the ESCB as private or other holders of government bonds (debt cut)?

(2) In the alternative, in the event that the Court does not consider the decision of the Governing Council of the ECB of 6 September 2012 on Technical features of Outright Monetary Transactions, qua act of an EU institution, to be an appropriate object for a request pursuant to point (b) of the first paragraph of Article 267 TFEU:

(a) Are Article 119 TFEU and Article 127 TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

- (i) to make government bond purchases conditional on the existence of and compliance with economic assistance programmes of the EFSF or of the ESM (conditionality)?
- (ii) to purchase government bonds of selected Member States only (selectivity)?
- (iii) to purchase government bonds of programme countries in addition to assistance programmes of the EFSF or of the ESM (parallelism)?
- (iv) to undermine the limits and conditions laid down by assistance programmes of the EFSF or of the ESM (circumvention)?

(b) Having regard to the prohibition of monetary financing, is Article 123 TFEU to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

- (i) to purchase government bonds without quantitative limits (volume)?
- (ii) to purchase government bonds without a minimum time gap from their issue on the primary market (market pricing)?
- (iii) to hold all purchased government bonds to maturity (interference with market logic)?
- (iv) to purchase government bonds without minimum credit standing requirements (default risk)?
- (v) to accept the same treatment of the ESCB as private and other holders of government bonds (debt cut)?
- (vi) to influence pricing, by communicating the intention to purchase or otherwise, coinciding with the issue of government bonds by Member States of the euro area (encouragement to purchase newly issued bonds)?

#### **Consideration of the questions referred for a preliminary ruling**

##### *Preliminary observations*

11 The Italian Government submits that the present request for a preliminary ruling may not be examined by the Court of Justice, since the referring court does not accept the binding and definitive interpretative value that the answer given by the Court in response to that request has. It argues that the referring court considers that it has ultimate responsibility for ruling on the validity of the decisions in question in the light of the conditions and limits imposed by the German Basic Law.

12 It may be observed in this regard that in *Kleinwort Benson* (C-346/93, EU:C:1995:85) the Court declared that it does not have jurisdiction to give a ruling where the court making the reference is not bound by the Court's interpretation. Indeed, the Court does not have jurisdiction to provide, in preliminary ruling proceedings, answers which are purely advisory (see, to that effect, judgment in *Kleinwort Benson*, C-346/93, EU:C:1995:85, paragraphs 23 and 24).

13 However, in that case an interpretation of EU law was not called for because the Court was asked to interpret an act of EU law in order to enable the national court to decide on the application of national law in a situation where the national law contained no direct and unconditional renvoi to EU law but was limited to taking an act of EU law as a model and only partially reproduced the terms thereof (see, to that effect, judgments in *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, paragraph 21, and *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraph 24).

14 It must be stated that the circumstances of the present case differ significantly from those of the case that gave rise to the judgment in *Kleinwort Benson* (C-346/93, EU:C:1995:85), since, here, the request for a preliminary ruling concerns directly the interpretation and application of EU law, which means that the present judgment will have definitive consequences as regards the resolution of the main proceedings.

15 In that regard, it should be observed that, according to settled case-law of the Court of Justice, Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States (see, inter alia, judgments in *SAT Fluggesellschaft*, C-364/92, EU:C:1994:7, paragraph 9, and *ATB and Others*, C-402/98, EU:C:2000:366, paragraph 29). In that procedure, which is based on a clear separation of functions between the national courts and the Court, any assessment of the facts of the case is a matter for the national court, which must determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, to that effect, inter alia, judgments in *WWF and Others*, C-435/97, EU:C:1999:418, paragraph 31, and *Lucchini*, C-119/05, EU:C:2007:434, paragraph 43), whilst the Court is empowered to give rulings on the interpretation or the validity of an EU provision only on the basis of the facts which the national court puts before it (judgment in *Eckelkamp and Others*, C-11/07, EU:C:2008:489, paragraph 52).

16 It must also be borne in mind that it is settled case-law of the Court that a judgment in which the latter gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings (see, inter alia, judgments in *Fazenda Pública*, C-446/98, EU:C:2000:691, paragraph 49, and *Elchinov*, C-173/09, EU:C:2010:581, paragraph 29).

17 It follows that the Court must reply to the referring court's request for a preliminary ruling.

#### *Admissibility*

18 Ireland, the Greek, Spanish, French, Italian, Netherlands, Portuguese and Finnish Governments, the European Parliament, the European Commission and the ECB challenge, on various grounds, the admissibility of the request for a preliminary ruling or of certain of the questions it includes.

19 First, the Italian Government maintains that the dispute in the main proceedings is contrived and artificial. The actions before the referring court are, in its submission, devoid of purpose since it has not been shown that the applicants in the main proceedings are in need of preventive protection or at risk of damage, but also because the alleged lack of action on the part of the Deutscher Bundestag is not per se amenable to any form of legal classification. Those actions should, moreover, have been declared inadmissible by the referring court since they concern EU measures that are not legal acts. The Italian Government further submits that the case in the main proceedings does not actually give rise to a question of obviously ultra vires acts which is connected to German constitutional identity.

20 The Italian Government also argues that the questions are abstract and hypothetical inasmuch as they are based on a series of assumptions, in particular with regard to the links between purchases of government bonds and compliance with economic assistance programmes, the lack of any quantitative limit on the volume of those purchases or the failure to take account of the risk of losses for the ECB.

21 The Greek Government also maintains that the questions raised are hypothetical, basing its argument on the fact that the ECB has not, in its view, adopted any measure which directly affects the rights conferred by EU law on the applicants in the main proceedings. The Finnish Government submits that the second question is inadmissible given that it relates to hypothetical actions on the part of the ECB and the national central banks of the euro area.

22 Next, although it does not expressly raise an objection to admissibility, the Spanish Government asserts that the national proceedings which have given rise to the reference for a preliminary ruling are not compatible with the system for reviewing the validity of EU acts established by Articles 263 TFEU and 267 TFEU given that they create a direct action against the validity of an EU act without complying with the conditions for admissibility laid down by Article 263 TFEU in respect of actions for annulment.

23 Finally, Ireland, the Greek, Spanish, French, Italian, Netherlands and Portuguese Governments, the Parliament, the Commission and the ECB submit that the first question is inadmissible since a question concerning validity cannot, in their submission, be directed at an act which, like the OMT decisions, is preparatory or does not have legal effects.

24 In the first place, as regards the argument that the dispute in the main proceedings is contrived and artificial and that the questions referred are hypothetical, it should be observed that, as is apparent from paragraph 15 of this judgment, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling (see, to that effect, judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 28 and the case-law cited).

25 Accordingly, questions concerning EU law enjoy a presumption of relevance. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 29 and the case-law cited).

26 In the present case, the arguments which the Italian Government puts forward to establish the contrived and artificial nature of the dispute in the main proceedings and the hypothetical nature of the questions raised are based on a critical analysis of the admissibility of the actions at issue in the main proceedings and of the assessment of the facts undertaken by the referring court for the purpose of applying the criteria laid down by national law. It is not, however, for the Court to call that assessment into question since it falls, in the framework of these proceedings, within the jurisdiction of the national court (see, to that effect, judgment in *Lucchini*, C-119/05, EU:C:2007:434, paragraph 43); nor is it for the Court to determine whether a decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and legal proceedings (judgment in *Schnorbus*, C-79/99, EU:C:2000:676, paragraph 22 and the case-law cited). Those arguments are therefore not sufficient to rebut the presumption of relevance mentioned in the previous paragraph.

27 As to the fact, to which the Greek and Finnish Governments draw attention, that the programme for purchasing government bonds announced in the press release has not been implemented and that its implementation will be possible only after further legal acts have been adopted, it does not — as the referring court states — render the actions in the main proceedings devoid of purpose since under German law preventive legal protection may be granted in such a situation if certain conditions are met.

28 Although the main actions — since they seek to avoid the infringement of rights that are under threat — must necessarily be based on hypotheses which are by their nature uncertain, they are, according to the referring court, none the less permitted under German law. Since, in proceedings of the kind provided for in Article 267

TFEU, the interpretation of national law falls exclusively to the referring court (judgment in *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 58), the fact that the OMT decisions have not yet been implemented and that their implementation will be possible only after further legal acts have been adopted is not a ground for denying that the request for a preliminary ruling meets an objective need for resolving the cases brought before that court (see, by analogy, judgment in *Bosman*, C-415/93, EU:C:1995:463, paragraph 65).

29 In the second place, as regards the alleged incompatibility between the national proceedings and the system established by Articles 263 TFEU and 267 TFEU, the Court has, on a number of occasions, ruled on the admissibility of requests for a preliminary ruling concerning the validity of secondary legislation which have been made in judicial review proceedings brought under United Kingdom law. The Court, relying on the fact that, under national law, the persons concerned were able to make an application for judicial review of the legality of the intention or obligation of the United Kingdom Government to comply with EU legislation, has concluded that the opportunity open to individuals to plead the invalidity of an EU act of general application before national courts is not conditional upon that act actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is seized of a genuine dispute in which the question of the validity of such an act is raised on indirect grounds (see, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 36 and 40, and *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraphs 33 and 34). It is clear from the order for reference that that is indeed the case here.

30 As regards, in the third place, the arguments, set out in paragraph 23 of this judgment, which relate specifically to the first question, it should be observed that, in the present case, the referring court has brought the matter before the Court in order that the latter determine whether Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

31 In the light of the foregoing, the request for a preliminary ruling must be declared admissible.

#### *Substance*

32 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

Articles 119 TFEU and 127(1) and (2) TFEU, and Articles 17 to 24 of the Protocol on the ESCB and the ECB

33 The referring court raises the question of whether a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release, can be covered by the powers of the ESCB, as defined by primary law.

#### – Powers of the ESCB

34 It should be noted as a preliminary point that under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, as well as the definition and conduct of a single monetary policy and exchange-rate policy (judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 48).

35 As regards more particularly monetary policy, Article 3(1)(c) TFEU states that the Union is to have exclusive competence in that area for the Member States whose currency is the euro (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 50).

36 Under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union (judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 49). Under Article 282(4) TFEU, the ECB is to adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 TFEU to 133 TFEU, with Article 138 TFEU and with the conditions laid down in the Statute of the ESCB and of the ECB.

37 Within that framework, it is for the ESCB, pursuant to Article 127(2) TFEU, to define and implement that policy.

38 More specifically, it follows from Article 129(1) TFEU, read in conjunction with Article 12.1 of the Protocol on the ESCB and the ECB, that the Governing Council is to formulate the monetary policy of the Union and that the Executive Board of the ECB is to implement that policy in accordance with the guidelines and decisions laid down by the Governing Council.

39 It also follows, from the third subparagraph of Article 12.1 of the Protocol that, to the extent deemed possible and appropriate, the ECB is to have recourse to the national central banks to carry out operations which form part of the tasks of the ESCB, those banks being obliged, under Article 14.3 of the Protocol, to act in accordance with the guidelines and instructions of the ECB.

40 Furthermore, it is apparent from Article 130 TFEU that the ESCB is to be independent when carrying out its task of formulating and implementing the Union's monetary policy. It can be seen from the wording of that Article that it is intended to shield the ESCB and its decision-making bodies from external influences which would be likely to interfere with the performance of the tasks which the FEU Treaty and the Protocol on the ESCB and the ECB assign to the ESCB. Thus, Article 130 TFEU is, in essence, intended to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law (see, to that effect, judgment in *Commission v ECB*, C-11/00, EU:C:2003:395, paragraph 134).

41 In accordance with the principle of conferral of powers set out in Article 5(2) TEU, the ESCB must act within the limits of the powers conferred upon it by primary law and it cannot therefore validly adopt and implement a programme which is outside the area assigned to monetary policy by primary law. In order to ensure that the principle of conferral is complied with, the acts of the ESCB are, on the conditions laid down by the Treaties, subject to review by the Court (see, to that effect, judgment in *Commission v ECB*, C-11/00, EU:C:2003:395, paragraph 135).

42 It must be pointed out in this regard that the FEU Treaty contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the ESCB for the purpose of implementing that policy (see, to that effect, *Pringle*, C-370/12, EU:C:2012:756, paragraph 53).

43 Thus, under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that, without prejudice to that objective, the ESCB is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 54).

44 The Protocol on the ESCB and the ECB is thus characterised by a clear mandate, which is directed primarily at the objective of ensuring price stability. The tightly drawn nature of that mandate is further reinforced by the procedures for amending certain parts of the Statute of the ESCB and of the ECB.

45 As to the means assigned to the ESCB by primary law for the purpose of achieving those objectives, Chapter IV of the Protocol on the ESCB and the ECB, which describes the monetary functions and operations assured by the ESCB, sets out the instruments to which the ESCB may have recourse in the framework of monetary policy.

– The delimitation of monetary policy

46 The Court has held that in order to determine whether a measure falls within the area of monetary policy it is appropriate to refer principally to the objectives of that measure. The instruments which the measure employs in order to attain those objectives are also relevant (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraphs 53 and 55).

47 In the first place, as regards the objectives of a programme such as that at issue in the main proceedings, it can be seen from the press release that the aim of the programme is to safeguard both 'an appropriate monetary policy transmission and the singleness of the monetary policy'.

48 First, the objective of safeguarding the singleness of monetary policy contributes to achieving the objectives of that policy inasmuch as, under Article 119(2) TFEU, monetary policy must be ‘single’.

49 Secondly, the objective of safeguarding an appropriate transmission of monetary policy is likely both to preserve the singleness of monetary policy and to contribute to its primary objective, which is to maintain price stability.

50 The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the ‘impulses’ which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB’s decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB’s ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU.

51 The fact that a programme such as that announced in the press release might also be capable of contributing to the stability of the euro area, which is a matter of economic policy (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 56), does not call that assessment into question.

52 Indeed, a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area (see, by analogy, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 56).

53 In the second place, as regards the means to be used for achieving the objectives sought by a programme such as that announced in the press release, it is not disputed that the implementation of such a programme will entail outright monetary transactions on secondary sovereign debt markets.

54 It is clear from Article 18.1 of the Protocol on the ESCB and the ECB, which forms part of Chapter IV thereof, that in order to achieve the objectives of the ESCB and to carry out its tasks, as provided for in primary law, the ECB and the national central banks may, in principle, operate in the financial markets by buying and selling outright marketable instruments in euro. Accordingly, the transactions which the Governing Council has in mind in the press release use one of the monetary policy instruments provided for by primary law.

55 As regards the selective nature of the programme announced in the press release, it should be borne in mind that the programme is intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States. In those circumstances, the mere fact that the programme is specifically limited to those government bonds is thus not of a nature to imply, of itself, that the instruments used by the ESCB fall outside the realm of monetary policy. Moreover, no provision of the FEU Treaty requires the ESCB to operate in the financial markets by means of general measures that would necessarily be applicable to all the States of the euro area.

56 In the light of those considerations, it is apparent that a programme such as that announced in the press release, in view of its objectives and the instruments provided for achieving them, falls within the area of monetary policy.

57 The fact that the implementation of such a programme is made conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes does not alter that conclusion.

58 It is, of course, possible that a government bond-buying programme may, indirectly, increase the impetus to comply with those adjustment programmes and thus, to some extent, further the economic-policy objectives of those programmes.

59 However, such indirect effects do not mean that such a programme must be treated as equivalent to an economic policy measure, since it is apparent from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union.

60 The point should also be made that the ESCB, in a wholly independent manner, made implementation of the programme announced in the press release conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes, thereby ensuring that its monetary policy will not give the Member States whose sovereign bonds it purchases financing opportunities which would enable them to depart from the adjustment programmes to which they have subscribed. The ESCB thus ensures that the monetary policy measures it has adopted will not work against the effectiveness of the economic policies followed by the Member States.

61 Furthermore, since the ESCB is obliged, under Article 127(1) TFEU, read in conjunction with Article 119(3) TFEU, to comply with the guiding principle that public finances must be sound, the conditions included in a programme such as that announced in the press release, which prevent that programme from acting as an incentive to Member States to allow their financial situation to deteriorate, cannot be regarded as taking the programme beyond the confines of the monetary policy framework laid down by primary law.

62 It should be added that full compliance of the Member State concerned with the obligations arising under an adjustment programme to which it has subscribed is not, in any event, a sufficient condition to trigger intervention by the ESCB in the framework of a programme such as that announced in the press release, since such intervention is made strictly conditional upon there being disruptions of the monetary policy transmission mechanism or the singleness of monetary policy.

63 Accordingly, the fact that the purchase of government bonds on the secondary market subject to a condition of compliance with a macroeconomic adjustment programme could be regarded as falling within economic policy when the purchase is undertaken by the ESM (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 60) does not mean that this should equally be the case when that instrument is used by the ESCB in the framework of a programme such as that announced in the press release.

64 In that regard, the difference between the objectives of the ESM and those of the ESCB is decisive. Whilst it can be seen from paragraphs 48 to 52 of this judgment that a programme such as that at issue in the main proceedings may be implemented only in so far as is necessary for the maintenance of price stability, the ESM's intervention is intended to safeguard the stability of the euro area, that objective not falling within monetary policy (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 56).

65 That analysis also leads the Court to exclude the possibility that a programme such as that announced in the press release may serve to circumvent the conditions circumscribing the ESM's activity on the secondary market, since the ESCB's intervention is not intended to take the place of that of the ESM in order to achieve the latter's objectives but must, on the contrary, be implemented independently on the basis of the objectives particular to monetary policy.

– Proportionality

66 It follows from Articles 119(2) TFEU and 127(1) TFEU, read in conjunction with Article 5(4) TEU, that a bond-buying programme forming part of monetary policy may be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy.

67 In that regard, it should be borne in mind that, according to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives (see, to that effect, judgment in *Association Kokopelli*, C-59/11, EU:C:2012:447, paragraph 38 and the case-law cited).

68 As regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion (see, by analogy, judgments in *Afton Chemical*, C-343/09, EU:C:2010:419, paragraph 28, and *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 35).

69 Nevertheless, where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance. Those guarantees include the obligation for the ESCB to

examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions.

70 In that regard, the Court has consistently held that, although the statement of reasons for an EU measure, which is required by Article 296(2) TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. In addition, the question whether the obligation to provide a statement of reasons has been satisfied must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question (see, to that effect, judgment in *Commission v Council*, C-63/12, EU:C:2013:752, paragraphs 98 and 99 and the case-law cited).

71 Although an examination of whether the obligation to provide a statement of reasons has been satisfied may be undertaken only on the basis of a decision that has been formally adopted, in this case it must none the less be found that the press release, together with draft legal acts considered during the meeting of the Governing Council at which the press release was approved, make known the essential elements of a programme such as that announced in the press release and are such as to enable the Court to exercise its power of review.

72 As regards, in the first place, the appropriateness of a programme such as that announced in the press release for achieving the ESCB's objectives, it is apparent from the press release and from the explanations provided by the ECB that the programme is based on an analysis of the economic situation of the euro area, according to which, at the date of the programme's announcement, interest rates on the government bonds of various States of the euro area were characterised by high volatility and extreme spreads. According to the ECB, those spreads were not accounted for solely by macroeconomic differences between the States concerned but were caused, in part, by the demand for excessive risk premia for the bonds issued by certain Member States, such premia being intended to guard against the risk of a break-up of the euro area.

73 According to the ECB, that special situation severely undermined the ESCB's monetary policy transmission mechanism in that it gave rise to fragmentation as regards bank refinancing conditions and credit costs, which greatly limited the effects of the impulses transmitted by the ESCB to the economy in a significant part of the euro area.

74 Having regard to the information placed before the Court in the present proceedings, it does not appear that that analysis of the economic situation of the euro area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment.

75 In that regard, the fact, mentioned by the referring court, that that reasoned analysis has been subject to challenge does not, in itself, suffice to call that conclusion into question, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.

76 In the situation described in paragraphs 72 and 73 of this judgment, the purchase, on secondary markets, of government bonds of the Member States affected by interest rates considered by the ECB to be excessive is likely to contribute to reducing those rates by dispelling unjustified fears about the break-up of the euro area and thus to play a part in bringing about a fall in — or even the elimination of — excessive risk premia.

77 In those circumstances, the ESCB was entitled to take the view that such a development in interest rates is likely to facilitate the ESCB's monetary policy transmission and to safeguard the singleness of monetary policy.

78 Thus, it is undisputed that interest rates for the government bonds of a given State play a decisive role in the setting of the interest rates applicable to the various economic actors in that State, in the value of the portfolios of financial institutions holding such bonds and in the ability of those institutions to obtain liquidity. Therefore, eliminating or reducing the excessive risk premia demanded in respect of the government bonds of a Member State is likely to avoid the volatility and level of those premia from hindering the transmission of the effects of the ESCB's monetary policy decisions to the economy of that State and from jeopardising the singleness of monetary policy.

79 Moreover, the ECB's assertion that the mere announcement of the programme at issue in the main proceedings was sufficient to achieve the effect sought — namely to restore the monetary policy transmission mechanism and the singleness of monetary policy — has not been challenged in these proceedings.

80 It follows from the foregoing that, in economic conditions such as those described by the ECB at the date of the press release, the ESCB could legitimately take the view that a programme such as that announced in the press release is appropriate for the purpose of contributing to the ESCB's objectives and, therefore, to maintaining price stability.

81 Accordingly, it should, in the second place, be established whether such a programme does not go manifestly beyond what is necessary to achieve those objectives.

82 It must be noted in that regard that the wording of the press release makes quite clear that, under the programme at issue in the main proceedings, the purchase of government bonds on secondary markets is permitted only in so far as it is necessary to achieve the objectives of that programme and that such purchases will cease as soon as those objectives have been achieved.

83 It should also be noted that the announcement made in the press release about the programme at issue in the main proceedings will be followed, if necessary, by a second phase, namely implementation of the programme, which will be dependent upon an in-depth assessment of the requirements of monetary policy.

84 Moreover, more than two years after the programme at issue in the main proceedings was announced, that programme has not been implemented, the Governing Council taking the view that its activation was not justified by the economic situation of the euro area.

85 In addition to the fact that implementation of a programme such as that announced in the press release is strictly subject to the objectives of that programme, the Court notes that the potential scale of the programme is limited in a number of ways.

86 It is thus apparent that, in the context of such a programme, the ESCB may purchase only the government bonds of Member States which are undergoing a macroeconomic adjustment programme and which have access to the bond market again. Furthermore, a programme such as that at issue in the main proceedings is concentrated on government bonds with a maturity of up to three years, the ESCB reserving the right to sell at any time the bonds it has purchased.

87 It follows from those considerations, first, that a programme such as that announced in the press release ultimately concerns only a limited part of the government bonds issued by the States of the euro area, so that the commitments which the ECB is liable to enter into when such a programme is implemented are, in fact, circumscribed and limited. Secondly, such a programme can be put into effect only when the situation of certain of those States has already justified EMS intervention which is still under way.

88 In those circumstances, a programme whose volume is thus restricted could legitimately be adopted by the ESCB without a quantitative limit being set prior to its implementation, such a limit being likely, moreover, to reduce the programme's effectiveness.

89 Furthermore, in so far as the referring court raises the question of the selectivity of such a programme, it should be recalled that this programme is intended to rectify the disruption of the ESCB's monetary policy which arose as a result of the particular situation of government bonds issued by certain Member States. In those circumstances, the ESCB was fully entitled to take the view that a selective bond-buying programme may prove necessary in order to rectify that disruption, concentrating the ESCB's activity on the parts of the euro area which are particularly affected by that disruption and thereby preventing the scale of that programme from being needlessly increased, beyond what is necessary to achieve its objectives, or the programme's effectiveness from being diminished.

90 It must also be stated that a programme such as that announced in the press release identifies the Member States whose bonds may be purchased on the basis of criteria linked to the objectives pursued and not by means of an arbitrary selection.

91 In the third place, the ESCB weighed up the various interests in play so as to actually prevent disadvantages from arising, when the programme in question is implemented, which are manifestly disproportionate to the programme's objectives.

92 It follows from the foregoing considerations that a programme such as that announced in the press release does not infringe the principle of proportionality.

Article 123(1) TFEU

93 The referring court raises the issue of the compatibility with Article 123(1) TFEU of a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

94 It is clear from its wording that Article 123(1) TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments (judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 123).

95 It follows that that provision prohibits all financial assistance from the ESCB to a Member State (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 132), but does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State.

96 Thus, Article 18.1 of the Protocol on the ESCB and the ECB permits the ESCB, in order to achieve its objectives and to carry out its tasks, to operate in the financial markets, inter alia, by buying and selling outright marketable instruments, which include government bonds, and does not make that authorisation subject to particular conditions as long as the nature of open market operations is not disregarded.

97 Nevertheless, the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU.

98 In addition, in order to determine which forms of purchases of government bonds are compatible with Article 123(1) TFEU, it is necessary to take account of the objective pursued by that provision (see, by analogy, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraph 133).

99 To that end, it must be recalled that the origin of the prohibition laid down in Article 123 TFEU is to be found in Article 104 of the EC Treaty (which became Article 101 EC), which was inserted in the EC Treaty by the Treaty of Maastricht.

100 It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 123 TFEU is to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits (see the Draft Treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, pp. 24 and 54).

101 Thus, as is stated in the seventh recital in the preamble to Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles [123 TFEU] and [125(1) TFEU] (OJ 1993 L 332, p. 1), purchases made on the secondary market may not be used to circumvent the objective of Article 123 TFEU.

102 It follows that, as the Advocate General has observed in point 227 of his Opinion, when the ECB purchases government bonds on secondary markets, sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU.

103 As regards a programme such as that announced in the press release, it must in the first place be stated that, in the framework of such a programme, the ESCB is entitled to purchase government bonds — not directly, from

public authorities or bodies of the Member States — but only indirectly, on secondary markets. Intervention by the ESCB of the kind provided for by a programme such as that at issue in the main proceedings thus cannot be treated as equivalent to a measure granting financial assistance to a Member State.

104 That said, the point should be made, in the second place, that the ESCB's intervention could, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States if the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, *de facto*, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.

105 However, the explanations provided by the ECB in these proceedings have made clear that the implementation of a programme such as that announced in the press release must be subject to conditions intended to ensure that the ESCB's intervention on secondary markets does not have an effect equivalent to that of a direct purchase of government bonds on the primary market.

106 In this respect, the draft decision and draft guideline produced by the ECB in these proceedings indicate that the Governing Council is to be responsible for deciding on the scope, the start, the continuation and the suspension of the intervention on the secondary market envisaged by such a programme. The ECB has also made clear before the Court that the ESCB intends, first, to ensure that a minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market and, secondly, to refrain from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases envisaged.

107 Inasmuch as those safeguards prevent the conditions of issue of government bonds from being distorted by the certainty that those bonds will be purchased by the ESCB after their issue, they ensure that implementation of a programme such as that announced in the press release will not, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States.

108 It is true that, despite those safeguards, the ESCB's intervention remains capable of having, as the referring court points out, some influence on the functioning of the primary and secondary sovereign debt markets. However, that fact is not decisive since such influence constitutes, as the Advocate General has observed in point 259 of his Opinion, an inherent effect in purchases on the secondary market which are authorised by the FEU Treaty. That effect is, moreover, essential if those purchases are to be used effectively in the framework of monetary policy.

109 In the third place, a programme such as that announced in the press release would circumvent the objective of Article 123(1) TFEU, recalled in paragraph 100 of this judgment, if that programme were such as to lessen the impetus of the Member States concerned to follow a sound budgetary policy. In fact, since it follows from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union, the action taken by the ESCB on the basis of Article 123 TFEU cannot be such as to contravene the effectiveness of those policies by lessening the impetus of the Member States concerned to follow a sound budgetary policy.

110 Moreover, the conduct of monetary policy will always entail an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the public deficit of the Member States.

111 In any event, the Court finds that the features of a programme such as that announced in the press release exclude the possibility of that programme being considered of such a kind as to lessen the impetus of the Member States to follow a sound budgetary policy.

112 In that regard, it must be borne in mind, first, that the programme provides for the purchase of government bonds only in so far as is necessary for safeguarding the monetary policy transmission mechanism and the singleness of monetary policy and that those purchases will cease as soon as those objectives are achieved.

113 That limitation on the ESCB's intervention means (i) that the Member States cannot, in determining their budgetary policy, rely on the certainty that the ESCB will at a future point purchase their government bonds on

secondary markets and (ii) that the programme in question cannot be implemented in a way which would bring about a harmonisation of the interest rates applied to the government bonds of the Member States of the euro area regardless of the differences arising from their macroeconomic or budgetary situation.

114 The adoption and implementation of such a programme thus do not permit the Member States to adopt a budgetary policy which fails to take account of the fact that they will be compelled, in the event of a deficit, to seek financing on the markets, or result in them being protected against the consequences which a change in their macroeconomic or budgetary situation may have in that regard.

115 Secondly, a programme such as that at issue in the main proceedings is accompanied by a series of guarantees that are intended to limit its impact on the impetus to follow a sound budgetary policy.

116 Thus, by limiting that programme to certain types of bonds issued only by those Member States which are undergoing a structural adjustment programme and which have access to the bond market again, the ECB has, de facto, restricted the volume of government bonds eligible to be purchased in the framework of the programme and, accordingly, has limited the scale of the programme's impact on the financing conditions of the States of the euro area.

117 Moreover, the impact of a programme such as that announced in the press release on the impetus to follow a sound budgetary policy is also limited by the fact that the ESCB has the option of selling the purchased bonds at any time. It follows that the consequences of withdrawing those bonds from the markets may be temporary. That option also means that the ESCB is able to adapt its programme in the light of the attitude of the Member States concerned, in particular with a view to limiting or suspending purchases of government bonds if a Member State changes its issuance behaviour by issuing more short-maturity bonds in order to finance its budget by means of bonds that are eligible for ESCB intervention.

118 The fact that the ESCB also has the possibility of holding the bonds it has purchased until maturity does not play a decisive role in this regard, since that possibility depends on such action being necessary to achieve the objectives sought and, in any event, the market operators involved cannot be certain that the ESCB will make use of that option. It should also be observed that such a practice is in no way precluded by Article 18.1 of the Protocol on the ESCB and the ECB and that it does not imply that the ESCB waives its right to payment of the debt, by the issuing Member State, once the bond matures.

119 In addition, by providing only for the purchase of government bonds issued by Member States that have access to the bond market again, the ESCB in practice excludes from the programme it intends to implement the Member States whose financial situation has deteriorated so far that they are no longer in a position to secure financing on the market.

120 Finally, the fact that the purchase of government bonds is conditional upon full compliance with the structural adjustment programmes to which the Member States concerned are subject precludes the possibility of a programme, such as that announced in the press release, acting as an incentive to those States to dispense with fiscal consolidation, relying on the financing opportunities to which the implementation of such a programme could give rise.

121 It follows from the foregoing that a programme such as that announced in the press release does not lessen the impetus of the Member States concerned to follow a sound budgetary policy. Accordingly, Article 123(1) TFEU does not prevent the ESCB from adopting such a programme and implementing it under conditions which do not result in the ESCB's intervention having an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States.

122 The features of such a programme to which the referring court has specifically drawn attention and which have not been mentioned in the analysis in the previous paragraphs do not call that conclusion into question.

123 Thus, even if it were established that that programme could expose the ECB to a significant risk of losses, that would in no way weaken the guarantees which are built into the programme in order to ensure that the Member States' impetus to follow a sound budgetary policy is not lessened.

124 In this regard, the Court observes that those guarantees are also likely to reduce the risk of losses to which the ECB is exposed.

125 It should also be borne in mind that a central bank, such as the ECB, is obliged to take decisions which, like open market operations, inevitably expose it to a risk of losses and that Article 33 of the Protocol on the ESCB and the ECB duly provides for the way in which the losses of the ECB must be allocated, without specifically delimiting the risks which the Bank may take in order to achieve the objectives of monetary policy.

126 Furthermore, although the lack of privileged creditor status may mean that the ECB is exposed to the risk of a debt cut decided upon by the other creditors of the Member State concerned, it must be stated that such a risk is inherent in a purchase of bonds on the secondary markets, an operation which was authorised by the authors of the Treaties, without being conditional upon the ECB having privileged creditor status.

127 In view of all the foregoing considerations, the answer to the questions referred is that Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release.

### **Costs**

128 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

**Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank must be interpreted as permitting the European System of Central Banks (ESCB) to adopt a programme for the purchase of government bonds on secondary markets, such as the programme announced in the press release to which reference is made in the minutes of the 340th meeting of the Governing Council of the European Central Bank (ECB) on 5 and 6 September 2012.**



## Bundesverfassungsgericht, Gauweiler Press Release 21 June 2016

Press Release No. 34/2016 of 21 June 2016

Judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13

If the conditions formulated by the Court of Justice of the European Union in its judgment of 16 June 2015 (C-62/14) and intended to limit the scope of the OMT programme are met, the complainants' rights under Art. 38 sec. 1 sentence 1, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3 of the Basic Law (*Grundgesetz* – GG) are not violated by the fact that the Federal Government and the *Bundestag* have not taken suitable steps to revoke or limit the effect of the policy decision of the European Central Bank of 6 September 2012 concerning the OMT programme. Furthermore, if these conditions are met, the OMT programme does not currently impair the *Bundestag's* overall budgetary responsibility. Such was the decision of the Second Senate of the Federal Constitutional Court in a judgment pronounced today. If interpreted in accordance with the Court of Justice's judgment, the policy decision on the OMT programme does not "manifestly" exceed the competences attributed to the European Central Bank. Moreover, if interpreted in accordance with the Court of Justice's judgment, the OMT programme does not present a constitutionally relevant threat to the German *Bundestag's* right to decide on the budget.

### Facts of the Case:

The constitutional complaints and the application for *Organstreit* proceedings [*proceedings relating to disputes between constitutional organs*] challenge two programmes aimed at the purchase of government bonds of Member States of the Euro zone on the secondary market by the European System of Central Banks ("ESCB"). For further information please refer to press releases [nos. 29/2013](#) of 19 April 2013 (available in German), [9/2014](#) of 7 February 2014, and [3/2016](#) of 15 January 2016.

### Key Considerations of the Senate:

1. The constitutional complaints and the *Organstreit* proceedings are partially inadmissible. In particular, the constitutional complaints are inadmissible to the extent that they directly challenge acts of the European Central Bank. To that extent those acts cannot be challenged before the *Bundesverfassungsgericht* (German Federal Constitutional Court).
2. To the extent that the constitutional complaints and the application for *Organstreit* proceedings are admissible, they are unfounded.
  - a) By empowering the Federation to transfer sovereign powers to the European Union (Art. 23 sec. 1 sentence 2 GG), the Basic Law also accepts a precedence of application of European Union law (*Anwendungsvorrang des Unionsrechts*). The legislature deciding on European integration matters may not only exempt institutions, bodies, offices and agencies of the European Union from being comprehensively bound by the guarantees of the Basic Law but also German entities that implement European Union law.

However, the precedence of application of European Union law only extends as far as the Basic Law and the relevant Act of Approval permit or envisage the transfer of sovereign powers. Therefore, limits for the opening of German statehood derive from the constitutional identity of the Basic Law guaranteed by Art. 79 sec. 3 GG and from the European integration agenda (*Integrationsprogramm*), which is laid down in the Act of Approval and vests European Union law with the necessary democratic legitimacy for Germany.

- b) The fundamental elements of the principle of democracy (Art. 20 secs. 1 and 2 GG) are part of the constitutional identity of the Basic Law, which has been declared to be beyond the reach both of constitutional amendment (Art. 79 sec. 3 GG) and European integration (Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG). Therefore, the legitimacy given to state authority by elections may not be depleted by transfers of powers and tasks to the European level. Thus, the principle of sovereignty of the people (*Volkssouveränität*) (Art. 20 sec. 2 sentence 1 GG) is violated if institutions, bodies, offices and agencies of the European Union that are not adequately democratically legitimised through the European integration agenda laid down in the Act of Approval exercise public authority.

c) When conducting its identity review, the Federal Constitutional Court examines whether the principles declared by Art. 79 sec. 3 GG to be inviolable are affected by transfers of sovereign powers by the German legislature or by acts of institutions, bodies, offices and agencies of the European Union. This concerns the protection of the fundamental rights' core of human dignity (Art. 1 GG) as well as the fundamental principles that characterise the principles of democracy, of the rule of law, of the social state, and of the federal state within the meaning of Art. 20 GG.

When conducting its *ultra vires* review, the Federal Constitutional Court (merely) examines whether acts of institutions, bodies, offices and agencies of the European Union are covered by the European integration agenda (Art. 23 sec. 2 sentence 2 GG), and thus by the precedence of application of European Union law. Finding an act to be *ultra vires* requires – irrespective of the area concerned – that it manifestly exceed the competences transferred to the European Union.

d) Similar to the duties to protect (*Schutzpflichten*) mandated by the fundamental rights, the re-responsibility with respect to European integration (*Integrationsverantwortung*) requires the constitutional organs to protect and promote the citizens' rights protected by Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 sec. 2 sentence 1 GG if the citizens are not themselves able to ensure the integrity of their rights. Therefore, the constitutional organs' obligation to fulfil their responsibility with respect to European integration is paralleled by a right of the voters enshrined in Art. 38 sec. 1 sentence 1 GG. This right requires the constitutional organs to ensure that the drop in influence (*Einflussknick*) and the restrictions on the voters' "right to democracy" that come with the implementation of the European integration agenda do not extend further than is justified by the transfer of sovereign powers to the European Union.

In principle, duties to protect are violated only if no protective measures are taken at all, if measures taken are manifestly unsuitable or completely inadequate, or if they fall considerably short of the protection's aim. This means for the responsibility with respect to European integration (*Integrationsverantwortung*) that, if institutions, bodies, offices and agencies of the European Union exceed their competences in a manifest and structurally relevant manner or violate the constitutional identity in other ways, the constitutional organs must actively work towards respect of the European integration agenda. They may – within the scope of their competences – be required to use legal or political means to work towards revocation of measures that are not covered by the European integration agenda as well as – as long as the measures continue to have effect – to take suitable measures to restrict the national effects of such measures as far as possible. Just like the duties of protection inherent in fundamental rights, the responsibility with respect to European integration (*Integrationsverantwortung*) may in certain legal and factual circumstances concretise in such a way that a specific duty to act results from it.

3. According to these standards and if the conditions listed below are met, the inaction on the part of the Federal Government and of the *Bundestag* with regard to the policy decision of the European Central Bank of 6 September 2012 does not violate the complainants' rights under Art. 38 sec. 1 sentence 1, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3. Furthermore, the *Bundestag*'s rights and obligations with regard to European integration (*Integrationsverantwortung*) – including its overall budgetary responsibility – are not impaired.

a) The Federal Constitutional Court bases its review on the interpretation of the OMT decision formulated by the Court of Justice in its judgment of 16 June 2015. The Court of Justice's finding that the policy decision on the OMT programme is within the bounds of the respective competences and does not violate the prohibition of monetary financing of the budget still remains within the mandate of the Court of Justice (Art. 19 sec. 1 sentence 2 TEU).

The Court of Justice bases its view to a large extent on the objectives of the OMT programme as indicated by the European Central Bank, on the means employed to achieve those objectives, and on the programme's effects on economic policy, which – according to the Court of Justice – are only indirect in nature. It bases its review not only on the policy decision of 6 September 2012 concerning the technical details, but derives further framework conditions – in particular from the principle of proportionality –, which set binding limits for any implementation of the OMT programme. Furthermore, the Court of Justice affirms that acts of the European Central Bank are not exempt from judicial review, in particular regarding whether the principles of conferral and proportionality are complied with.

b) Nevertheless, the manner of judicial specification of the Treaty (Treaty on the Functioning of the European Union) evidenced in the judgment of 16 June 2015 meets with serious objections on the part of the Senate. These objections concern the way the facts of the case were established, the way the principle of conferral was discussed,

and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted.

Firstly, the Court of Justice accepts the assertion that the OMT programme pursues a monetary policy objective without questioning or at least discussing and individually reviewing the soundness of the underlying factual assumptions, and without testing these assumptions with regard to the indications that evidently argue against a character of monetary policy.

Furthermore, – despite its own belief that economic and monetary policy overlap – the Court of Justice essentially relies on the objectives of the measure as indicated by the organ on review as well as on the recourse to the instrument of the purchase of government bonds enshrined in Art. 18 of the ESCB Statute when qualifying the OMT programme as an instrument belonging to the field of monetary policy.

Lastly, the Court of Justice provides no answer to the following issue: that the independence granted to the European Central Bank leads to a noticeable reduction in the level of democratic legitimation of its actions and should therefore give rise to restrictive interpretation and to particularly strict judicial review of the mandate of the European Central Bank. This holds all the more true if the principles of democracy and sovereignty of the people (*Volkssouveränität*) are affected – and thereby the constitutional identity of a Member State, which the European Union is required to respect.

c) Despite these concerns, if interpreted in accordance with the Court of Justice’s judgment, the policy decision on the OMT programme does not – within the meaning of the competence retained by the Federal Constitutional Court to review *ultra vires* acts – “manifestly” exceed the competences attributed to the European Central Bank. Although – unlike the Senate – the Court of Justice does not question the indicated objectives and evaluates each of the signs that the Senate holds to argue against the alleged objectives in an isolated manner instead of performing an overall evaluation, this is acceptable because on the level of the exercise of competences the Court of Justice has essentially performed the restrictive interpretation of the policy decision that the Senate’s request for a preliminary ruling of 14 January 2014 held to be possible.

The Court of Justice differentiates between the policy decision of 6 September 2012 on the one hand and the implementation of the programme on the other. With a view to the proportionality of the OMT programme and the fulfilment of the obligations to state reasons, it specifies additional compelling restrictions that apply to any implementation of the OMT programme and exceed the framework conditions indicated in the policy decision. Against this backdrop, one must assume that the Court of Justice considers the conditions it specified to be legally binding. In using procedural means to limit the ECB’s competences by reviewing whether the principle of proportionality has been observed, the Court of Justice takes up the issue of the nearly unlimited potential of the decision of 6 September 2012. The restrictive parameters developed by the Court of Justice do not completely remove the character of the OMT programme insofar as it encroaches upon economic policy. However, together with the conditions prescribed by the decision of 6 September 2012 – in particular the participation of Member States in adjustment programmes, Member States’ access to the bond market, and the focus on bonds with a short maturity – they make it appear acceptable to assume that the character of the OMT programme is at least to the largest extent monetary in kind.

d) If interpreted in accordance with the Court of Justice’s judgment, the policy decision on the technical framework conditions of the OMT programme as well as its possible implementation also do not manifestly violate the prohibition of monetary financing of the budget. Although the Court of Justice considers the policy decision to be permissible even without further specifications, its implementation must fulfil further conditions in order for the purchase programme to not violate Union law. Thusly interpreted, and when comprehensively assessed and evaluated, the OMT programme fulfils the requirements formulated by the Senate’s order of 14 January 2014 requesting a preliminary ruling by the Court of Justice.

e) Since, against this backdrop, the OMT programme constitutes an *ultra vires* act if the framework conditions defined by the Court of Justice are not met, the German *Bundesbank* may only participate in the programme’s implementation if and to the extent that the prerequisites defined by the Court of Justice are met; i.e. if

- purchases are not announced,
- the volume of the purchases is limited from the outset,

- there is a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted,
- the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds,
- purchased bonds are only in exceptional cases held until maturity and
- purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.

f) Their responsibility with respect to European integration does not require the Federal Government and the *Bundestag* to take action against the OMT programme in order to protect the overall budgetary responsibility of the *Bundestag*. If interpreted in accordance with the Court of Justice's judgment, the OMT programme does not present a constitutionally relevant threat to the *Bundestag's* right to decide on the budget. Therefore, it can currently also not be established that implementation of the OMT programme would pose a threat to the overall budgetary responsibility.

g) However, due to their responsibility with respect to European integration (*Integrationsverantwortung*), the Federal Government and the *Bundestag* are under a duty to closely monitor any implementation of the OMT programme. This compulsory monitoring shall determine not only whether the abovementioned conditions are met, but also whether there is a specific threat to the federal budget – deriving in particular from the volume and the risk structure of the purchased bonds, which may change even after their purchase.

## LECTURE 13: SAVING THE ECONOMIC AND MONETARY UNION OUTSIDE AND INSIDE THE EU LEGAL ORDER

The interventions by the ECB aimed at restoring confidence in European markets and sovereign debt of Eurozone Member States have never been considered sufficient to mitigate the negative effects of the Eurozone crisis. In order to do so, intervention mechanisms had to be created that would help in preventing a next crisis of the same kind. In the EU's system of conferred competences, however, the principle of conferral did not allow those intervention mechanisms to be created as a matter of EU law. As a result, new institutional frameworks have seen the light of day outside the EU legal order. The establishment of a European Stability Mechanism (ESM) constitutes a prime example of this. At the same time, the EU legal order also wanted to strengthen its regulatory framework, creating a capital markets union founded on a single rulebook. In the end, a hybrid legal framework emerges, containing both classical EU law instruments and tools created outside the formal scope of the EU legal order. In this lecture, we will explore those mechanisms and the interaction between new frameworks and the EU legal order.

### Materials to read:

- Treaty establishing the European Stability Mechanism, signed on 29 February 2012, available on [www.esm.europa.eu/pdf/ESM%20Treaty%20consolidated%2013-03-2014.pdf](http://www.esm.europa.eu/pdf/ESM%20Treaty%20consolidated%2013-03-2014.pdf) (via eCampus)
- Court of Justice, 27 November 2012, Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756.
- Communication from the Commission to the European Parliament, the Council and the European Central Bank, On steps towards Completing Economic and Monetary Union (COM/2015/0600 final).
  
- P. Craig, “Pringle: legal reasoning, text, purpose and teleology”, 20 *Maastricht Journal of European and Comparative Law* (2013), 3-11 (via eCampus).
- B. De Witte, “Euro crisis responses and the EU legal order: increased institutional variation or constitutional mutation?”, 11 *European Constitutional Law Review* (2013), 434-457 (via eCampus).

### Lecture 13 outline:

- a. Strengthening the Eurozone for the future: the ESM
  1. Bailing out Member States and the no-bail out clause
  2. Public international law solutions
  3. A temporary European Financial Stability Mechanism
  4. A temporary European Financial Stability Facility
  5. Modifying the Treaty framework
  6. Establishing a European Stability Mechanism
  7. The functioning of the European Stability Mechanism
  8. The future of the European Stability Mechanism

- b. Beyond the ESM: a stronger EMU
  - 1. Lack of sufficiently powerful budgetary control as reason for the crisis
  - 2. More convergence and stability in the Eurozone: an ex-ante focus
  - 3. A strict and clear 'European semester' and tight budgetary control
  - 4. Towards a dense single rulebook for financial market operators
  - 5. A Capital Markets Union
- c. A hybrid legal framework?
  - 1. Inside and outside the EU legal order
  - 2. Pragmatism over principles?
  - 3. Living with hybridity: practical problems
- d. Enhancing coherence within hybridity
  - 1. Treaty modifications
  - 2. Public international law techniques
  - 3. Pragmatism over coherence?
  - 4. The role of law in the setup of post-crisis rescue, resolution and stability mechanisms

Questions for discussion:

- Distinguish between different interpretations of the *Pringle* judgment. What did motivate the Court of Justice to consider the ESM Treaty to be adopted on a correct legal basis? Did the Court's reasoning strike you as convincing?
- How does EU law ensure coherence with the extra-legal ESM frameworks? What legal tools could be relied on to enhance such coherence?

**Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General***

In Case C-370/12,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 31 July 2012, received at the Court on 3 August 2012, in the proceedings

**Thomas Pringle**

v

**Government of Ireland,**

**Ireland,**

**The Attorney General,**

THE COURT (Full Court),

[...]

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns, first, the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p. 1), and, secondly, the interpretation of Articles 2 TEU, 3 TEU, 4(3) TEU, 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principles of effective judicial protection and legal certainty.

2 The reference was made in an appeal against a judgment of the High Court (Ireland) in proceedings brought by Mr Pringle, a member of the Irish Parliament, against the Government of Ireland, Ireland and the Attorney General seeking a declaration, first, that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 constitutes an unlawful amendment of the FEU Treaty and, secondly, that by ratifying, approving or accepting the Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded in Brussels on 2 February 2012 ('the ESM Treaty'), Ireland would undertake obligations incompatible with the Treaties on which the European Union is founded.

**I – Legal context**

*A – Decision 2011/199*

3 On 16 December 2010 the Belgian Government submitted, in accordance with the first subparagraph of Article 48(6) TEU, a proposal for the revision of Article 136 TFEU which consisted of adding a paragraph 3 to that article.

4 The European Parliament, the European Commission and the European Central Bank ('the ECB') each issued an opinion on the proposal, on 23 March, 15 February and 17 March 2011 respectively. Decision 2011/199 was adopted on 25 March 2011.

5 Recitals 2, 4 and 5 of the preamble to that decision are as follows:

‘(2) At the meeting of the European Council of 28 and 29 October 2010, the Heads of State or Government agreed on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invited the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect.

...

(4) The stability mechanism will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole as have been experienced in 2010, and hence help preserve the economic and financial stability of the Union itself. At its meeting of 16 and 17 December 2010, the European Council agreed that, as this mechanism is designed to safeguard the financial stability of the euro area as [a] whole, Article 122(2) of the [FEU Treaty] will no longer be needed for such purposes. The Heads of State or Government therefore agreed that it should not be used for such purposes.

(5) On 16 December 2010, the European Council decided to consult, in accordance with Article 48(6), second subparagraph, of the TEU, the European Parliament and the Commission, on the proposal. It also decided to consult the [ECB]. ...’

6 Article 1 of Decision 2011/199 provides:

‘The following paragraph shall be added to Article 136 of the [FEU] Treaty:

“3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”’

7 Under Article 2 of Decision 2011/199:

‘Member States shall notify the Secretary-General of the European Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements.

This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph.’

#### B – *The ESM Treaty*

8 The contracting parties to the ESM Treaty are the Member States whose currency is the euro.

9 Recitals 1 and 16 of the preamble to the ESM Treaty are as follows:

‘(1) The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism (“ESM”) will assume the tasks currently fulfilled by the European Financial Stability Facility (“EFSF”) and the European Financial Stabilisation Mechanism (“EFSM”) in providing, where needed, financial assistance to euro area Member States.

...

(16) Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 [TFEU].’

10 Article 1 of the ESM Treaty, headed ‘Establishment and members’ provides:

‘1. By this Treaty, the Contracting Parties establish among themselves an international financial institution, to be named the “European Stability Mechanism” (“ESM”).

2. The Contracting Parties are ESM Members.’

11 Article 3 of the ESM Treaty describes the purpose of the ESM, whose maximum lending capacity is initially to be fixed by Article 39 of that treaty at EUR 500 000 million, as follows:

‘The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.’

12 Article 4(1), (3) and (4), first subparagraph, of the ESM Treaty state:

‘1. The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director and other dedicated staff as may be considered necessary.

...

3. The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. Abstentions do not prevent the adoption of a decision by mutual agreement.

4. By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. ...’

13 Article 5(3) of the ESM Treaty provides that ‘the Member of the European Commission in charge of economic and monetary affairs and the President of the ECB, as well as the President of the Euro Group (if he or she is not the Chairperson or a Governor) may participate in the meetings of the Board of Governors [of the ESM] as observers’.

14 Under Article 5(7)(m) of the ESM Treaty, the Board of Governors is to take decisions by qualified majority ‘on a dispute, in accordance with Article 37(2)’.

15 Article 6(2) of the ESM Treaty states that ‘the Member of the European Commission in charge of economic and monetary affairs and the President of the ECB may appoint one observer each [to the ESM Board of Directors]’.

16 Article 8(5) of the ESM Treaty provides:

‘The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. ...’

17 Article 12 of the ESM Treaty defines the principles governing the provision of stability support and states in paragraph 1:

‘If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.’

18 The procedure for granting stability support to an ESM Member is described in Article 13 the ESM Treaty as follows:

‘1. An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:

(a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);

(b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the [International Monetary Fund (IMF)];

(c) to assess the actual or potential financing needs of the ESM Member concerned.

2. On the basis of the request of the ESM Member and the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an “MoU”) detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the [FEU Treaty], in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 and approval by the Board of Governors.’

5. The Board of Directors shall approve the financial assistance facility agreement detailing the financial aspects of the stability support to be granted and, where applicable, the disbursement of the first tranche of the assistance.

6. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner.

7. The European Commission – in liaison with the ECB and, wherever possible, together with the IMF – shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.’

19 The ESM may grant support to an ESM Member by means of the instruments provided for in Articles 14 to 18 of the ESM Treaty, namely financial assistance in the form of a precautionary credit line (Article 14) and in the form of loans (Articles 15 and 16), purchase of bonds issued by an ESM Member on the primary market (Article 17) and operations on the secondary market in relation to bonds issued by an ESM Member (Article 18).

20 In accordance with Article 20(1) of the ESM Treaty, ‘[w]hen granting stability support, the ESM shall aim to fully cover its financing and operating costs and shall include an appropriate margin’.

21 Article 25(2) of the ESM Treaty provides:

‘If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.’

22 Under Article 32(2) of the ESM Treaty, the ESM is to have full legal personality.

23 Article 37 of the ESM Treaty, headed ‘Interpretation and dispute settlement’, states:

‘1. Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall be submitted to the Board of Directors for its decision.

2. The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

3. If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.’

## II – The background to the main proceedings and the questions referred for a preliminary ruling

24 On 13 April 2012 Mr Pringle brought before the High Court (Ireland) an action against the defendants in the main proceedings in support of which he claimed, first, that Decision 2011/199 was not lawfully adopted pursuant to the simplified revision procedure provided by Article 48(6) TEU because it entails an alteration of the competences of the European Union contrary to the third paragraph of Article 48(6) TEU and that Decision 2011/199 is inconsistent with provisions of the EU and FEU Treaties concerning economic and monetary union and with general principles of European Union law.

25 Mr Pringle further claimed that Ireland, by ratifying, approving or accepting the ESM Treaty, would undertake obligations which would be in contravention of provisions of the EU and FEU Treaties concerning economic and monetary policy and would directly encroach on the exclusive competence of the Union in relation to monetary policy. He claimed that by establishing the ESM the Member States whose currency is the euro are creating for themselves an autonomous and permanent international institution with the objective of circumventing the prohibitions and restrictions laid down by the provisions of the FEU Treaty in relation to economic and monetary policy. Further, he claimed that the ESM Treaty confers on the Union’s institutions new competences and tasks which are incompatible with their functions as defined in the EU and FEU Treaties. Lastly, he claimed that the ESM Treaty was incompatible with the general principle of effective judicial protection and with the principle of legal certainty.

26 By a judgment of 17 July 2012 the High Court dismissed Mr Pringle’s action in its entirety.

27 On 19 July 2012 Mr Pringle brought an appeal against that judgment before the referring court.

28 In those circumstances the Supreme Court decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

‘(1) Is ... Decision 2011/199... valid:

– having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and, in particular, whether the proposed amendment to Article 136 TFEU involved an increase in the competences conferred on the Union in the Treaties?

– having regard to the content of the proposed amendment, in particular whether it involves any violation of the Treaties or of the general principles of law of the Union?

(2) Is a Member State of the European Union whose currency is the euro, having regard to

- Articles 2 and 3 TEU and the provisions of Part Three, Title VIII, TFEU, and in particular Articles 119, 120, 121, 122, 123, 125, 126, and 127 TFEU;
- the exclusive competence of the Union in monetary policy as set out in Article 3(1)(c) TFEU and in concluding international agreements falling within the scope of Article 3(2) TFEU;
- the competence of the Union in coordinating economic policy, in accordance with Article 2(3) TFEU and Part Three, Title VIII, TFEU;
- the powers and functions of Union institutions pursuant to principles set out in Article 13 TEU;
- the principle of sincere cooperation laid down in Article 4(3) TEU;
- the general principles of Union law including in particular the general principle of effective judicial protection and the right to an effective remedy as provided under Article 47 of the Charter of Fundamental Rights of the European Union [‘the Charter’] and the general principle of legal certainty,

entitled to enter into and ratify an international agreement such as the ESM Treaty?

(3) If ... Decision [2011/199] is held valid, is the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty subject to the entry into force of that Decision?’

### III – Consideration of the questions referred for a preliminary ruling

#### A – *The first question*

29 By its first question, the referring court seeks to ascertain whether Decision 2011/199 is valid in so far as it amends Article 136 TFEU by providing for the insertion, on the basis of the simplified revision procedure under Article 48(6) TEU, of an Article 136(3) relating to the establishment of a stability mechanism.

#### 1. The jurisdiction of the Court

30 Ireland, the governments of the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Kingdom of the Netherlands, the Republic of Austria and the Slovak Republic, the European Council and the Commission submit that the jurisdiction of the Court to examine the first question is limited, if not excluded, because the question relates to the validity of primary law. They contend that the Court has no power under Article 267 TFEU to assess the validity of provisions of the Treaties.

31 In that regard, first, it must be borne in mind that the question of validity concerns a decision of the European Council. Since the European Council is one of the Union’s institutions listed in Article 13(1) TEU and since the Court has jurisdiction, under indent (b) of the first paragraph of Article 267 TFEU ‘to give preliminary rulings concerning ... the validity ... of acts of the institutions’, the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council.

32 Next, it must be stated that Decision 2011/199 concerns the insertion of a new provision of primary law in the FEU Treaty, namely paragraph 3 of Article 136 TFEU.

33 As submitted by Ireland and the governments and institutions mentioned in paragraph 30 of this judgment, it is true that, in accordance with indent (a) of the first paragraph of Article 267 TFEU, the examination of the validity of primary law does not fall within the Court’s jurisdiction. Nonetheless, after the entry into force of the Treaty of Lisbon, which introduced, in addition to the ordinary procedure for the revision of the FEU Treaty, a simplified revision procedure under Article 48(6) TEU, the question arises whether the Court is required to ensure that the Member States, when they undertake a revision of the FEU Treaty using that simplified procedure, comply with the conditions laid down by that provision.

34 In that regard, it must be recalled that, under the first subparagraph of Article 48(6) TEU, the simplified revision procedure concerns ‘revising all or part of the provisions of Part Three of the [FEU] Treaty, relating to the internal policies and actions of the Union’. The second subparagraph of Article 48(6) confirms that ‘[t]he European Council may adopt a decision amending all or part of the provisions of Part Three of the [FEU] Treaty’. Under the third subparagraph of Article 48(6), such a decision ‘shall not increase the competences conferred on the Union in the Treaties’.

35 Since it is necessary that compliance with those conditions be monitored in order to establish whether the simplified revision procedure is applicable, it falls to the Court, as the institution which, under the first subparagraph of Article 19(1) TEU, is to ensure that the law is observed in the interpretation and application of the Treaties, to examine the validity of a decision of the European Council based on Article 48(6) TEU.

36 To that end, it is for the Court to verify, first, that the procedural rules laid down in Article 48(6) TEU were followed and, secondly, that the amendments decided upon concern only Part Three of the FEU Treaty, which implies that they do not entail any amendment of provisions of another part of the Treaties on which the European Union is founded, and that they do not increase the competences of the Union.

37 It follows from the foregoing that the Court has jurisdiction to examine the validity of Decision 2011/199 in the light of the conditions laid down in Article 48(6) TEU.

## 2. Admissibility

38 Ireland claims that the question referred for a preliminary ruling is inadmissible because, first, in accordance with the case-law established in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, the applicant in the main proceedings should have brought a direct action under Article 263 TFEU for the annulment of Decision 2011/199 within the time-limit for proceedings laid down in the sixth paragraph of that article and, secondly, he should in any event have brought his action to challenge the validity of that decision before the national courts within a reasonable time. Mr Pringle did not commence the main proceedings until 13 April 2012, although Decision 2011/199 was adopted on 25 March 2011.

39 In that regard, it must be recalled that any party has the right, in proceedings before the national courts, to plead, before the court hearing the case, the invalidity of an act of the Union and to ask that court, which has no jurisdiction itself to declare the act invalid, to put that question to the Court by means of a reference for a preliminary ruling (see Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 35; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 40, and Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 45). It must be emphasised that under indent (b) of the first paragraph of Article 267 TFEU the admissibility of a reference for a preliminary ruling made on the basis of that provision is not subject to a condition that such a party has complied with a time-limit within which a case challenging the validity of the Union act concerned must be brought before the national court or tribunal with jurisdiction. In the absence of regulation by the Union, time-limits for the introduction of actions before national courts are to be determined by the national rules of procedure and it is exclusively for the courts and tribunals of the Member States to assess whether such time-limits have been respected in the main proceedings.

40 It is clear from the order for reference both that the High Court rejected Ireland’s argument that the action brought before it was out of time and that the referring court found it unnecessary to re-consider the matter.

41 Nonetheless, the point must be made that the recognition of a party’s right to plead the invalidity of an act of the Union presupposes that that party did not have the right to bring, under Article 263 TFEU, a direct action for the annulment of that act (see, to that effect, *TWD Textilwerke Deggendorf*, paragraph 23; *E and F*, paragraph 46, and Case C-494/09 *Bolton Alimentari* [2011] ECR I-647, paragraph 22). Were it to be accepted that a party who beyond doubt had standing to institute proceedings under the fourth paragraph of Article 263 TFEU for the annulment of an act of the Union could, after the expiry of the time-limit for bringing proceedings laid down in the sixth paragraph of Article 263 TFEU, challenge before the national courts the validity of that act, that would amount to enabling the person concerned to circumvent the fact that that act is final as against him once the time-limit for his bringing an action has expired (see, to that effect, *TWD Textilwerke Deggendorf*, paragraphs 18 and 24; *E and F*, paragraphs 46 and 48, and *Bolton Alimentari*, paragraphs 22 and 23).

42 In the present case, it is not evident that the applicant in the main proceedings had beyond doubt standing to bring an action for the annulment of Decision 2011/199 under Article 263 TFEU.

43 Accordingly, Ireland's argument that the first question should be declared to be inadmissible cannot be accepted.

44 It follows from the foregoing that the first question is admissible.

### 3. Substance

45 It is necessary to examine, first, whether the amendment of the FEU Treaty envisaged by Decision 2011/199 concerns solely provisions of Part Three of the FEU Treaty and, secondly, whether it increases the competences conferred on the Union in the Treaties.

#### a) Whether the revision of the FEU Treaty concerns solely provisions of Part Three of that treaty

46 It must be stated that Decision 2011/199 amends a provision of Part Three of the FEU Treaty, namely Article 136 TFEU, and thereby formally satisfies the condition stated in the first and second subparagraphs of Article 48(6) TEU that the simplified revision procedure may concern solely provisions of that Part Three.

47 However, the referring court is unsure whether the revision of the FEU Treaty does not also affect provisions of Part One of that treaty. It seeks to ascertain whether Decision 2011/199 encroaches on the competence of the Union in the area of monetary policy and in the area of the coordination of the economic policies of the Member States.

48 In that regard, it must be recalled that, under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy. The monetary policy of the Union is the subject of, inter alia, Article 3(1)(c) TFEU and Articles 127 TFEU to 133 TFEU.

49 Further, under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union.

50 Article 3(1)(c) TFEU states that the Union is to have exclusive competence in the area of monetary policy for the Member States whose currency is the euro.

51 Moreover, under Article 119(1) TFEU, the activities of the Member States and the Union are to include the adoption of an economic policy based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, conducted in accordance with the principle of an open market economy with free competition. The Union's economic policy is the subject of Articles 2(3) TFEU, 5(1) TFEU and 120 TFEU to 126 TFEU.

52 It must therefore be determined, first, whether Decision 2011/199, in so far as it amends Article 136 TFEU by adding a paragraph 3 which provides that '[t]he Member States whose currency is the euro may establish a stability mechanism', grants to Member States a competence in the area of monetary policy for the Member States whose currency is the euro. If that were the case, the Treaty amendment concerned would encroach on the Union's exclusive competence as laid down in Article 3(1)(c) TFEU and, since the latter provision is to be found in Part One of the FEU Treaty, such an amendment could be made only by using the ordinary revision procedure provided for in Article 48(2) to (5) TEU.

53 In that regard, it must first be observed that the FEU Treaty, which contains no definition of monetary policy, refers, in its provisions relating to that policy, to the objectives, rather than to the instruments, of monetary policy.

54 Under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that the European System of Central Banks ('ESCB') is to support the general economic policies in the Union, with a view to contributing to the achievement

of its objectives, as laid down in Article 3 TEU. Further, under Article 139(2) TFEU, Article 127(1) TFEU is not to apply to Member States with a derogation within the meaning of Article 139(1).

55 It is necessary therefore to examine whether or not the objectives to be attained by the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 and the instruments provided to that end fall within monetary policy for the purposes of Articles 3(1)(c) TFEU and 127 TFEU.

56 As regards, first, the objective pursued by that mechanism, which is to safeguard the stability of the euro area as a whole, that is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy. Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.

57 As regards, secondly, the instruments envisaged in order to attain the objective concerned, Decision 2011/199 states only that the stability mechanism will grant any required financial assistance; it contains no other information on the operation of that mechanism. The grant of financial assistance to a Member State however clearly does not fall within monetary policy.

58 It must next be stated that, as is confirmed moreover by the conclusions of the European Council of 16 and 17 December 2010 to which reference is made in recital 4 of the preamble to Decision 2011/199, the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union. Constituted by various regulations of the European Parliament and the Council adopted on 16 November 2011, namely Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L 306, p. 1), Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ 2011 L 306, p. 8), Regulation (EU) No 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ 2011 L 306, p. 12), Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances (OJ 2011 L 306, p. 25); by Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 2011 L 306, p. 33), and by Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ 2011 L 306, p. 41), that framework establishes closer coordination and surveillance of the economic and budgetary policies conducted by the Member States and is intended to consolidate macroeconomic stability and the sustainability of public finances.

59 While the provisions of the regulatory framework referred to in the preceding paragraph and the provisions in the chapter of the FEU Treaty relating to economic policy, in particular Articles 123 TFEU and 125 TFEU, are essentially preventive, in that their objective is to reduce so far as possible the risk of public debt crises, the objective of establishing the stability mechanism is the management of financial crises which, notwithstanding such preventive action as might have been taken, might nonetheless arise.

60 In the light of the objectives to be attained by the stability mechanism the establishment of which is envisaged by Article 1 of Decision 2011/199, the instruments provided in order to achieve those objectives and the close link between that mechanism, the provisions of the FEU Treaty relating to economic policy and the regulatory framework for strengthened economic governance of the Union, it must be concluded that the establishment of that mechanism falls within the area of economic policy.

61 That finding is not called into question by the fact that the ECB issued, on 17 March 2011, an opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 C 140, p. 8). Although it must be accepted that the second subparagraph of Article 48(6) TEU provides that '[t]he European Council shall act by unanimity, after consulting ... the [ECB] in the case of institutional changes in the monetary area', the fact remains that it is clearly apparent from the wording of recital 5 of the preamble to Decision 2011/199 that the European Council consulted the ECB on its own initiative and not because it was under any obligation under that provision to do so.

62 In any event, the consultation of the ECB on the draft of Decision 2011/199 cannot affect the nature of the envisaged stability mechanism.

63 Consequently, Article 1 of Decision 2011/199 which, by the addition of a paragraph 3 to Article 136 TFEU, envisages the establishment of a stability mechanism, is not capable of affecting the exclusive competence held by the Union under Article 3(1)(c) TFEU in the area of monetary policy for the Member States whose currency is the euro.

64 Secondly, as regards whether Decision 2011/199 affects the Union's competence in the area of the coordination of the Member States' economic policies, it must be observed that, since Articles 2(3) and 5(1) TFEU restrict the role of the Union in the area of economic policy to the adoption of coordinating measures, the provisions of the EU and FEU Treaties do not confer any specific power on the Union to establish a stability mechanism of the kind envisaged by Decision 2011/199.

65 Admittedly, Article 122(2) TFEU confers on the Union the power to grant *ad hoc* financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. However, as emphasised by the European Council in recital 4 of the preamble to Decision 2011/199, Article 122(2) TFEU does not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by that decision. The fact that the mechanism envisaged is to be permanent and that its objectives are to safeguard the financial stability of the euro area as a whole means that such action cannot be taken by the Union on the basis of that provision of the FEU Treaty.

66 Further, even if Article 143(2) TFEU also enables the Union, subject to certain conditions, to grant mutual assistance to a Member State, that provision covers only Member States whose currency is not the euro.

67 As to whether the Union could establish a stability mechanism comparable to that envisaged by Decision 2011/199 on the basis of Article 352 TFEU, suffice it to say that the Union has not used its powers under that article and that, in any event, that provision does not impose on the Union any obligation to act (see Case 22/70 *Commission v Council* ('ERTA') [1971] ECR 263, paragraph 95).

68 Consequently, having regard to Articles 4(1) TEU and 5(2) TEU, the Member States whose currency is the euro are entitled to conclude an agreement between themselves for the establishment of a stability mechanism of the kind envisaged by Article 1 of Decision 2011/199 (see, to that effect, Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paragraph 16; Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 26, and Case C-91/05 *Commission v Council* [2008] ECR I-3651, paragraph 61).

69 However, those Member States may not disregard their duty to comply with European Union law when exercising their competences in that area (see Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 32). However, the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU, the article affected by the revision of the FEU Treaty, is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies.

70 It follows from all the foregoing that Decision 2011/199 satisfies the condition laid down in the first and second subparagraphs of Article 48(6) TEU that a revision of the FEU Treaty by means of the simplified revision procedure may concern only provisions of Part Three of the FEU Treaty.

b) Whether the revision of the FEU Treaty increases the competences conferred on the Union in the Treaties

71 The referring court further seeks to ascertain whether Decision 2011/199 satisfies the condition laid down in Article 48(6) TEU that a revision of the FEU Treaty by means of the simplified procedure may not have the effect of increasing the competences of the Union.

72 In that regard, it should be recalled that Article 136(3) TFEU, the insertion of which is provided for by Article 1 of Decision 2011/199, confirms that Member States have the power to establish a stability mechanism and is further intended to ensure, by providing that the granting of any financial assistance under that mechanism will be made subject to strict conditionality, that the mechanism will operate in a way that will comply with European Union law.

73 That amendment does not confer any new competence on the Union. The amendment of Article 136 TFEU which is effected by Decision 2011/199 creates no legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the amendment of the FEU Treaty.

74 Even though the ESM Treaty makes use of the Union's institutions, in particular the Commission and the ECB, that fact is not, in any event, capable of affecting the validity of Decision 2011/199, which in itself provides only for the establishment of a stability mechanism by the Member States and is silent on any possible role for the Union's institutions in that connection.

75 It follows that Decision 2011/199 does not increase the competences conferred on the Union in the Treaties.

76 It follows from all the foregoing that the answer to the first question is that examination of that question has disclosed nothing capable of affecting the validity of Decision 2011/199.

#### B – *The second question*

77 The second question concerns the interpretation of Articles 2 TEU, 3 TEU, 4(3) TEU and 13 TEU, of Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU, and 125 TFEU to 127 TFEU, and of the general principles of effective judicial protection and legal certainty. The referring court seeks to ascertain whether those articles and principles preclude a Member State whose currency is the euro from concluding and ratifying an agreement such as the ESM Treaty.

##### 1. The jurisdiction of the Court

78 The Spanish Government maintains that, since the Union is not a contracting party to the ESM Treaty, the Court has no jurisdiction to interpret, in the context of a reference for a preliminary ruling, the provisions of that treaty (see Case C-132/09 *Commission v Belgium* [2010] ECR I-8695, paragraph 43 and case-law cited).

79 In that regard, suffice it to say that the second question, by its very wording, concerns the interpretation of various provisions of European Union law and not the interpretation of provisions of the ESM Treaty.

80 The Court has jurisdiction to provide the national court with all the criteria for the interpretation of European Union law which may enable it to assess whether the provisions of the ESM Treaty are compatible with European Union law (see, to that effect, Case C-489/09 *Vandoorne* [2011] ECR I-225, paragraph 25 and case-law cited).

81 The Court therefore has jurisdiction to examine the second question.

##### 2. Admissibility

82 A number of the governments who submitted observations to the Court, along with the Commission, maintain that the second question is partly inadmissible because the referring court failed to provide any information as to how the interpretation of certain provisions and certain principles referred to in the second question is of any relevance to the outcome of the dispute before it.

83 It should first be recalled that, in accordance with settled case-law of the Court, the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court and national courts by means of which the Court provides national courts with the criteria for the interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22; Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20; and the order of 13 January 2010 in Joined Cases C-292/09 and C-293/09 *Calestani and Lunardi*, paragraph 18).

84 The Court has previously held that the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary that the national court should give at least some explanation of the reasons for the choice of the European Union law provisions of which it requests an interpretation (order of 3 May 2012 in Case C-185/12 *Ciampaglia*, paragraph 5 and case-law cited).

85 Further, it must be emphasised in that regard that the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that governments of the Member States and other interested parties have the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under that provision, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case-file that may be sent to the Court by the national court (order of 23 March 2012 in Case C-348/11 *Thomson Sales Europe*, paragraph 49 and case-law cited).

86 In the present case, as stated by Ireland, the Slovak Government and the Commission, the order for reference gives no explanation of the relevance to the outcome of the dispute of the interpretation of Articles 2 TEU and 3 TEU. As maintained by the German, Spanish and French Governments and the Commission, the same is true of the interpretation of the general principle of legal certainty.

87 Consequently, the second question is inadmissible in so far as it concerns the interpretation of Articles 2 TEU and 3 TEU and the general principle of legal certainty.

88 Further, the Netherlands Government and the Commission express their uncertainty as to the direct effect of Articles 119 TFEU to 121 TFEU. Since those articles do not impose on Member States clear and unconditional obligations which may be relied on by individuals before the national courts, they contend that the question is inadmissible in so far as it concerns the interpretation of those articles. Ireland, which considers that none of the provisions referred to in the question has direct effect, maintains that the question is inadmissible in its entirety.

89 In that regard, in accordance with the Court's case-law, the Court has jurisdiction to give preliminary rulings concerning the interpretation of provisions of European Union law irrespective of whether or not they have direct effect (see Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-6995, paragraph 34 and case-law cited).

90 Further, it is clear that the purpose of the referring court's question is not to determine whether the applicant in the main proceedings can assert a right directly based on the articles concerned of the EU and FEU Treaties. The purpose of requesting criteria for interpretation from the Court is solely to enable the referring court to assess whether the provisions of the ESM Treaty are compatible with European Union law.

91 It follows from all the foregoing that the second question is admissible in so far as it concerns the interpretation of Articles 4(3) TEU and 13 TEU, of Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and of the general principle of effective judicial protection.

### 3. Substance

92 Interpretation is therefore required, first, of the provisions of the FEU Treaty relating to the Union's exclusive competence, namely Articles 3(1)(c) TFEU and 127 TFEU on the Union's monetary policy and Article 3(2) TFEU on the Union's competence for the conclusion of an international agreement, secondly, of provisions relating to the Union's economic policy, namely Articles 2(3) TFEU, 119 TFEU to 123 TFEU, 125 TFEU and 126 TFEU and, finally, of Articles 4(3) TEU and 13 TEU and the general principle of effective judicial protection.

a) Interpretation of provisions relating to the Union's exclusive competence

i) Interpretation of Articles 3(1)(c) TFEU and 127 TFEU

93 The referring court seeks to ascertain whether the stability mechanism established by the ESM Treaty falls under monetary policy and, accordingly, under the Union's exclusive competence. It follows from Article 3 of the ESM Treaty that its purpose is to support the stability of the euro. The referring court further refers to the argument of the applicant in the main proceedings that the grant of financial assistance to Member States whose currency is the euro or the recapitalisation of their financial institutions, and the necessary borrowing for that purpose, on the scale envisaged by the ESM Treaty, would increase the amount of euro currency in circulation. The Treaties on which the Union is founded confer on the ECB the exclusive power to regulate money supply in the euro area. The applicant argues that those Treaties do not allow a second entity to carry out such tasks and to act in parallel with the ECB, outside the framework of the European Union legal order. Further, an increase in money supply

has a direct influence on inflation. Consequently, the applicant claims that the activities of the ESM could have a direct impact on price stability in the euro area, which would go to the very core of the Union's monetary policy.

94 In that regard, as is apparent from paragraph 50 of this judgment, the Union has, under Article 3(1)(c) TFEU, an exclusive competence in the area of monetary policy for the Member States whose currency is the euro. Under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union. The objective pursued by the ESCB in general and the Eurosystem in particular is, in accordance with Articles 127(1) TFEU and 282(2) TFEU, to maintain price stability.

95 However, the activities of the ESM do not fall within the monetary policy which is the subject of those provisions of the FEU Treaty.

96 Under Articles 3 and 12(1) of the ESM Treaty, it is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members, namely Member States whose currency is the euro, who are experiencing or are threatened by severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. To that end, the ESM is not entitled either to set the key interest rates for the euro area or to issue euro currency, while the financial assistance which the ESM grants must be entirely funded – the provisions of Article 123(1) TFEU being respected – from paid-in capital or by the issue of financial instruments, as provided for in Article 3 of the ESM Treaty.

97 As is apparent from paragraph 56 of this judgment, any effect of the activities of the ESM on price stability is not such as to call into question that finding. Even if the activities of the ESM might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted.

98 It follows from the foregoing that Articles 3(1)(c) TFEU and 127 TFEU do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) Interpretation of Article 3(2) TFEU

99 The referring court asks whether the ESM Treaty is an international agreement the operation of which may affect the common rules on economic and monetary policy. To that end, the national court refers to recital 1 of the preamble to that treaty which states that the ESM will assume the tasks currently fulfilled by the EFSF and the EFSM.

100 In that regard, it must be recalled that, under Article 3(2) TFEU, the Union is to have 'exclusive competence for the conclusion of an international agreement when its conclusion ... may affect common rules or alter their scope'.

101 It follows also from that provision that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope. However, the arguments put forward in this context have not demonstrated that an agreement such as the ESM Treaty would have such effects.

102 First, since the EFSF was established by the Member States whose currency is the euro outside the framework of the Union, the assumption by the ESM of the tasks conferred on the EFSF is not such as to affect common rules of the Union or alter their scope.

103 Secondly, even if it is apparent from recital 1 of the preamble to the ESM Treaty that the ESM will, among other tasks, assume the tasks hitherto allocated temporarily to the EFSM, established on the basis of Article 122(2) TFEU, that fact is not such as to affect common rules of the Union or alter their scope.

104 The establishment of the ESM does not affect the power of the Union to grant, on the basis of Article 122(2) TFEU, *ad hoc* financial assistance to a Member State when it is found that that Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

105 Moreover, since neither Article 122(2) TFEU nor any other provision of the EU and FEU Treaties confers a specific power on the Union to establish a permanent stability mechanism such as the ESM (see paragraphs 64 to 66 of this judgment), the Member States are entitled, in the light of Articles 4(1) TEU and 5(2) TEU, to act in this area.

106 The conclusion and ratification of the ESM Treaty by the Member States whose currency is the euro therefore does not jeopardise in any way the objective pursued by Article 122(2) TEU or by Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118, p. 1), adopted on the basis of that provision, and does not prevent the Union from exercising its own competences in the defence of the common interest (see, to that effect, Case C-476/98 *Commission v Germany* [2002] ECR I-9855, paragraph 105).

107 Consequently, Article 3(2) TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

b) Interpretation of various provisions of the ESM Treaty relating to economic policy

i) Interpretation of Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU

108 The national court refers to the argument of the applicant in the main proceedings that the ESM Treaty constitutes an amendment which fundamentally subverts the legal order governing economic and monetary union and which is incompatible with European Union law. The applicant claims that it is clear from recital 2 in the preamble to Decision 2011/199 that the European Council itself considered that the establishment of a permanent stability mechanism required an amendment of the FEU Treaty. The applicant further claims that Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU confer on the Union's institutions the competence for the coordination of economic policy. The referring court also seeks to ascertain whether the ESM Treaty encroaches on the power of the Council of the European Union to issue recommendations under Article 126 TFEU and, in particular, whether 'conditionality' provided for by the ESM Treaty is the equivalent of the recommendations provided for by that article.

109 In that regard, first, it is apparent from paragraph 68 of this judgment that the Member States have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the Member States who are parties to such an agreement are consistent with European Union law.

110 Next, the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism. Under Articles 3 and 12(1) of the ESM Treaty, the purpose of the ESM is to mobilise funding and to provide financial stability support to ESM Members who are experiencing, or are threatened by, severe financing problems.

111 While it is true that, under Article 3, Article 12(1) and the first subparagraph of Article 13(3) of the ESM Treaty, the financial assistance provided to a Member State that is an ESM Member is subject to strict conditionality, appropriate to the financial assistance instrument chosen, which can take the form of a macro-economic adjustment programme, the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union.

112 The second subparagraph of Article 13(3) of the ESM Treaty expressly provides that the conditions attached to any stability support are to be 'fully consistent with the measures of economic policy coordination provided for in [the FEU Treaty]'. Further, it is apparent from Article 13(4) that the Commission is to check, before signing the MoU defining the conditionality attached to stability support, that the conditions imposed are fully consistent with the measures of economic policy coordination.

113 Lastly, nor does the ESM Treaty affect the competence of the Council of the European Union to issue recommendations on the basis of Article 126(7) and (8) TFEU to a Member State in which an excessive deficit exists. First, the ESM is not called upon to issue such recommendations. Secondly, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty provide that the conditions imposed on ESM Members who

receive financial assistance must be consistent with any recommendation which the Council might issue under the abovementioned provisions of the FEU Treaty.

114 It follows that Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) Interpretation of Article 122 TFEU

115 It must first be recalled that, under Article 122(1) TFEU, the Council of the European Union may decide, in a spirit of solidarity between Member States, upon measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

116 Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.

117 Next, in relation to Article 122(2) TFEU, the referring court, in order to assess whether the ESM encroaches on the competence attributed to the Union by that provision, asks whether that provision exhaustively defines the exceptional circumstances in which it is possible to grant financial assistance to Member States and whether that article empowers solely the Union's institutions to grant financial assistance.

118 In that regard, it must be stated that the subject-matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States. Under Article 122(2) TFEU, the Council of the European Union may grant, under certain conditions, such assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

119 The exercise by the Union of the competence conferred on it by that provision of the FEU Treaty is not affected by the establishment of a stability mechanism such as the ESM.

120 Further, nothing in Article 122 TFEU indicates that the Union has exclusive competence to grant financial assistance to a Member State.

121 It follows that the Member States remain free to establish a stability mechanism such as the ESM, provided however that, in its operation, that mechanism complies with European Union law and, in particular, with measures adopted by the Union in the area of coordination of the Member States' economic policies (see paragraphs 68 and 69 of this judgment). As is apparent from paragraphs 111 to 113 of this judgment, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty are intended to ensure that any financial assistance granted by the ESM will be consistent with such coordinating measures.

122 Consequently, Article 122 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

iii) Interpretation of Article 123 TFEU

123 Article 123 TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments.

124 The referring court asks whether the conclusion and ratification by the Member States whose currency is the euro of an agreement such as the ESM Treaty is not intended to circumvent the prohibition laid down in Article 123 TFEU since those Member States may not, either directly or through intermediary bodies created or recognised by them, derogate from European Union law or condone such a derogation.

125 In that regard, it must be held that Article 123 TFEU is addressed specifically to the ECB and the central banks of the Member States. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition.

126 It is apparent from Articles 3, 12(1) and 13 of the ESM Treaty that it is the ESM which grants financial assistance to an ESM Member when the conditions stated in those provisions are met. Accordingly, even if the Member States are acting via the ESM, the Member States are not derogating from the prohibition laid down in Article 123 TFEU, since that article is not addressed to them.

127 Moreover, there is no basis for the view that the funds provided by the ESM Members to the ESM might be derived from financial instruments prohibited by Article 123(1) TFEU.

128 Consequently, Article 123 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

#### iv) Interpretation of Article 125 TFEU

129 The referring court asks whether an agreement such as the ESM Treaty is in breach of the ‘no bail-out clause’ in Article 125 TFEU.

130 It must be stated at the outset that it is apparent from the wording used in Article 125 TFEU, to the effect that neither the Union nor a Member State are to ‘be liable for ... the commitments’ of another Member State or ‘assume [those commitments]’, that that article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.

131 That reading of Article 125 TFEU is supported by the other provisions in the chapter of the FEU Treaty relating to economic policy and, in particular, Articles 122 TFEU and 123 TFEU. First, Article 122(2) TFEU provides that the Union may grant *ad hoc* financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. If Article 125 TFEU prohibited any financial assistance whatever by the Union or the Member States to another Member State, Article 122 TFEU would have had to state that it derogated from Article 125 TFEU.

132 Secondly, Article 123 TFEU, which prohibits the ECB and the central banks of the Member States from granting ‘overdraft facilities or any other type of credit facility’, employs wording which is stricter than that used in the ‘no bail-out clause’ in Article 125 TFEU. The difference in the wording used in the latter article supports the view that the prohibition stated there is not intended to prohibit any financial assistance whatever to a Member State.

133 Accordingly, in order to determine which forms of financial assistance are compatible with Article 125 TFEU, it is necessary to have regard to the objective pursued by that article.

134 To that end, it must be recalled that the origin of the prohibition stated in Article 125 TFEU is to be found in Article 104b of the EC Treaty (which became Article 103 EC), which was inserted in the EC Treaty by the Treaty of Maastricht.

135 It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, pp. 24 and 54). The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union.

136 Given that that is the objective pursued by Article 125 TFEU, it must be held that that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. As is apparent from paragraph 5 of the ECB opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, the

activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.

137 However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.

138 As regards the ESM Treaty, it is clear, first, that the instruments for stability support of which the ESM may make use under Articles 14 to 18 of the ESM Treaty demonstrate that the ESM will not act as guarantor of the debts of the recipient Member State. The latter will remain responsible to its creditors for its financial commitments.

139 The granting of financial assistance to an ESM Member in the form of a credit line, in accordance with Article 14 of the ESM Treaty, or in the form of loans, in accordance with Articles 15 and 16 of the ESM Treaty, in no way implies that the ESM will assume the debts of the recipient Member State. On the contrary, such assistance amounts to the creation of a new debt, owed to the ESM by that recipient Member State, which remains responsible for its commitments to its creditors in respect of its existing debts. It should be observed in that regard that, under Article 13(6) of the ESM Treaty, any financial assistance granted on the basis of Articles 14 to 16 thereof must be repaid to the ESM by the recipient Member State and that, under Article 20(1) thereof, the amount to be repaid is to include an appropriate margin.

140 As regards the stability support facilities provided for in Articles 17 and 18 of the ESM Treaty, first, the purchase by the ESM of bonds issued by an ESM Member on the primary market is comparable to the granting of a loan. For the reasons set out in the preceding paragraph, the ESM does not by purchasing such bonds assume the debts of the recipient Member State.

141 Next, as regards the purchase on the secondary market of bonds issued by an ESM Member, it is clear that, in such a situation, the issuing Member State remains solely answerable to repay the debts in question. The fact that the ESM as the purchaser on that market of bonds issued by an ESM Member pays a price to the holder of those bonds, who is the creditor of the issuing ESM Member, does not mean that the ESM becomes responsible for the debt of that ESM Member to that creditor. That price may be significantly different from the value of the claims contained in those bonds, since the price depends on the rules of supply and demand on the secondary market of bonds issued by the ESM Member concerned.

142 Secondly, the ESM Treaty does not provide that stability support will be granted as soon as a Member State whose currency is the euro is experiencing difficulties in obtaining financing on the market. In accordance with Articles 3 and 12(1) of the ESM Treaty, stability support may be granted to ESM Members which are experiencing or are threatened by severe financing problems only when such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States and the grant of that support is subject to strict conditionality appropriate to the financial assistance instrument chosen.

143 It is apparent from paragraphs 111 and 121 of this judgment that the purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the coordination of Member States' economic policies, those measures being designed, *inter alia*, to ensure that the Member States pursue a sound budgetary policy.

144 Thirdly, the national court refers to an argument of the applicant in the main proceedings that the rules relating to capital calls stated in Article 25(2) of the ESM Treaty are incompatible with Article 125 TFEU in that they imply that the ESM Members guarantee the debt of the defaulting member.

145 In that regard, it must be noted that Article 25(2) of the ESM Treaty provides that where a Member State that is an ESM Member fails to pay the sum called for, a revised increased capital call is to be made to all the other ESM Members. However, under that same provision, the defaulting ESM Member State remains bound to pay its part of the capital. Accordingly, the other ESM Members do not act as guarantors of the debt of the defaulting ESM Member.

146 Consequently, a mechanism such as the ESM and the Member States who participate in it are not liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU.

147 It follows that Article 125 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

c) Interpretation of Article 4(3) TEU

148 Pursuant to the principle of sincere cooperation, established in Article 4(3) TEU, Member States are, *inter alia*, to refrain from any measure which could jeopardise the attainment of the Union's objectives.

149 The national court refers to the argument of the applicant in the main proceedings that the establishment of the ESM is incompatible with the provisions of the FEU Treaty relating to economic and monetary policy and, consequently, also with the principle of sincere cooperation contained in Article 4(3) TEU.

150 Such an argument cannot be accepted.

151 It is apparent from paragraphs 93 to 98 and 108 to 147 of this judgment that the establishment of a stability mechanism, such as the ESM, does not infringe the provisions of the FEU Treaty relating to economic and monetary policy. Further, as is apparent from paragraphs 111 to 113 of this judgment, the ESM Treaty contains provisions which ensure that, in carrying out its tasks, the ESM will comply with European Union law.

152 It follows that Article 4(3) TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

d) Interpretation of Article 13 TEU

153 Article 13(2) TEU provides that each institution of the Union is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

154 The referring court asks whether the allocation, by the ESM Treaty, of new tasks to the Commission, the ECB and the Court is compatible with their powers as defined in the Treaties. It is appropriate to examine separately the role which the Commission and the ECB, on the one hand, and the Court, on the other, will be called upon to play under the ESM Treaty.

i) The role allocated to the Commission and the ECB

155 The ESM Treaty allocates various tasks to the Commission and to the ECB.

156 As regards the Commission, those tasks consist of assessing requests for stability support (Article 13(1)), assessing their urgency (Article 4(4)), negotiating an MoU detailing the conditionality attached to the financial assistance granted (Article 13(3)), monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)), and participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)).

157 The tasks allocated to the ECB consist of assessing the urgency of requests for stability support (Article 4(4)), participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)) and, in liaison with the Commission, assessing requests for stability support (Article 13(1)), negotiating an MoU (Article 13(3)) and monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)).

158 In that regard, it is apparent from the case-law of the Court that the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance (see *Parliament v Council and Commission*, paragraphs 16, 20 and 22, and *Parliament v Council*, paragraphs 26, 34 and 41), provided that those tasks do not alter the essential character of

the powers conferred on those institutions by the EU and FEU Treaties (see, inter alia, Opinion 1/92 [1992] ECR I-2821, paragraphs 32 and 41; Opinion 1/00 [2002] ECR I-3493, paragraph 20; and Opinion 1/09 [2011] ECR I-1137, paragraph 75).

159 The duties allocated to the Commission and to the ECB in the ESM Treaty constitute tasks of the kind referred to in the preceding paragraph.

160 First, the activities of the ESM fall under economic policy. The Union does not have exclusive competence in that area.

161 Secondly, the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM.

162 Thirdly, the tasks conferred on the Commission and the ECB do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.

163 As regards the Commission, it is stated in Article 17(1) TEU that the Commission ‘shall promote the general interest of the Union’ and ‘shall oversee the application of Union law’.

164 It must be recalled that the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole. By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it, as provided in Article 13(3) and (4) of that treaty, to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law.

165 As regards the tasks allocated to the ECB by the ESM Treaty, they are in line with the various tasks which the FEU Treaty and the Statute of the ESCB [and of the ECB] confer on that institution. By virtue of its duties within the ESM Treaty, the ECB supports the general economic policies in the Union, in accordance with Article 282(2) TFEU. Moreover, it is clear from Article 6.2 of the Statute of the ESCB that the ECB is entitled to participate in international monetary institutions. Article 23 of that Statute confirms that the ECB may ‘establish relations ... with organisations’.

166 The argument that, since the judgments in *Parliament v Council and Commission* and *Parliament v Council* predate the inclusion in the Treaties of provisions relating to enhanced cooperation, the Member States whose currency is the euro should have established enhanced cooperation between themselves in order to be entitled to make use of the Union’s institutions within the ESM, cannot be accepted.

167 It is clear from Article 20(1) TEU that enhanced cooperation may be established only where the Union itself is competent to act in the area concerned by that cooperation.

168 However, it is apparent from paragraphs 64 to 66 of this judgment that the provisions of the Treaties on which the Union is founded do not confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM.

169 In those circumstances, Article 20 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) The role allocated to the Court

170 It must be recalled that, under Article 37(2) of the ESM Treaty, the Board of Governors is to decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of the ESM Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with that treaty. Under Article 37(3) thereof, if an ESM Member contests the decision referred to in paragraph 2, the dispute is to be submitted to the Court of Justice.

171 In that regard, first, it is apparent from recital (16) of the preamble to the ESM Treaty that the jurisdiction which the Court is called upon to exercise under Article 37(3) of the ESM Treaty is based directly on Article 273 TFEU. Under that article, the Court has jurisdiction in any dispute between Member States which relates to the subject-matter of the Treaties, if that dispute is submitted to it under a special agreement.

172 Secondly, while it is true that the jurisdiction of the Court under Article 273 TFEU is subject to the existence of a special agreement, there is no reason, given the objective pursued by that provision, why such agreement should not be given in advance, with reference to a whole class of pre-defined disputes, by means of a provision such as Article 37(3) of the ESM Treaty.

173 Thirdly, the disputes to be submitted to the jurisdiction of the Court are related to the subject-matter of the Treaties within the meaning of Article 273 TFEU.

174 In that regard, it must be observed that a dispute linked to the interpretation or application of the ESM Treaty is likely also to concern the interpretation or application of provisions of European Union law. Under Article 13(3) of the ESM Treaty, the MoU which is to be negotiated with the Member State requesting stability support must be fully consistent with European Union law and, in particular, with the measures taken by the Union in the area of coordination of the economic policies of the Member States. Accordingly, the conditions to be attached to the grant of such support to a Member State are, at least in part, determined by European Union law.

175 Fourthly, it is true that the jurisdiction of the Court under Article 273 TFEU is subject to the condition that only Member States are parties to the dispute submitted to it. That said, since the membership of the ESM consists solely of Member States, a dispute to which the ESM is party may be considered to be a dispute between Member States within the meaning of Article 273 TFEU.

176 It follows that the allocation by Article 37(3) of the ESM Treaty of jurisdiction to the Court to interpret and apply the provisions of that treaty satisfies the conditions laid down in Article 273 TFEU.

177 It follows from all the foregoing that Article 13 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

e) Interpretation of the general principle of effective judicial protection

178 The national court observes, referring to an argument put forward by the applicant in the main proceedings, that the establishment of the ESM outside the European Union legal order may have the consequence that the ESM is removed from the scope of the Charter. The referring court seeks to ascertain whether the establishment of the ESM is thereby in breach of Article 47 of the Charter which guarantees that everyone has the right to effective judicial protection.

179 In that regard, it must be observed that, under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing Union law. Under Article 51(2), the Charter does not extend the field of application of Union law beyond the powers of the Union, or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see Case C-400/10 PPU *McB*. [2010] ECR I-8965, paragraph 51, and Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 71).

180 It must be observed that the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.

181 It follows from the foregoing that the general principle of effective judicial protection does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

182 In those circumstances, the answer to the second question is that Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of

effective judicial protection do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or the ratification of that treaty by those Member States.

*C – The third question*

183 By this question, the referring court asks whether the Member States may conclude and ratify the ESM Treaty before the entry into force of Decision 2011/199.

184 In that regard, it must be recalled that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 confirms the existence of a power possessed by the Member States (see paragraphs 68, 72 and 109 of this judgment). Accordingly, that decision does not confer any new power on the Member States.

185 Consequently, the answer to the third question is that the right of a Member State to conclude and ratify the ESM Treaty is not subject to the entry into force of Decision 2011/199.

**IV – Costs**

186 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Full Court) hereby rules:

1. **Examination of the first question referred has disclosed nothing capable of affecting the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.**
2. **Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude the conclusion between the Member States whose currency is the euro of an agreement such as the Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded at Brussels on 2 February 2012, or the ratification of that treaty by those Member States.**
3. **The right of a Member State to conclude and ratify that Treaty is not subject to the entry into force of Decision 2011/199.**



## **On steps towards Completing Economic and Monetary Union (COM/2015/0600 final)**

### **1. INTRODUCTION**

The architecture of the Economic and Monetary Union (EMU) has been significantly strengthened over the past years to enhance economic governance and to achieve financial stability. Nevertheless, the EMU's resilience needs to be further reinforced in order to re-launch a process of upward convergence, both between Member States and within societies, with increasing productivity, job creation and social fairness at its core.

In June 2015, the President of the European Commission, in close cooperation with the President of the Euro Summit, the President of the Eurogroup, the President of the European Central Bank and the President of the European Parliament presented a report on an ambitious yet pragmatic roadmap for completing the EMU. This Five Presidents' Report makes the point that progress is necessary on four fronts in parallel. Firstly, towards a genuine Economic Union that ensures each economy has the structural features to prosper within the Monetary Union. Secondly, towards a Financial Union that guarantees the integrity of the currency across the Monetary Union by limiting risk to financial stability and increasing risk-sharing with the private sector. Thirdly, towards a Fiscal Union that delivers both fiscal sustainability and fiscal stabilisation. And finally, towards a Political Union that provides the foundation for all of the above through genuine democratic accountability, legitimacy and institutional strengthening.

The Five Presidents also agreed on a roadmap for implementation that should consolidate the euro area by early 2017 (Stage 1 – "deepening by doing"). In this first stage, which started on 1 July 2015<sup>3</sup>, action would build on existing instruments, also by making the best possible use of the existing Treaties. Then, on the basis of benchmarks for a renewed upward convergence of the euro area economies, more fundamental reforms should be undertaken, moving to a medium- to long-term vision for new growth perspectives (Stage 2 – "completing EMU"). Overall, translating the Five Presidents' report into action requires a shared sense of purpose among all euro area Member States and EU institutions. The actions set out in this Communication apply to euro area Member States, but the process towards a deeper EMU is open to all EU countries. At the same time, the Commission will make sure that no distortions occur in the single market.

This Communication and its accompanying proposals take forward key elements of Stage 1 of the process to deepen EMU. The package of measures includes a revised approach to the European Semester; an improved toolbox of economic governance, including the introduction of national Competitiveness Boards and an advisory European Fiscal Board; a more unified representation of the euro area in international organisations, notably the International Monetary Fund; and steps towards a Financial Union, notably via a European Deposit Insurance Scheme. These measures will be complemented by steps taken with the European Parliament to improve democratic accountability of the European economic governance system.

### **2.A REVAMPED EUROPEAN SEMESTER**

Economic policy coordination in the EMU has been significantly bolstered during the economic and financial crisis. In order to overcome pre-crisis imbalances, structural weaknesses and the legacy of the crisis, and to boost investment and rebuild medium-term growth potential, these common rules, procedures and institutions at EU level play a central role.

The European Semester, the annual cycle for the coordination of economic policies at EU level introduced in 2011, has become an important vehicle for delivering reforms at national and EU level. Yet, Member States should make more progress on implementing country-specific recommendations, given that implementation has so far been uneven and often only limited.

Over the years, the process has been continuously improved, to capitalise on its strengths and to address its weaknesses. Most recently, the new Commission has used its first European Semester in 2015 to substantially streamline the exercise. The publication of the Country Reports already in February created more space for genuine dialogue with the Member States, allowing for deeper debate at bilateral and multilateral level, as well as with other stakeholders. This earlier timing also requires adapting the role of National Reform Programmes which should become an instrument for Member States to respond to the Commission analysis by presenting forward-looking policy initiatives. More time for reflection and debate was also created by the earlier publication of the Commission proposals for country-specific recommendations in May. Here, the Commission introduced greater

focus by significantly decreasing the number of recommendations, only covering key priority issues of macro-economic and social relevance that require Member States' attention in the following twelve to eighteen months. While this focus must be maintained, the Country Reports will continue to take a more holistic approach, covering a broader range of topics with economic relevance for the Member States.

The stability and implementation of this improved structure is key to reaping the full benefits in the coming period. At the same time, and building on these developments, some further adjustments can bring additional benefits. This notably includes better integrating the euro area and national dimensions, a stronger focus on employment and social performance, promoting convergence by benchmarking and pursuing best practices, and the support to reforms from European Structural and Investment Funds and technical assistance. Table 1 provides a graphical overview of the proposed 2016 European Semester.

### 2.1. Better integrating the euro area and national dimensions

Given the deeper interdependence of euro area countries and the higher potential for spill-over effects among countries which share the single currency, enhanced coordination and stronger surveillance of the budgetary processes and economic policies of all euro area Member States is necessary. The lesson learned from the crisis is twofold: first, inadequate national fiscal and economic policies and financial supervision can cause huge economic and social hardship; second, the euro area as a whole is not immune to the risks of large and destabilising economic and financial shocks. Hence, while sound national policies would go a long way to reduce the chances of a crisis, there is also a case to monitor and analyse closely the aggregate fiscal, economic and social situation of the euro area as a whole, and consider this analysis in the formulation of national policies.

Already now, the European Semester includes an overall euro area dimension, in particular in the annual assessment of Draft Budgetary Plans of euro area Member States and the resulting overall fiscal stance in the euro area, as well as in the euro area recommendations. The process is about setting priorities together and acting on them with a euro area perspective. However, this process is still based on a strong country-by-country approach, and only takes into account the overall euro area dimension in an indirect way. The European Semester should be structured so that discussions and recommendations about the euro area take place first, ahead of country-specific discussions, so that common challenges are fully reflected in country-specific actions.

The Commission will therefore, as part of its Annual Growth Survey to be published in November, put specific focus on the key fiscal, economic, social and financial priorities for the euro area as a whole. In particular, the Commission calls for a specific Eurogroup discussion on the euro area fiscal stance in the context of its assessment of Draft Budgetary Plans. This may also require bringing the publication of the recommendation for the euro area forward.

Discussions on euro area priorities should take place within the Council and the Eurogroup, as well as with the European Parliament. The ensuing common understanding will then provide orientations for the content of National Reform and Stability Programmes of euro area Member States in April and the respective country-specific recommendations in May.

### 2.2. A stronger focus on employment and social performance

The Commission has already taken steps to enhance the focus on employment and social issues in the context of the European Semester and the process of deepening of EMU. The 2015 Country Reports discussed employment and social developments in detail. Country-specific recommendations in these fields were addressed to most Member States.

Employment and social aspects are being further emphasised also in the Macroeconomic Imbalances Procedure. The Commission proposed earlier in 2015 to add three indicators (activity rate, youth unemployment, long-term unemployment) to the existing 11 headline indicators of the Macroeconomic Imbalances Procedure scoreboard. This would serve the purpose of qualifying the social and employment context in which the adjustment is taking place, ultimately feeding through into better policy design. The Commission is planning to use the extended list of headline indicators as of the 2016 Alert Mechanism Report.

Greater attention is also given to the social fairness of new macroeconomic adjustment programmes to ensure that the adjustment is spread equitably and to protect the most vulnerable in society. The Commission prepared for the

first time a social impact assessment for the Memorandum of Understanding for Greece. 4 It intends to continue this practice in case of any future stability support programme.

A number of further steps should be taken to achieve stronger focus on Member States' employment and social performance. Member States should pay greater attention to the contribution of national social partners, in particular to strengthen ownership of reform efforts. To this end, the Commission encourages stronger involvement of social partners in the elaboration of National Reform Programmes. In addition, Commission representations in the Member States will consult national social partners at pre-defined key milestones of the Semester. These steps would be complemented by strengthened dialogue with social partners during European Semester missions. Moreover, the involvement of EU-level social partners will be continued and possibly enhanced, for instance through a renewed Tripartite Social Summit and Macroeconomic Dialogue, to strengthen their contributions to the Semester process.

Convergence towards best practices in the employment and social policy field should contribute to a better functioning and legitimacy of the EMU project. In the short term, such upward convergence could be achieved through the development of common benchmarks along the components of the 'flexicurity' concept, such as flexible and reliable labour contracts that avoid a two-tier labour market, comprehensive lifelong learning strategies, effective policies to help the unemployed re-enter the labour market, modern and inclusive social protection and education systems and enabling labour taxation. The Commission also confirmed its intention to put forward a European pillar of social rights, which would build on the existing "acquis" and serve as a compass for the overall convergence process.

### 2.3.Promoting convergence by benchmarking and pursuing best practices

The Five Presidents' report emphasises the use of benchmarking and cross-examining performance in order to achieve convergence and reach similarly resilient economic structures throughout the euro area. Cross-examination aims to identify underperformance and support convergence towards best performers in areas of labour markets, competitiveness, business environment and public administrations, as well as certain aspects of tax policy. Benchmarking can contribute to enhancing ownership of the Member States' structural reform agendas and foster their implementation.

As the ongoing benchmarking exercises in the Eurogroup (e.g. on the tax wedge on labour) have shown, benchmarking, if appropriately used, can be a truly powerful lever for action. In particular, benchmark indicators need to meet two requirements. First, they need to closely relate to the policy levers, such that they can lead to actual and meaningful policy implications. Second, there needs to be robust evidence and enough consensus that they contribute significantly to higher level objectives such as jobs, growth, competitiveness, social inclusion and fairness or financial stability. 5

The availability of such indicators, their statistical reliability, complexity and the extent to which they capture the full reality can vary significantly by policy area. As a consequence, the implementation of the benchmarking exercise should leave room for tailor-made adjustments by policy area. Furthermore, benchmarking needs to be complemented by economic analysis, which allows for reflection on potential trade-offs across policy areas and for in-depth evaluation of policy impacts.

Starting with the 2016 European Semester, the Commission will progressively suggest benchmarks and cross-examination exercises across policy or thematic areas. These will feed into debates in the appropriate Council formations and the Eurogroup, with a view to fostering a common understanding of challenges and policy responses.

The outcome of the discussions and evaluations will inform the European Semester and will pave the way to strengthening convergence of policies also in view of Stage 2.

### 2.4.More focused support to reforms through EU funds and technical assistance

To support structural reforms in line with the common economic priorities set at EU level, the Commission will seek to enhance the use of the European Structural and Investment Funds in support of key priorities highlighted in the country-specific recommendations, including through the use of the measures linking effectiveness of these Funds to sound economic governance. 6 The new legal framework requires that programmes co-financed by ESI

Funds address all relevant country-specific recommendations. The Commission will monitor and report progress towards the agreed objectives by 2017. The reform of Cohesion Policy in 2013 has introduced the principle of so-called macroeconomic conditionality to all five European Structural and Investment Funds. This is part of the broader effort to ensure that European Structural and Investment Funds are used to support reforms identified to be of key importance for social and economic performance in the Member States, and to ensure that the effectiveness of the European Structural and Investment Funds is not undermined by unsound macroeconomic policies. <sup>7</sup>

At the same time, reform implementation will be supported through other EU funding programmes in their policy fields and the progressive roll-out of technical assistance offers by the Commission's Structural Reform Support Service. The Commission has established this Service in order to make technical support available upon request to all Member States for the preparation and effective implementation of reforms in the context of the economic governance processes (notably the implementation of country-specific recommendations, actions under the Macroeconomic Imbalances Procedure, or reforms under stability support programmes), including through support for the efficient and effective use of EU Funds.

### 3.IMPROVING THE TOOLBOX OF ECONOMIC GOVERNANCE

In the wake of the economic and financial crisis, the economic governance framework has been considerably strengthened with the introduction of the Six-Pack, Two-Pack and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) <sup>8</sup> . The reinforced fiscal rules as well as the recently created Macroeconomic Imbalances Procedure have significantly deepened and widened the scope and possible effectiveness of EU action.

A first review of the strengthened economic governance framework <sup>9</sup> identified some areas for improvement, notably concerning transparency, complexity and predictability of policy making, which are relevant to the effectiveness of the tools. The short experience with the operation of the new instruments, some of which entered into force only recently, limits the possibility to draw firm conclusions on their impact on growth, imbalances and convergence.

More evidence and experience with the reformed governance structures are necessary before embarking on further legislative reform. At the current juncture, the Commission will pursue the full and transparent application of the available instruments and tools. In parallel, the Commission intends to improve clarity and reduce the complexity of the existing framework, from the fiscal rules to the application of the Macroeconomic Imbalances Procedure. Moreover, as indicated in the Five Presidents' report, the Commission supports the introduction of a system of national Competitiveness Boards and the establishment of an advisory European Fiscal Board.

#### 3.1.Improving transparency and reducing complexity of the current fiscal rules

With the aim of improving transparency of the way it applies the rules of the Stability and Growth Pact, the Commission has published a "Vade mecum on the Stability and Growth Pact" <sup>10</sup> . The Vade mecum will be updated annually to timely reflect changes in the evolution of the rules and surveillance practice. Furthermore, the Commission is sharing with Member States the data and calculations underlying its surveillance decisions. It also intends to share the same information with national fiscal councils and – after consultation with the Member States – with the public. The new independent advisory European Fiscal Board (see section 3.4) will contribute to increasing transparency. The Commission will also start presenting an update of the full set of external economic assumptions in September, to inform the formulation of national Draft Budgetary Plans.

The way the rules are implemented can be simplified and made more transparent, without changing their legal basis. The Commission will aim for the following clarifications, in close consultation with the Member States.

First, the Commission will ensure the consistency of methodology between the debt rule of the Excessive Deficit Procedure and Member States' structural budgetary target, known as the Medium Term Budgetary Objectives. The recent strengthening of economic governance has translated the debt criterion of the Excessive Deficit Procedure into a simple rule for the reduction of government debt in excess of 60% of GDP. What role the rule should play when deciding whether to place a Member State in EDP has however remained unclarified. When

updating the lower limits for the Medium Term Budgetary Objectives that Member States can set, the Commission will ensure the consistency of such values with the respect of the debt rule in the medium-term.

Second, the Commission will aim to streamline the methodology for assessing compliance with the Stability and Growth Pact. Currently, as a result of discussion with Member States over the years, different sets of budgetary indicators are used to assess the compliance of fiscal policies for Member States under the preventive arm of the Stability and Growth Pact and in the Excessive Deficit Procedure. A harmonised and consistent approach would bring greater simplicity and allow for a more consistent transition from the corrective to the preventive regime of the Stability and Growth Pact. The Commission will thus explore ways for increasing reliance on a single practical indicator of compliance with the Stability and Growth Pact.

Third, the Commission will explore the possibility of updating multi-year Council recommendations to reduce excessive deficits in order to take into account not only conditions of unforeseen deterioration of the economic environment – as it is explicitly envisaged in the Stability and Growth Pact –, but also in case of unforeseen improvements. Such an approach would support the objective of the Excessive Deficit Procedure to ensure a timely correction of excessive deficit situations.

Finally, the Commission is reviewing the transposition of the rules set out in the so-called Fiscal Compact (i.e. the fiscal part of the Treaty on Stability Coordination and Governance in the EMU), which are designed to strengthen the consistency between the national and European fiscal frameworks and enhance their ownership in Member States. The Commission has undertaken an analysis of the incorporation of the Fiscal Compact into national law in line with Article 3(2) TSCG. It has engaged in preliminary consultations with Contracting Parties, with a view to giving them, where necessary, the opportunity to submit their observations on the Commission's findings as foreseen in Article 8(1) TSCG and then publishing its report on the incorporation pursuant to that Article.

### 3.2.A stronger Macroeconomic Imbalances Procedure

The Macroeconomic Imbalances Procedure has been instrumental in bringing the key issues on imbalance to the forefront in the economic surveillance and has been effective in supporting effective policy adjustment in some countries (for example in Spain and Slovenia). Nevertheless, experience suggests that implementation can be improved in a number of ways.

First, the transparency of the Commission's decisions within the Macroeconomic Imbalances Procedure will be enhanced by a publication of a "Compendium", which will collect and present the relevant information on the implementation of the Macroeconomic Imbalances Procedure in one place. Also, the findings of the In-Depth Reviews will be presented in a clearer way both in the Country Reports and in the Communication presenting conclusions from the In-Depth Reviews. The Commission will also present explicit justification of decisions taken, including regarding country-specific recommendations linked to the Macroeconomic Imbalances Procedure.

Second, the Commission will ensure appropriate follow-up to the identification of excessive imbalances. This requires economic judgement and active engagement with Member States to tackle their specific challenges and ensure domestic ownership of reforms. So far, the Commission placed Member States with imbalances in different categories which evolved over time, and, depending on the nature and intensity of the imbalances, called for different degrees of monitoring and policy action. The Excessive Imbalances Procedure has not been invoked yet. The Commission will stabilise the categories, clarify the criteria guiding its decision, and better explain the link between the nature of imbalances and how they are addressed in the country-specific recommendations. The Commission will engage with Member States, including with the new Competitiveness Boards, 11 on how best to address the imbalances and put in place a strong and time-bound system of specific monitoring to support implementation. The Excessive Imbalances Procedure can be opened in case of insufficient commitment to reforms and lack of effective progress in implementation, and will be used in case of severe macroeconomic imbalances that jeopardise the proper functioning of the economic and monetary union, like those that led to the crises. The Commission will also invite greater Council involvement in the specific monitoring of countries with excessive imbalances for which the Excessive Imbalances Procedure is not activated.

Third, the euro area dimension of the Macroeconomic Imbalances Procedure will be enhanced. Euro area considerations will be better integrated in related documents (the Alert Mechanism Report and the Communication

on the In-Depth Reviews findings) and decisions. The Macroeconomic Imbalances Procedure will continue to deal with the correction of harmful external deficits as well as with fostering adequate reforms in countries accumulating large and sustained current account surpluses.

### 3.3.A system of national Competitiveness Boards

Competitiveness is essential for resilience and adjustment capacity inside the monetary union and to ensure sustainable growth and convergence looking forward. To foster progress with structural reforms in the competitiveness domain, the existing EU mechanisms for economic policy coordination need to be backed by strong national ownership of reform agendas. It makes sense to raise independent policy expertise at national level and to reinforce the policy dialogue between the EU and the Member States. Therefore, the Commission proposes that the Council recommends Member States to establish national Competitiveness Boards in charge of tracking performance and policies in the field of competitiveness.

Competitiveness Boards would help to improve national policymaking by providing independent expertise notably on assessing competitiveness performance and competitiveness-related reforms. They would thus contribute to effective reform design and implementation, including in response to country-specific recommendations. The scope of competitiveness aspects to be monitored should reflect a comprehensive notion of competitiveness, including price and non-price developments. Competitiveness Boards would compile and publish their findings on the areas monitored on an annual basis.

Competitiveness Boards should conform to a set of common principles, taking into account the diversity of experiences and practices in Member States. The Boards' advice should inform the wage setting processes, but their aim is neither to interfere with the wage setting process and the role of the social partners, nor to harmonise national wage setting systems. The Boards should be independent from public authorities dealing with related matters and have the capacity to ensure high-quality economic analysis. Provided that these requirements are met, Member States should be free to design their national Competitiveness Boards, either by setting up new institutions or adapting the mandate of existing bodies.

The Commission adopts together with this Communication a Recommendation for a Council Recommendation on the establishment of national Competitiveness Boards. It is addressed to the euro area Member States, but the other Member States are also encouraged to set up similar bodies. The Commission will monitor the follow-up to the Recommendation and, if necessary in Stage 2, will present common principles by means of a binding instrument.

### 3.4.An advisory European Fiscal Board

The past years have underscored the importance of conducting responsible fiscal policies as a key pillar of the European growth strategy. Fiscal policies should foster macroeconomic stability in line with the rule-based fiscal framework. The conduct of responsible national fiscal policies is especially important in the euro area.

Together with this Communication, the Commission establishes an independent advisory European Fiscal Board. This Board will contribute in an advisory capacity to multilateral surveillance in the euro area. It will be composed of five renowned experts with credible competence and experience in macroeconomics and practical budgetary policy-making. The Board's advice will rely on an economic judgment that is consistent with EU fiscal rules.

The Board should provide an evaluation of the implementation of the EU fiscal framework, in particular regarding the horizontal consistency of the decisions and implementation of budgetary surveillance, cases of particularly serious non-compliance with the rules, and the appropriateness of the actual fiscal stance at euro area and national level.

As the Stability and Growth Pact centres on national budget balances and debt developments and does not determine the aggregate fiscal stance, the Board should also contribute to a more informed discussion of the overall implications of budgetary policies at euro area and national level, with a view to achieving an appropriate fiscal stance for the euro area. Where it identifies risks jeopardising the proper functioning of the Economic and Monetary Union, the Board shall accompany its advice with a specific consideration of the policy options available under the Stability and Growth Pact.

The Board will also cooperate with the national fiscal councils, aiming at exchanging best practices and facilitating common understandings. This will be undertaken in direct connection to the Board's tasks and in mutual respect of the prerogatives and legal grounding of the national fiscal councils and the European Fiscal Board.

#### 4. THE EXTERNAL REPRESENTATION OF THE EURO

In order to complete EMU, greater responsibility and integration at EU and euro area level must go hand in hand with institutional strengthening. One of the areas where concrete steps towards this objective are explicitly foreseen in the Treaty and can therefore be taken already today is the external representation of the euro area.

The economic and financial weight of the euro area and the existence of a single monetary and exchange rate policy have made euro area policy decisions and economic developments increasingly relevant for the world economy. While the strengthened governance framework for the euro area and the strong convergence of financial sector regulation and supervision in the context of the Banking Union have made the euro area internally more robust.

The progress that has been achieved on further internal integration of the euro area also needs to be projected externally, to allow the euro area to play a more active role in international financial institutions and to shape effectively its future role in the global financial architecture. A more coherent representation would also be to the benefit of third countries, in particular by means of a stronger and more consistent euro area contribution to global economic and financial stability.

Considerable progress has been made in strengthening the Union and the euro area external representation in many international economic and financial fora. In the International Monetary Fund, this included further strengthening of coordination arrangements in 2007, the election of a President of the group of EU representatives to the International Monetary Fund (so-called EURIMF), the improvement of the working relationship between the Sub-Committee on the International Monetary Fund of the Economic and Financial Committee (EFC/SCIMF) and the EURIMF, and the increased coordination among EURIMF members on Executive Board strategies. However, further steps are needed to achieve a truly unified external representation.

Accompanying this Communication, the Commission is presenting a Communication showing the way towards an increasingly unified external representation of the EMU. <sup>12</sup> It also puts forward a proposal for a Council Decision under Article 138 TFEU laying down measures in view of establishing a unified representation of the euro area in the International Monetary Fund. <sup>13</sup> External representation of the euro area is still particularly fragmented in the International Monetary Fund, which through its lending instruments and surveillance is a key institutional actor in global economic governance. Such arrangements should be set out and agreed without delay, but implemented gradually, to allow all actors involved – at EU and international level – to make the necessary legal and institutional adjustments.

Taking into account the future development of the EMU or in the international financial architecture, the Commission may decide that further initiatives are useful to strengthen euro area external representation in also other international fora.

#### 5. STEPS TOWARDS A FINANCIAL UNION

Besides progress in the areas of economic governance, completing the Banking Union is an indispensable step on the way towards a full and deep EMU. For the single currency, a unified and fully integrated financial system is the prerequisite not only for the proper transmission of monetary policy, but also for an adequate risk diversification across countries and general confidence in the banking system across the euro area. Important steps have been agreed in that direction in recent years, but further work is necessary.

First, the Commission will work with Member States to fully implement the agreed legal provisions. The Single Supervisory Mechanism aimed at independent and uniformly high quality prudential supervision is already fully operational, and the Single Resolution Mechanism will ensure effective resolution of troubled banks as of 1 January 2016. The Commission will make full use of its powers under the Treaty to ensure the full transposition of the Bank Recovery and Resolution Directive (the deadline was January 2015) <sup>14</sup> and the Deposit Guarantee Directive (the deadline was July 2015) <sup>15</sup> into national law by all Member States as soon as possible. Member

States are urged to ratify the Intergovernmental Agreement on the Single Resolution Mechanism by 30 November 2015. 16

Second, the Commission encourages Member States to find a swift agreement on an effective bridge financing mechanism, to ensure that, while the Single Resolution Fund is gradually being built up through levies raised from the banking sector, the Single Resolution Mechanism has sufficient resources at its disposal to finance possible residual resolution costs for troubled banks, in accordance with the Bank Recovery and Resolution Directive. In the same vein, Member States should agree swiftly on a common backstop for the Single Resolution Fund which should be fiscally neutral over the medium term.

Third, the Commission will make a legislative proposal before the end of the year on the first steps towards a common European Deposit Insurance Scheme with a view to creating a more European system, disconnected from the sovereign, so that financial stability is enhanced and citizens can be certain that the safety of their deposits does not depend on their geographical location.

The first step towards a more common system will build on a "re-insurance" approach. A joint reinsurance fund – supplemental to existing national Deposit Guarantee Schemes – would contribute under certain conditions when national Deposit Guarantee Schemes are called upon. These conditions should be designed to limit the liability for the fund and reduce moral hazard at the national level, and should reflect the fact that national funds are gradually being built up and different starting points successively being aligned. The European Deposit Insurance Scheme would be mandatory for euro area Member States and open to non-euro area Member States willing to join the Banking Union.

Fourth, in parallel with its proposal on the European Deposit Insurance Scheme, the Commission is committed to further reduce risks and ensure a level playing field in the banking sector and limit the bank-sovereign loop. To this end, it will set out how work can be brought forward in those outstanding areas where the regulatory and prudential framework may need to be reviewed and completed to achieve these objectives.

Finally, alongside the completion of the Banking Union, the Capital Markets Union is a key priority. On 30 September, the Commission published the Capital Markets Union Action Plan, inter alia aiming to ensuring more diversified sources of finance for companies and strengthened cross-border risk-sharing through deepening integration of bond and equity markets.

## 6.EFFECTIVE DEMOCRATIC LEGITIMACY, OWNERSHIP AND ACCOUNTABILITY

Effective democratic legitimacy and accountability are crucial for strengthening the ownership in Stage 1 of the deepening of EMU and is indispensable in Stage 2, when the envisaged initiatives involve more pooling of sovereignty. In recent years, the Commission has gradually established a deeper and more permanent dialogue with the Member States through bilateral meetings, more targeted discussion in the Council and more widespread technical and political missions to the capitals. The Commission will continue to intensify these dialogues, also by making use of its network of European Semester Officers in the Member States.

First practical steps have been initiated by the European Parliament to strengthen parliamentary oversight as part of the European Semester. ‘Economic dialogues’ between the European Parliament and the Council, the Commission and the Eurogroup have taken place in line with the provisions of the ‘Six-Pack’ and ‘Two-Pack’ legislation. This has already been part of the last European Semester rounds. These dialogues may be enhanced by agreeing on dedicated time-slots during the main steps of the Semester cycle. A new form of inter-parliamentary cooperation was established to bring together European and national actors. This takes place within the European Parliamentary Week organised by the European Parliament in cooperation with national Parliaments, which includes representatives from national Parliaments for in-depth discussions on policy priorities. The ‘Two-Pack’ also enshrined the right for a national Parliament to convene a Commissioner for a presentation of the Commission’s opinion on a draft budgetary plan or of its recommendation to a Member State in Excessive Deficit Procedure.

The timing and added value of these parliamentary moments could be further strengthened, in line with the renewed European Semester. In particular, the Commission could engage with the European Parliament at a plenary debate before the Annual Growth Survey is presented, and continue the debate following its adoption. Moreover, a second dedicated plenary debate could be held upon presentation by the Commission of the Country-

Specific Recommendations, in accordance with the relevant provisions of the 'Six-Pack' on economic dialogue. At the same time, Commission and Council representatives could participate in inter-parliamentary meetings in particular in the context of the European Parliamentary Week. This new practice could be progressively agreed upon in more detail between the EU institutions in full respect of their respective institutional role.

The Commission will also work out model arrangements to make the interaction with national Parliaments more efficient. Such interaction should apply to national parliamentary debates both on the Country-Specific Recommendations addressed to the Member State and within the annual national budgetary procedure. That would give more life to the right recognised in the 'Two-Pack' to convene a Commissioner. As a rule, national Parliaments should be closely involved in the adoption of National Reform and Stability Programmes.

## 7.COMPLETING EMU: PREPARING FOR STAGE 2

The steps presented in this Communication for Stage 1 of completing EMU, build on existing instruments and make the best possible use of the existing Treaties. However, all these initiatives of Stage 1 should not be seen in isolation, but rather as stepping stones towards the next stage, starting as of 2017. In Stage 2, more far-reaching measures should be agreed upon to complete the EMU's economic and institutional architecture. This will involve sharing more sovereignty and solidarity and will have to be accompanied by strengthened democratic oversight.

To prepare the transition from Stage 1 to Stage 2 of completing the EMU, the Commission will present a White Paper in spring 2017, building on the progress made in Stage 1 and outlining the next steps needed to complete the EMU in Stage 2. The White Paper will be prepared in consultation with the Presidents of the other EU institutions.

2016 will be crucial in preparing this White Paper, building on the three following strands:

-First, all EU institutions and Member States should agree and take action on the measures presented in this Communication. In particular, it would be important that the Competitiveness Boards and the European Fiscal Board become operational by mid-2016.

-Second, it is key to consult and engage with citizens, stakeholders, social partners, European and national Parliaments, Member States, regional and local authorities on completing EMU in Stage 2. With a view to stimulate this necessary broad-based debate across Europe, the Commission will facilitate a wide consultation, including public debates in 2016. The consultation should be broad-based, transparent and inclusive and allow citizens to give their views.

-Finally, the Commission will establish in mid-2016 an Expert Group to explore the legal, economic and political preconditions that will inform the more long-term proposals as outlined in the Five Presidents' Report.

The implementation of Stage 1, the outcome of the consultation and the work of the expert group should contribute to shaping a consensus for more fundamental steps ahead. This input will feed into the White Paper, which should eventually – following further discussion – be translated into a stronger legislative and institutional framework for the EMU.

## 8.CONCLUSION

This Communication substantiates the different steps under Stage 1 that the Five Presidents had outlined in their report on "Completing Europe's Economic and Monetary Union". These steps are ambitious and pragmatic. Following the principle of "deepening by doing", the proposed measures build on existing instruments and make the best possible use of the existing Treaties.

The presented initiatives will help to boost competitiveness and economic and social convergence, with the aim of further improving the Economic Union. The Fiscal Union is fostered via achieving and maintaining responsible fiscal policies at national and EU level. The initiatives will also help to further increase the efficiency and stability of financial markets and to complete the Financial Union. Finally, the Political Union is supported by enhancing democratic accountability and national ownership.

All of these elements are important in themselves, but they are also interdependent. They thus need to be tackled in parallel. As a whole, the Stage 1 initiatives will further bolster the resilience of the EMU. They are also an important step in stimulating the convergence necessary to move on to Stage 2 of the process of completing a deep and genuine EMU.

The Commission calls on all the actors involved to ensure that the process to deepen EMU is swiftly implemented. Only continued ambition and concerted action can ensure that the EMU not only survives but thrives, and regains its path towards strong, sustainable and inclusive growth and job creation.

## 5. THE FUTURE'S LOOKING GLASS: BREXIT

Although the European Union delivered unprecedented growth and peace across the European continent, its legitimacy and *raison-d'être* have been questioned consistently over the past decade. The most ferocious opponents to the EU integration project have been nationalist or extreme-left or –right wing political parties at the Member States' level. Calls for review of membership conditions and/or withdrawal from the European Union have become more explicit. In the United Kingdom, such calls have resulted in a popular consultation – a referendum – on the question whether to stay in the European Union or not. Following a rather tense campaign, the referendum organised on 23 June 2016 resulted in a majority of voters in favour of a so-called “Brexit”. As a result, the United Kingdom seems committed to leave the European Union as a Member State.

The envisaged Brexit has often been described as problematic, dramatic, or even as the death of the EU integration project. Whilst future developments will show where the Brexit will lead the European Union, it is undoubtedly the case that it triggers unprecedented problems associated with EU law. The final lecture in this course aims to introduce you to the withdrawal procedure in Article 50 TEU, which would enable the United Kingdom to exit from the EU, as well as to the potential legal forms through which the United Kingdom could continue to associate itself with – parts of – EU policy fields, such as the internal market.



## LECTURE 14: THE EU LAW IMPLICATIONS OF AND SOLUTIONS FOR A BREXIT-SITUATION

The 23 June 2016 referendum's outcome in favour of an exit of the United Kingdom from the European Union fuelled debates on how to proceed with such unprecedented exit. Article 50 TEU allows for a procedure in this, but does not in itself offer an alternative for the United Kingdom to maintain some kind of legal affiliation with the EU's internal market. This lecture will outline the consequences of an exit from the EU and explore at the same time alternative options available. The focus of this lecture will be on the role of law in ensuring a smooth exit from and enabling a new settlement with the European Union.

### Materials to read:

- Article 50 TEU.
  
- G. Barrett, "The era of Article 50: how the UK will leave the EU if it opts for a Brexit in its 23 June 2016 vote", *University College Dublin Working Paper*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2784214](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2784214) (via eCampus).
- P. Craig, "Brexit: a drama in six acts", *Oxford Legal Research Studies Working Paper*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2807975](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2807975) (via eCampus).
- A. Reid, "Brexit Begins: an overview of the legal issues", <http://eulawanalysis.blogspot.be/2016/07/brexit-begins-overview-of-legal-issues.html> (via eCampus).

### Lecture 14 outline:

- a. Brexit: political origins
  1. A continuous EU legitimacy crisis
  2. Organising a referendum
- b. After the referendum: article 50 TEU to the test
  1. Article 50 TEU
  2. Limits on Article 50 TEU
  3. Legal consequences of Article 50 TEU
  4. A role for the Court of Justice?
- c. Beyond Brexit: legal alternatives for the United Kingdom to maintain some EU affiliation
  1. Back to the future: membership of the European Free Trade Association
  2. A "Norwegian" solution: membership of the European Economic Area
  3. A "Swiss" solution?
  4. An entirely new deal grounded in public international law
  5. A hybrid cooperation arrangement?
- d. Reflections on the future of the European Union and EU law

e. Exam preparation information – Q&A session

Questions for discussion:

- Would it be possible – as a matter of EU law – that the United Kingdom stays in the European Union after the referendum's outcome? Would this legal possibility also be politically feasible?
- What are the advantages and disadvantages, from the point of view of legal coherence and legal certainty, of the different 'continuous affiliation' strategies available to the United Kingdom?

## Article 50 TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
  2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
  3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
  4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
- A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.