Central and East European Moot Court Competition 2021

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In cooperation with:
Centre for European Legal Studies (CELS) of the Faculty of Law, University of Cambridge
and Bucharest University Faculty of Law

MOOT BUNDLE 2021

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Although the rules prevent competitors from citing authorities other than those in this bundle, should further background information be sought to prepare the case the following websites may be useful:

http://curia.europa.eu http://www.amicuria.org

Equally, competitors may find it helpful to look at the following documents concerning the CJEU's rules and procedures:
CJEU Rules of procedure: http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf
CJEU Statute: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf

Notes for the guidance of Counsel in written and oral proceedings before the CJEU:
http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf

PART A. PRELIMINARIA

CENTRAL AND EASTERN EUROPEAN MOOT COMPETITION
(2021 EDITION)
MOOT COURT PROBLEM

Systech	**(Applicant)**
v.	
European Commission	**(Respondent)**

Facts and legislation

1. The Connecting Europe Facility (CEF), which is based on Regulation No 1316/2013,[1] was introduced by the European Commission (the Commission) under the Multiannual Financial Framework (MFF) 2014-2020 with the aim of co-financing transport, energy and telecommunications projects.

2. CEF defines the funding elements which seek to accelerate investment in the field of trans-European networks and freight services, promoting the implementation, construction and retrofitting of infrastructure and rolling stock, and supporting projects with a European added value and significant social benefits, which do not receive adequate financing from the market.

3. On 1 April 2015, the Commission published a call for proposals for the development of a new transmission standard for telecommunication, which was to be used by producers of mobile telephones and networks to develop equipment covering an extended frequency range. The standard was to include specifications for equipment using frequencies previously reserved for military use, but currently abandoned in accordance with a resolution adopted by the Secretary General of NATO on 29 January 2015.

4. The call for proposals was based on a work programme adopted under Article 17 of the Regulation No 1316/2013. In accordance with Article 6(1) thereof, financial assistance was to be provided to a company that undertook to develop the transmission standard. The company would become the beneficiary of a grant that would be awarded under Article 121 of Regulation No 966/2012, [2] which provides that grants may be awarded by the Commission either by means of a decision or by entering into a contract with the beneficiary. In both cases, the award of the grant will be supplemented by General and Special Conditions.

5. In the call for proposals, the Commission specified that the grant would cover eligible costs of 1,500,000 Euro, to be implemented within a 12-month period from 1 January 2016, and that the grant would be awarded to the applicant that submitted a project proposal which fulfilled the defined technical specifications and which provided best value for money.

6. Several companies, including AlphaTech, BetaTech, DeltaTech and GammaTech, expressed an interest in the project, but by the deadline of 18 June 2015 set in the call for proposals, only the company SysTech had submitted an application. SysTech is a telecommunications company registered in Slorania, a Member State of the European Union (EU), where it also has its headquarters.

7. The Commission found that sufficient competition had been achieved through the expressions of interest, and under Article 18 of Regulation No. 1316/2013 proposed to the CEF Coordination Committee that the grant be awarded to SysTech. On 15 October 2015, the chairperson of the CEF Coordination Committee, acting under Regulation No. 182/2011, [3] approved the proposed award.

8. The grant was awarded to SysTech by Commission Decision C(2015)18490 of 2 December 2015 (the Award Decision). The approved project was referred to as project PPTS4390. In an annex to the Award Decision (the

[1] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, OJ 2013 L 348, p. 129.

[2] Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ 2012 L 298, p. 1.

[3] Regulation (EU) No 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, OJ 2011 L 55, p. 13.

Annex), the Commission included General Conditions and Special Conditions for the implementation of the grant. The General Conditions are not relevant for the present case, whereas the Special Conditions provided that:

> *Article III(6)(1) of the Special Conditions attached to the Award Decision*
> (a) By accepting the Grant to which the present Special Conditions are attached, the beneficiary SysTech agrees to be bound by the provisions contained in these Special Conditions.
> (b) Any question concerning the interpretation of the Special Conditions may be submitted to court proceedings only in the event that the Commission and SysTech have failed to reach a common understanding of the issues concerned.

9. On 1 January 2016, SysTech initiated project PPTS4390 and received the full amount of the grant (1,500,000 Euro) as pre-financing, for which the Commission did not require SysTech to lodge a guarantee, despite this being a possibility under Article 134 of Regulation No. 966/2012.

10. By 10 June 2016, it became clear that development of the new transmission standard would require substantial computer simulation facilities that were beyond the scope of SysTech's in-house capacities. On 1 September 2016, the Commission therefore agreed to an addendum (the Addendum), which specified that the implementation of project PPTS4390 was extended to 31 December 2017, thus having the duration of 24 months as opposed to the previously stipulated 12 months.

11. The Addendum of 1 September 2016 further inserted a new Article III(2)(5) into the Special Conditions:

> *Article III(2)(5) of the Special Conditions attached to the Award Decision*
> (a) The Commission authorises SysTech to subcontract computer simulations to a third party, the Subcontractor, for the purposes of implementing the awarded Grant.
> (b) Selection of the Subcontractor must be performed in accordance with the provisions of Council Directive 2004/17 on public procurement procedures. [4]

12. On 15 September 2016, SysTech contacted the European trade association for computer service providers (ITRADE), located in Brussels. ITRADE is empowered to represent the common interests of its member companies, both by providing information about the computer service market, and by promoting policy interests of the members. When asked by SysTech to recommend a suitable provider of the computer simulation facilities it required, ITRADE indicated that the company CompMax, established in Slorania, provides the most extensive computer simulation services in Europe. ITRADE added that four other companies (AlphaTech, BetaTech, DeltaTech and GammaTech from other EU Member States), provide similar computer simulation services. However, each of the four would need to form a consortium with another of the four to handle the computer simulation required by SysTech.

13. Against this background, SysTech selected CompMax as the most suitable subcontractor. The companies negotiated an agreement on 1 October 2016, whereby CompMax would supply computer simulation facilities to SysTech for the purpose of project PPTS4390, in exchange for a fee of 415,000 Euro. However, prior to the scheduled date for formally signing the contract (1 October 2016), the director of CompMax advised SysTech to postpone the signing and to first publish a voluntary notice in the Official Journal of the EU under Article 2(4) of Directive 2007/66. [5]

14. On 13 October 2016, SysTech had a voluntary notice published in the Official Journal of the EU, which provided:

> For the purpose of project PPTS4390, SysTech will award a 415,000 Euro contract for computer simulation services to CompMax. For reasons of technical necessity, the contract will be awarded without any public procurement procedure.

[4] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134, p. 1

[5] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts OJ 2007 L 335, p. 31.

15. On 23 October 2016, CompMax and SysTech signed the previously agreed contract, but on 28 October 20016 the four companies AlphaTech, BetaTech, DeltaTech and GammaTech complained to ITRADE about the procedure for selection of CompMax as the subcontractor of SysTech. ITRADE called for a mediation meeting on 15 November 2016, to take place between CompMax and those four companies.

16. During that meeting, an agreement was mediated and protocolled by ITRADE, whereby CompMax undertook to pay 25,000 Euro to each of the four companies in exchange for an undertaking by those four companies not to pursue any further complaints about the selection of CompMax as the subcontractor for SysTech. It was furthermore agreed that the protocol should be held confidential by ITRADE as pertaining to business secrets, so as to avoid any misunderstanding concerning bid-rigging.

17. On 22 December 2017, SysTech completed project PPTS4390 and submitted the new transmission standard for telecommunication to the Commission. A press conference was held on 10 January 2018 during which the Commission presented the new standard as an important achievement that would allow for an effective expansion of mobile phone networks and their capacities within the EU by use of the additional frequencies released from previous military use. The new standard also received positive reviews from the international scientific community. Later in 2018, SysTech was shortlisted for the Trans European Business Award, which was funded *inter alia* by the World Trade Organisation.

18. On 1 March 2018, SysTech finalised all accounts for project PPTS4390 in accordance with Article III(3)(8) of the Annex to the Award Decision, which reads as follows:

> *Article III(3)(8) of the Special Conditions attached to the Award Decision*
> Prior to submission of the project accounts for the formal closing of the Grant procedure, SysTech must ensure that an audit certificate has been issued by an audit company that is authorised to operate within the Member States of the EU. SysTech may select the audit company without any formal selection procedure.

19. For this purpose, on 21 February 2018, SysTech's auditors, Grey Brown and Partners (GBP), issued a certificate which confirmed that no irregularities existed in the spending of the project funds of 1,500,000 Euro.

20. On 25 June 2018, the Commission replied that after reviewing the documentation submitted by SysTech, it had decided to require SysTech to undergo an additional audit, pursuant to Article III(4)(2) of the Special Conditions of the Award Decision, which states as follows:

> *Article III(4)(2) of the Special Conditions attached to the Award Decision*
> The Commission may decide at any time during the Grant period, including the formal closing procedure, to call for an audit to be performed either by the Commission services, by OLAF or by an audit company that is authorised to operate within the Member States of the EU.

21. The Commission selected the external auditors Sincere & Fresh (S&F), who on 13 November 2018 delivered an audit report to the Commission (the Audit Report), which stated that the selection of CompMax as a subcontractor had been made in violation of Article III(2)(5) of the Special Conditions, since proper procurement procedures had not been followed. Accordingly, the Audit Report concluded that the expenditure of 415,000 Euro for the subcontracting of CompMax was ineligible and could not be financed using the project funds.

22. In this regard, Article III(5)(9) of the Special Conditions provides:

> *Article III(5)(9) of the Special Conditions attached to the Award Decision*
> (a) Based on the outcome of an audit performed under Article III(4)(2), the Commission may require SysTech to repay the Grant in part or in full on the grounds that the obligations stipulated in these Special Conditions have not been fulfilled.
> (b) In case of a breach of obligations that concern essential elements of the grant implementation, without which the implementation cannot be completed, the Commission may also require SysTech to pay liquidated damages, calculated as 100 % of the amount to be repaid under paragraph (a).
> (c) For the application of repayment and liquidated damages under paragraphs (a) and (b), the Commission shall stipulate a reasonable time period within which SysTech shall be required to make the relevant payment[s].

(d) In the event that any payment is not made by SysTech by the date fixed under paragraph (c), the Commission shall add default interest to the payment due, which shall be calculated at 2 % per month on the due amount, including previously calculated interest, but subtracting any partial payments made.
(e) The Commission shall issue a debit note for the amount due no more than 7 days after the expiry of the date fixed under paragraph (c) and shall thereafter update the debit note every 3 months until final payment is made or the matter is otherwise settled.

23. Against that background, on 18 November 2018 the Commission sent a letter (the Repayment Letter) to SysTech in which it explained that, since the Commission was of the opinion that the subcontracting of CompMax constituted an essential element of the implementation of project PPTS4390, the Audit Report had implications for the entire project. Accordingly, SysTech would therefore be required to repay the entire amount of 1,500,000 Euro provided under the grant and might also become liable to pay liquidated damages.

24. The Repayment Letter set a deadline of 1 January 2019 for SysTech to repay the 1,500,000 Euro, and stipulated that if full repayment had not been completed by that time, the Commission would proceed to issue a debit note for the repayment of the project financing (1,500,000 Euro) plus liquidated damages (another 1,500,000 Euro) and default interest.

25. The Commission underlined that, if SysTech continued to withhold payment, Article 79 of Regulation No 966/2012 would entitle the Commission to issue a recovery order to enforce the debit notes. Such a recovery order would be an enforceable act within the meaning of Article 299 TFEU.

26. In December 2018, several letters where exchanged between SysTech and the Commission. During that exchange, SysTech argued that:
    (a) Whether an act of an EU institution constitutes a challengeable act under Article 263 TFEU depends only on whether the institution intended to impose legal obligations on a private party, and not on whether the Commission had competence to issue the act, as established in *Les Verts* (294/83).
    (b) As a private company in the field of telecommunications, SysTech was not subject to public procurement obligations, contrary to *Portugás* (C-425/12).
    (b) Public procurement obligations do not apply where only one supplier has the capacity to complete the subcontracted tasks, especially in case of contracts that have a limited value, as held in *Terna* v *Commission* (T-387/16).
27. The Commission denied SysTech's arguments and added that:
    (a) The Award Decision was invalid, as the award had been approved only by the chairman of CEF, which violated the principle of legality, and that SysTech would therefore in any case be obliged to repay the grant, as the funds had not been properly authorised, since the conditions of *Commission v Germany* (C-272/97) were not fulfilled.
    (b) The Addendum was invalid, as the extension of the implementation period was adopted without applying a new award procedure, which violated the principle of equal treatment (vis-à-vis other companies that might have been interested in bidding for the project), as held in relation to public procurement in *Frogne* (C-549/14).
    (c) The Special Conditions constituted a contract between SysTech and the Commission, which did not contain a choice of EU law as the governing law, and which therefore was not subject to EU law principles such as proportionality.
    (d) In any case, the Repayment Letter respected the principle of proportionality, as it imposed sanctions that did correspond to the alleged breach of public procurement obligations, thus complying with *Ceva v Commission* (T-428/07 and T-455/07).
    (e) Finally, SysTech could not, in order to escape its public procurement obligations, rely on the agreement between CompMax, AlphaTech, BetaTech, DeltaTech and GammaTech, since this agreement constituted bid-rigging, as established in *Verhuizingen Coppens* (T-210/08).

28. The exchange of letters between SysTech and the Commission did not lead to any agreement concerning the repayment claim. However, on 1 January 2019, SysTech made a payment of the 1,500,000 Euro. However, it informed the Commission that this payment was strictly 'subject to reservation', in the sense that:
    (a) Payment was made only to avoid the imposition of liquidated damages and default interest, but SysTech continued to deny the validity and legality of the Repayment Letter, as in *Commission* v *Netherlands* (C-96/89).

(b) Even if any errors had been made during the adoption and amendment of the Award Decision and Addendum, such errors would have been entirely the fault of the Commission and so the Commission could not seek to rely on its own errors in a way that would adversely affect the interests of another person, such as SysTech, since the principle of *Courage* (C-453/99) could not be applied by analogy.
(c) In any case, the Repayment Letter had made no mention of the reasons that the Commission later included in the exchange of letters in December 2018, and it was not permissible for the Commission to seek to introduce new reasoning at this later stage, as held in *Alliance One International and Standard Commercial Tobacco v. Commission* (C-628/10 P and C-14/11 P).

29. On 13 March 2019, SysTech submitted an application to the Sloranian High Court. It claimed that the court should oblige the Commission to recognise the validity of the reservation made by SysTech, as the Commission had no right to seek repayment of the grant financing, nor to impose any liquidated damages or default interest. Accordingly, the Commission should be obliged to return the 1,500,000 Euro repayment that SysTech made under the reservation. SysTech based its claim on Article 112 of the Sloranian Administrative Code, which states as follows:

> *Article 112 of the Sloranian Administrative Code*
> (1) A private party may initiate proceedings against any public authority, whether national, foreign or international, for the purpose of obtaining a ruling from the Sloranian High Court on the validity of a legal position asserted by the private party, which the public authority has failed or refused to recognise.
> (2) If the Court finds in favour of the private party, the Court shall impose on the public authority an obligation to uphold the legal position asserted by the private party.

30. On 5 May 2019, the Commission submitted its defence, in which it challenged the admissibility of the case on the grounds that:
    (a) Under the EU Protocol on Privileges and Immunities, the Commission was immune from judicial proceedings in any Member State of the EU, and *Zwartveld* (C-2/88-IMM) could not be applied to such proceedings.
    (b) The Repayment Letter of 18 November 2018 did not constitute a challengeable act within the meaning of Article 263 TFEU, as held in *Slovakia* v *Commission* (C-593/15-P and C-594/15-P).
    (c) The Commission had accepted a payment made on a voluntary basis by SysTech, and in the view of the Commission, the voluntary payment entailed that SysTech could no longer challenge whether payment had been due, since it had lost legal interest, as established in *TWD Textilwerke Deggendorf* (C-188/92).
    (d) Finally, the Commission could not be ordered to take any specific action, as confirmed in *GMPO v Commission* (T-733/17).

31. On 18 June 2019, SysTech submitted its reply and argued that:
    (a) Immunity against national judicial proceedings can apply for the Commission only in cases where the Court of Justice of the EU has exclusive competence, which does not include contractual matters or claims that may not be submitted by private parties, and the issue of the validity of EU acts may always be raised by a national court at its own motion, as held in *Cassa di Risparmio di Firenze* (C-222/04).
    (b) Where the Commission receives payments made under reservation (as in the case of SysTech's repayment of 1,500,000 Euro on 1 January 2019), the Commission cannot just passively receive the payment, but under the principle of loyalty in Article 4(3) TFEU, the Commission must take steps to challenge the reservation, as opposed to the discretion that is reserved for the Commission in other administrative matters according to *Swedish Match* (C-210/03).
    (c) If the Commission were entitled to retain the payment made under reservation, this would constitute a windfall profit, which is not protected by EU law, as held in *Iberdrola* (C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11).
32. Finally, on 18 June 2019, the Commission submitted its rejoinder and argued that:
    (a) A statement of reasons, such as in the Repayment Letter, is not required to include all aspects of the reasoning applied by the Commission, since mandatory rules and principles of EU law will apply in any case, as held in *Swedish Match* (C-210/03).
    (b) By entering into a contract with CompMax, without undertaking proper procurement procedures, SysTech had forfeited all rights to the grant that had been awarded under EU law, as it follows from *Terna* v *Commission* (T-387/16).
    (c) Since SysTech had been in bad faith when publishing a voluntary notice in the Official Journal of the EU, it was barred from relying on *Fastweb* (C-19/13).

33. The Sloranian High Court considered the case over the summer. On 15 September 2019, it submitted a request for a preliminary ruling to the CJEU, in which it asked the following questions.

34. The CJEU decided that answering the questions submitted the Sloranian High Court should best be undertaken after judgment was rendered in the appeal case *Czech Republic v Commission* (C-575/18-P), which at the time was pending. Accordingly, an informal suspension was applied to the request from the Sloranian High Court.

35. On 9. July 2020, the Court gave judgement in *Czech Republic v Commission*, but due to the restrictions imposed by the Corona virus pandemic, the suspension was only recently lifted, so as to allow for the written procedure to commence.

Questions:

In circumstances such as those described in the case file:

1. When the Commission requires the beneficiary of an EU grant (the Beneficiary) to repay the funds received in a letter (the Repayment Letter):

   (a) Does the Repayment Letter constitute a challengeable act under Article 263 TFEU?

   (b) May the Repayment Letter be challenged in a case that the Beneficiary brings against the Commission in the courts of a Member State of the EU?

2. When subcontracting with a private party (the Subcontractor) for the provision of computer simulation services, must the Beneficiary:

   (a) Either, comply with the EU public procurement provisions specified in the Special Conditions of the grants?
   (b) Or, comply with the currently applicable EU public procurement provisions?

3. If question 2 (a) or (b) is answered in the affirmative, may the question of whether the Beneficiary has breached public procurement law depend on:

   (a) Whether a voluntary notice has been published by the Beneficiary in the Official Journal of the EU under Article 2(4) of Directive 2007/66?

   (b) Whether a settlement is concluded between the Subcontractor and its competitors, who might otherwise have pursued the alleged breach of public procurement procedures?

4. When deciding whether the Beneficiary is obliged to repay the grant:

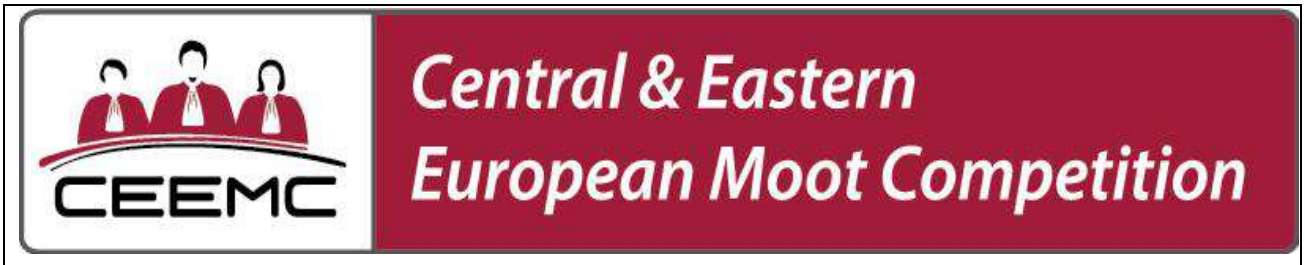
   (a) Must the justification, for seeking the repayment, be assessed solely on the basis of reasons mentioned in the Repayment Letter, or may account also be taken of new reasons mentioned in subsequent correspondence between the Commission and beneficiary?

   (b) May the justification, for seeking the repayment, include administrative errors that are the fault of the Commission itself?

5. When the Beneficiary makes a voluntary repayment of funds, but does so under a reservation, in which it challenges the repayment demand made by the Commission:

   (a) Must the Commission take steps to ensure that the reservation is removed?

   (b) If the Commission does not take such steps to have the reservation removed, or such steps are unsuccessful, is the Commission obliged to return the payment?



COMPETITION RULES (2021 Bucharest)

1. Competition and important dates:

This twenty-seventh edition of the competition takes place in Bucharest at the Palace of Justice. It is co-hosted by the University of Bucharest.

The CEEMC competition was first held in 1995 and, since then, has been held in multiple cities and countries throughout Central and Eastern Europe. The CEEMC enjoys extremely close links with many of the judges, Advocates General and referendaires of the Court of Justice of the European Union (CJEU), some of whom are regular members of the CEEMC's judicial panel. We celebrated the 25th anniversary of the competition at the CJEU in Luxembourg in May 2019, before taking a break in 2020 due to COVID-19.

The CEEMC is held under the auspices of the University of Cambridge and the Court of Justice of the European Union, both of which host prizes awarded to the best speakers/team. The participating teams and mooters have included *inter alia* those from Armenia, Belarus, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Lithuania, Latvia, Kazakhstan, Hungary, Malta, Moldova, Poland, Romania, Russia, Slovak Republic, Slovenia, Turkey and Ukraine.

The CEEMC question, which is prepared by a committee of organisers and external experts (including from the CJEU itself) aims to reproduce, as closely as possible, the discussion and argument of a genuine preliminary referral to the CJEU. The bundle of supporting materials and authorities which is provided alongside the CEEMC question includes all of the authorities to which that teams are permitted to refer to during the competition. In other words, no reference can be made in a team's written or oral pleadings to any legal sources other than those which are found in the bundle.

If your team has any questions regarding the competition, please email us at: organisers@ceemc.co.uk

IMPORTANT DATES:
To be eligible to participate, teams must register online at the CEEMC website or by sending an e-mail to the organising committee (organisers@ceemc.co.uk). They must also pay the competition fees and submit written pleadings. The relevant dates for each step are given below:

Final date for registering a team: 25th February 2021
NB. It is possible to consider applications from teams who have not registered their team by this date for reasons due to late awareness of the competition. In such a case, please contact us at organisers@ceemc.co.uk as soon as possible, entitling your mail **'CEEMC- Late registration request'.**

Final date for providing organisers with proof of fees payment: 17th April 2021 (see section 5 below for details of the organisers' bank details). If you believe that you may have difficulties with obtaining the financing to cover fees, please contact us to discuss how we may be able to help.

Final date for submitting written pleadings: 25th April 2021

2. Participating Teams

The CEEMC is open to teams representing a university located anywhere in the Central and Eastern Europe, Southern Europe and EU Neighborhood regions are encouraged to apply. Each team member must also:

- be enrolled as a full-time student on a University course; and:

- be not older than 30 years; and
- not be a qualified and practising lawyer; and
- not have previously participated in the CEEMC

A participating university may register more than one moot team, provided that each team submits a separate set of written pleadings and pays a separate registration fee. Teams should notify us if they are aware that their University wishes/intends to submit two teams.

3. The Stages of the CEEMC

The CEEMC question is based on an area of European Union substantive and/or procedural law, involving a preliminary reference to the Court of Justice of the EU under Article 267 TFEU. Each competing team must submit written pleadings (by the date indicates above) and participate in the oral pleadings at the CEEMC venue for the particular year. Each team must submit written pleadings on behalf of both the applicant and the respondent to the case. Likewise, during the oral rounds, each team will (in different rounds) act as both applicant and the respondent

The team with the highest overall score wins the CEEMC competition. A team's score is calculated as the aggregate of its scores granted for four separate rounds, described below.

All rounds are organised on the basis that English is the official language of the CEEMC.

ROUND 1: *Submission of written pleadings*

Each team must prepare written pleadings on the following basis:

- Each team must prepare a set of written pleadings for the applicant and a separate set of written pleadings for the respondent;
- The maximum permissible length of each set of pleadings is 10 pages (Times New Roman font, size 11);
- The pleadings should contain clear headings/sub-headings and each paragraph of the pleadings should be consecutively numbered;
- Arguments contained in the pleadings should be supported, wherever possible, by reference to existing legal authorities (i.e. cases/legislation);
- Any legal authorities referred to in written pleadings must be contained or referred to in the moot bundle;
- When referring to legal authorities, ensure to reference the paragraph of the case (or number of the Article in legislation) and to refer to the page of the CEEMC bundle on which it can be found;
- A separate bibliography of legal authorities relied upon in the pleadingds does not count towards the 10 page limit
- The written pleadings must be sent by email to us at: organisers@ceemc.co.uk
- The written pleadings must be sent by the end of the day indicated in section 1 above (**Competition and important dates)**
- The organisers will confirm the receipt of your team's pleadings within 3 days of submission.
- When submitting the written pleadings, please also attach a copy of your **proof of payment for the CEEMC**
- A maximum of 20 points are awarded for each team's written pleadings
- A prize is awarded for the best written pleadings, sponsored by Clifford Chance law firm.

ROUND 2: *Day 1 of Oral Pleadings*

At the moot venue, each team participates in oral pleadings *twice* on the first day – i.e. in one moot as the applicant, and in the other moot as the respondent. In each of the two moots that happen on day one, your team will virtually always moot against different opponents. You will be informed about the timings of your moots (and in which of those moots you are acting as applicant or respondent) and the identity of your opponents in the CEEMC timetable, which will be provided in advance (usually one day before the first day of oral pleadings). During this part of the competition, the courts will hear arguments on questions 1 and 2 of the questions referred by the fictitious EU Member State for a ruling by the Court to the European Union under the Article 267 TFEU procedure

During the first day of oral pleadings, all team members must actively submit pleadings (i.e. speak). However, it is *not* necessary for all members to speak in each of the two separate moots that happen on day 1 (e.g. a team with 4 people may decide that 2 team members shall plead for the applicants in moot 1, while the other 2 shall plead for the respondent in moot 2). The crucial thing is that, by the ed of Day 1, all team members must have delivered oral pleadings.

Timings:
The following timings apply to all moots except the final.

Pleadings for applicant: Max 20 minutes (this includes dealing with all questions to be mooted on that day)
Pleadings for respondent: Max 20 minutes (this includes dealing with all questions to be mooted on that day)
Reply for applicant: Max 5 minutes (a reply is limited to commenting on matters raised in the respondent's pleadings)
Rejoinder for respondent: Max 5 minutes (a reply is limited to commenting on matters raised in the applicant's reply)

In the event of exceeding these time limits, it is entirely within the discretion of the court whether or not the team will be allowed to continue (having requested an extra time period, not exceeding 5 extra minutes).

NB. The clock stops 'running' when a judge asks a question or makes a comment, but continues to 'run' again when the judge finishes.

NB. The timings for the final are explained below.

Scoring Criteria:

The following scoring criteria are applied by the judges to each individual moot during the CEEMC's oral-pleading stages (i.e. to all moots on Day 1 and Day 2, including the final):

Criteria	**Maximum Points Awarded**
Style and quality of presentation in oral arguments	30
Effective and accurate use of provided materials	30
Team-work	10
Ability to respond effectively to judges' questions.	10
Effectiveness of reply/rejoinder	20

ROUND 3: Day 2 of Oral Pleadings
Teams are selected from the first day of oral pleadings to progress to the second day. During day 2, the qualifying teams deal with different questions to those argued during the first day. The break-down of which questions will be deal with on each day is provided in the CEEMC question, but after Day 1 has finished, the judges may also decide that they also wish one/more of the questions from Day 1 to be discussed again during the Day 2 moots. Information about this will be provided at the same time as the teams are informed whether or not they will progress to Day 2. Each of the eight teams competing in Day 2 will again have two moots (mooting once as applicant, once as respondent). However, a key difference between the Day 1 rules is that, on Day 2, *each and every team member must speak (plead) during BOTH of the team's two moots.*
Day 2 lasts until lunchtime, at which time the two teams selected to proceed to the final (later that same day) will be announced. This round will focus on the remaining questions referred by the fictitious EU Member State national court for ruling by the CJEU as well as any additional questions required by the jury panel.

ROUND 4: Final
At lunchtime on Day 2, two teams are chosen (from the eight competing on Day 2) to face each other in the final. The role to be played by each finalist (applicant or respondent) is chosen by lot. The judges will announce which questions they wish to be mooted in pleadings during the final (selected from the questions dealt with during Day 1 and Day 2).

Each and every member of the team must speak (plead) in the final. It is permitted for a particular team member's speaking role to be limited to only a small fraction of the team's overall speaking time (e.g. by dealing only with one sub-part of a question, or saying very little during reply/rejoinder), but this may lead to the judges to draw adverse inferences regarding the team's overall quality and team-work.

The scoring criteria that apply to the final are identical to the othe rounds (as described above) but the timings are adapted as below:

Pleadings for applicant:	Max 45 minutes (this includes dealing with all questions to be mooted on that day)
Pleadings for respondent:	Max 45 minutes (this includes dealing with all questions to be mooted on that day)
Reply for applicant:	Max 10 minutes (a reply is limited to commenting on the respondent's pleadings)
Rejoinder for respondent:	Max 10 minutes (a reply is limited to commenting on the applicant's reply)

Time extensions are *not permissible* in the final.

Post-final: awards ceremony

Following the CEEMC final, the awards ceremony will be held. During this ceremony, each team member will received a certificate to commemorate their performance, signed by the CEEMC President. Special prizes will also be awarded to:

- the winning team
- the person chosen as best speaker (being a person who mooted at any stage on Day 2, but not necessarily in the final)
- other individual speakers whom the judges feel deserve special recognition
- best written pleadings

4. Fees

The competition fee is **EUR 250**. The competition fee should be paid by bank transfer and confirmation of payment should be sent (as an attachment to an e-sent to: organisers @ceemc .co.uk) by no later than the date specified in Section 1 above **Competition and important dates).** The fee covers the cost of participating in the CEEMC.

Once you have registered your team on the website, please contact us if you wish to receive an official invitation, which may be useful when applying for university funding.

Payment of the competition fee must be done by bank transfer.

5. Organiser's Bank details

Recipient name:	Juris Angliae Scientia Ltd
Recipient address:	Faculty of Law, University of Cambridge, 10 West Road, Cambridge United Kingdom, CB3 9BZ
Account no: (this is a Euro account)	PL90 1750 0009 0000 0000 4001 2915
BIC/SWIFT code:	PPABPLPK
Bank name:	BNP Paribas

NB. Please ensure that payments received are made in Euro and that any/all bank fees are paid.

The CEEMC is organised by the British Law Centres of the English charity Juris Angliae Scientia. To contact us, please write to: s.terrett@britishlawcentre.co.uk

PRELIMINARY INFORMATION ON THE CJEU

The following is a short introductory guide to the role of the Court of Justice to the European Union (formerly – and still commonly – known as the European Court of Justice or ECJ) and its relationship with the national courts of the Member States.

- The CJEU's function is to rule upon the interpretation and application of the Treaties and on the interpretation, application and validity of secondary EU law. It is effectively the supreme court on such issues, with no appeal to any higher judicial body.

- Cases may be brought directly before the CJEU on behalf of an EU institution (i.e. Commission, Council, European Parliament), by a Member State or by a national of a Member State.

- The Commission's power to bring actions against a Member State it suspects to be in breach of Community law stems from Article 258. The power of one Member State to bring an action against another Member State comes from Article 259 but such cases are rare. Institutions or Member States may also challenge secondary legislation adopted by institutions of the TFEU on the basis that it exceeds the competences granted under the treaties or fails to comply with procedural requirements thereof.

- Where an individual wishes the CJEU to rule upon a certain issue of European Union law, it is most common for such a case to begin in that person's national courts and for the national court to make an Article 267 reference to the CJEU asking for guidance on the interpretation, application or validity of an EU measure. (NB. Remember that the Treaty article which describes the preliminary ruling procedure has been renumbered over the years and moved from the EEC Treaty to the EC Treaty to TFEU, so some (earlier) cases may refer to the earlier numbering of Article 177 or Article 234).

- The CJEU is assisted by Advocate-Generals, who produce reasoned opinions on a case before the CJEU rules on it. These opinions will discuss the applicable law and will recommend how the court should decide the case. Often these opinions are more detailed than the eventual judgment of the court. They are not binding on the CJEU but they are very influential and are often followed in practice.

- The CJEU is not bound by its own jurisprudence (case-law) and may depart from an earlier decision if it wishes. Although any court attempts to follow its earlier jurisprudence wherever possible, the CJEU has already been seen to have reversed its own jurisprudence on a number of occasions.

- National courts are bound to follow the CJEU's rulings on Union law but it is for the national court to apply that Union law to the facts of the case in front of it.

PROVISIONAL COMPETITION TIMETABLE*
[*NB. A final version of the timetable will be provided in May]

Friday 7 May 2021

14.00-17.00 Advocacy and mooting workshops
19.00-20.30 Opening ceremony

Saturday 8 May 2021

Round 1 of Competition

09.30 - 11.00 Group 1
11.15 - 12.45 Group 2

13.00 - 14.00 LUNCH

14.15-15.45 Group 3
16.00-17.30 Group 4

Sunday 9 May 2021

Round 2 of Competition

09.00 - 11.00 First semi-finals
11.15-13.15 Second semi-finals

13.30 LUNCH BREAK (Announcement of finalists)

Round 3 of Competition

15.00 FINAL (followed immediately by presentation of moot-participation certificates and prize ceremony)

20.00 Big celebration and social event

ACKNOWLEDGMENTS

The Organising Committee wish to thank the following for their invaluable help:

- The Court of Justice of the European Union (Eleanor Sharpston A.G, Michal Bobek A.G, Peter Gjortler, Judges Alexander Kornezov, Krystyna Kowalik-Banczyk, Alexander Arabadjiev and Jan Passer and members of his cabinet) for their continuing support of the CEEMC

- The Palace of Justice, Bucharest

- The Faculty of Law, University of Cambridge for its continuing support of the CEEMC and British Law Centres

- The Faculty of Law, University of Bucharest

The Organisers would also like to acknowledge and thank the following authors for the extracts of their work which greatly assisted the moot teams to prepare for the competition:

- Alastair Mowbray (2008) The consideration of gender in the process of appointing judges to the European Court of Human Rights. Human Rights Law Review, 8 (3). pp. 549-559. ISSN 1461-
-

The Organising Committee also wish to offer special thanks to the CEEMC primary sponsors; the Warsaw office of Clifford Chance and the Honourable Society of the Inner Temple as well as thanks to our local event sponsors in 2021.

PART B. EU LEGISLATIVE MATERIALS

SELECTED EXTRACTS FROM THE TREATY ON EUROPEAN UNION

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall 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 Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

CONSOLIDATED VERSION

OF

THE TREATY ON THE FUNCTIONING OF THE

EUROPEAN UNION

Article 247

(ex Article 216 TEC)

If any Member of the Commission 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 Council acting by a simple majority or the Commission, compulsorily retire him.

Article 248

(ex Article 217(2) TEC)

Without prejudice to Article 18(4) of the Treaty on European Union, the responsibilities incumbent upon the Commission shall be structured and allocated among its members by its President, in accordance with Article 17(6) of that Treaty. The President may reshuffle the allocation of those responsibilities during the Commission's term of office. The Members of the Commission shall carry out the duties devolved upon them by the President under his authority.

Article 249

(ex Articles 218(2) and 212 TEC)

1. The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate. It shall ensure that these Rules are published.

2. The Commission shall publish annually, not later than one month before the opening of the session of the European Parliament, a general report on the activities of the Union.

Article 250

(ex Article 219 TEC)

The Commission shall act by a majority of its Members.

Its Rules of Procedure shall determine the quorum.

SECTION 5

THE COURT OF JUSTICE OF THE EUROPEAN UNION

Article 251

(ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union.

When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252

(ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253

(ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 254

(ex Article 224 TEC)

The number of Judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General.

The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office. They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

The Judges shall elect the President of the General Court from among their number for a term of three years. He may be re-elected.

The General Court shall appoint its Registrar and lay down the rules governing his service.

The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the Statute of the Court of Justice of the European Union provides otherwise, the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.

Article 255

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

Article 256

(ex Article 225 TEC)

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

Article 257

(ex Article 225*a* TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts.

Article 258

(ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259

(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260

(ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 261

(ex Article 229 TEC)

Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.

Article 262

(ex Article 229*a* TEC)

Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

Article 263

(ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission 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.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any 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.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, 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.

Article 264

(ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265

(ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266

(ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267

(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 268

(ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 269

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Article 270

(ex Article 236 TEC)

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

Article 271

(ex Article 237 TEC)

The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

(a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258;

(b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 263;

(c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 263, and solely on the grounds of non-compliance with the procedure provided for in Article 19(2), (5), (6) and (7) of the Statute of the Bank;

(d) the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court.

Article 272

(ex Article 238 TEC)

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 Union, whether that contract be governed by public or private law.

Article 273

(ex Article 239 TEC)

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

Article 274

(ex Article 240 TEC)

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Article 275

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, 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 Treaty on European Union.

Article 276

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 277

(ex Article 241 TEC)

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Article 278

(ex Article 242 TEC)

Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 279

(ex Article 243 TEC)

The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

Article 297

(ex Article 254 TEC)

1. Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council.

Legislative acts adopted under a special legislative procedure shall be signed by the President of the institution which adopted them.

Legislative acts shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

2. Non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them.

Regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication.

Other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification.

Article 298

1. In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.

2. In compliance with the Staff Regulations and the Conditions of Employment adopted on the basis of Article 336, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish provisions to that end.

Article 299

(ex Article 256 TEC)

Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.

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.

REGULATION (EU) No 1316/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 December 2013

establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010

(Text with EEA relevance)

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 172 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Having regard to the opinion of the Committee of the Regions ([2]),

Acting in accordance with the ordinary legislative procedure ([3]),

Whereas:

(1) In order to achieve smart, sustainable and inclusive growth and to stimulate job creation in line with the objectives of the Europe 2020 Strategy, the Union needs an up-to-date, high-performance infrastructure to help connect and integrate the Union and all its regions, in the transport, telecommunications and energy sectors. Those connections should help improve the free movement of persons, goods, capital and services. The trans-European networks should facilitate cross-border connections, foster greater economic, social and territorial cohesion, and contribute to a more competitive social market economy and to combating climate change.

(2) The aim of the creation of the Connecting Europe Facility (CEF) established by this Regulation is to accelerate investment in the field of trans-European networks and to leverage funding from both the public and the private sectors, while increasing legal certainty and respecting the principle of technological neutrality. The CEF should enable synergies between the transport, telecommunications and energy sectors to be harnessed to the full, thus enhancing the effectiveness of Union action and enabling implementing costs to be optimised.

(3) According to the Commission, the estimated investment requirement for trans-European networks in the transport, telecommunications and energy sectors for the period up to 2020 is EUR 970 000 million.

(4) This Regulation lays down, for the implementation of the CEF for the period 2014 to 2020, a financial envelope of EUR 33 242 259 000 in current prices which is to constitute the prime reference amount, within the meaning of point 17 of the Interinstitutional Agreement between the European Parliament, the Council and the Commission of 2 December 2013 on budgetary discipline, on cooperation in budgetary matters and on sound financial management ([4]) for the European Parliament and the Council during the annual budgetary procedure.

(5) In order to optimise the use of budgetary funds allocated to the CEF, the Commission should, following the mid-term evaluation of the CEF, be able to propose the transfer of appropriations between the transport, telecommunications and energy sectors. Such proposal should be subject to the annual budgetary procedure.

(6) The amount of EUR 11 305 500 000 in current prices transferred from the Cohesion Fund established by Regulation (EU) No 1301/2013 of the European Parliament and of the Council ([5]) should be used to commit budgetary resources to financial instruments under this Regulation only from 1 January 2017.

(7) The creation of efficient transport and energy infrastructure networks is one of the 12 key actions identified by the Commission in its Communication of 13 April 2011 entitled: "Single Market Act – Twelve levers to boost growth and strengthen confidence: 'Working together to create new growth'.

(8) The Commission has committed itself to mainstreaming climate change into Union spending programmes and to directing at least 20 % of the Union budget to climate-related objectives. It is important to ensure that climate change mitigation and adaptation, as well as risk prevention and management, are promoted in the preparation, design and implementation of projects of common interest. Infrastructure investments covered by this Regulation should help to promote the transition to a low-carbon and climate- and disaster-resilient economy and society, taking into account the specificities of regions with natural and demographic disadvantages, in particular the outermost and island regions. In the

([1]) OJ C 143, 22.5.2012, p. 116.
([2]) OJ C 277, 13.9.2012, p. 125.
([3]) Position of the European Parliament of 19 November 2013 (not yet published in the Official Journal)
([4]) OJ C 420, 20.12.2013, p. 1.
([5]) Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the Cohesion Fund and repealing Council Regulation (EC) No 1084/2006 (OJ L 347, 20.12.2013, p. 289).

transport and energy sectors in particular, the CEF should contribute to the Union's mid-term and long-term objectives in terms of decarbonisation.

(9) In its resolution of 8 June 2011 on Investing in the future: a new Multiannual Financial Framework (MFF) for a competitive, sustainable and inclusive Europe [1], the European Parliament stressed the importance of ensuring the rapid execution of the Union's Digital Agenda and of continuing efforts towards reaching by 2020 the targets of making access to high-speed internet available to all Union citizens, also in less developed regions. The European Parliament underlined that investing in an effective transport infrastructure had a key role to play in enabling Europe to defend its competitiveness and pave the way for post-crisis, long-term economic growth, and that the trans-European transport network ("TEN-T") was vital in order to guarantee the proper functioning of the internal market and provide important European added value. The European Parliament also stated that it was of the opinion that TEN-T should, accordingly, be a key priority in the MFF and that an increase in TEN-T funds was necessary in the MFF. In addition, the European Parliament emphasised the need to maximise the impact of Union funding and the opportunity offered by the Cohesion and by the European Structural and Investment Funds and financial instruments to fund key national and cross-border European priority energy infrastructure projects, and stressed the need for a substantial allocation from the Union budget for financial instruments in this field.

(10) With a view to financing infrastructure in cross-border regions as part of the development of the networks as a whole, synergies should be encouraged between the financial instruments of the CEF and other Union funds.

(11) On 28 March 2011, the Commission adopted the White Paper entitled "Roadmap to a Single European Transport Area — Towards a competitive and resource efficient transport system" (the "White Paper"). The White Paper aims at reducing the greenhouse gas emissions (GHG) of the transport sector by at least 60 % by 2050 compared to 1990. As far as infrastructure is concerned, the White Paper aims at establishing a fully functional and Union-wide multimodal TEN-T core network by 2030. Interoperability could be enhanced by innovative solutions that improve compatibility between the systems involved. The White Paper also aims at optimising the performance of multimodal logistic chains, including by making greater use of more energy-efficient modes. Therefore, it sets the following relevant targets for TEN-T policy: 30 % of road freight carried over distances of more than 300 km should shift to other modes by 2030, and more than 50 % by 2050; the length of the existing high-speed rail network should triple by 2030 and by 2050 the majority of medium-distance passenger journeys should be undertaken by rail; by 2050, all core network airports should be connected to the rail network and all seaports to the rail freight and, where possible, to the inland waterway system.

(12) In its resolution of 6 July 2010 on a sustainable future for transport [2], the European Parliament emphasised that an efficient transport policy required a financial framework that was appropriate to the challenges arising and that, to that end, the current resources for transport and mobility should be increased; it further considered that there was a need to create a facility to coordinate and optimise the use of different sources of transport funding and of all the financial means and mechanisms available at Union level.

(13) In its conclusions of 11 June 2009 on the TEN-T policy review, the Council reaffirmed the need to continue investing in transport infrastructure in order to ensure proper development of the TEN-T in all transport modes, as a basis for the internal market and competitiveness, economic, social and territorial cohesion of the Union and its connection to neighbouring countries, focusing on the European added value that this would bring. The Council also underlined the need for the Union to make available the financial resources necessary to stimulate investment in TEN-T projects and, in particular, the need to reconcile appropriate financing support from the TEN-T budget to the priority projects which involve relevant cross-border sections and the implementation of which would extend beyond 2013 within the institutional constraints of the MFF programming. In the view of the Council, public-private partnership approaches should be further developed and supported in this context where appropriate.

(14) On the basis of the objectives set by the White Paper, the TEN-T guidelines as laid down in Regulation (EU) No 1315/2013 of the European Parliament and of the Council [3] identify the infrastructure of the TEN-T, specify the requirements to be fulfilled by it and provide for measures for their implementation. Those guidelines envisage, in particular, the completion of the core network by 2030 through the creation of new infrastructure as well as the substantial upgrading and rehabilitation of existing infrastructure.

[1] OJ C 380E, 11.12.2012, p. 89.

[2] OJ C 351E, 2.12.2011, p. 13.

[3] Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (See page 1 of this Official Journal).

(15) Based on an analysis of the transport infrastructure plans of Member States, the Commission estimates that investment needs in transport amount to EUR 500 000 million over the entirety of the TEN-T network for the period 2014-2020, of which an estimated EUR 250 000 million will need to be invested in the core network of the TEN-T.

(16) The geographical alignment of rail freight corridors as provided for by Regulation (EU) No 913/2010 of the European Parliament and of the Council ([1]) and of core network corridors under Part I of Annex I to this Regulation should, where appropriate, be ensured, taking into consideration the objectives of the respective instruments, in order to reduce the administrative burden and streamline the development and use of the railway infrastructure. The rail freight corridors should be subject solely to the provisions of Regulation (EU) No 913/2010, including as regards changes to their alignment.

(17) Within the framework of the TEN-T policy review launched in February 2009, a dedicated expert group was created to support the Commission and look into the issue of the funding strategy and financing perspectives for the TEN-T. Expert Group No 5 drew from the experience of external experts from various fields: infrastructure managers, infrastructure planners, national, regional and local representatives, environmental experts, academia, and representatives of the private sector. The final report of Expert Group No 5 ([2]) adopted in July 2010 contains 40 recommendations, some of which have been taken into account in this Regulation. That report recommends inter alia that the Commission should provide a standard framework for the blending of Union grants and TEN-T public-private partnerships ("PPPs"), covering both the funds under the cohesion policy and the TEN-T budget.

(18) Experience with the MFF (2007-2013) shows that some Member States which are eligible for financing from the Cohesion Fund are facing significant obstacles in delivering on time complex cross-border transport infrastructure projects with a high European added value, as well as allowing efficient use of Union funds. Therefore, in order to improve the completion of transport projects – in particular cross-border ones – with a high European added value, part of the Cohesion Fund allocation (EUR 11 305 500 000) should be transferred to finance transport projects on the transport core network or transport projects relating to horizontal priorities in the Member States eligible for financing from the Cohesion Fund under the CEF. In an initial phase, the selection of projects eligible for financing should respect the national allocations under the Cohesion Fund. The Commission should support Member States eligible for financing from the Cohesion Fund in their efforts to develop an appropriate pipeline of projects, in particular by strengthening the institutional capacity of the public administrations concerned and by organising additional calls for proposals, while ensuring a transparent process for the selection of projects.

(19) The amount of EUR 11 305 500 000 transferred from the Cohesion Fund, to be spent exclusively in Member States eligible for funding from the Cohesion Fund, should not be used to finance actions with synergies between transport, telecommunications and energy sectors contributing to projects of common interest resulting from a multi-sectoral call for proposals.

(20) Institutional and administrative capacity are essential prerequisites for effective delivery of the objectives of the CEF. The Commission should, as far as possible, offer appropriate means of support to permit the design and implementation of projects in the Member States concerned.

(21) In its Communication of 17 November 2010 entitled: "Energy infrastructure priorities for 2020 and beyond – a Blueprint for an integrated energy network", the Commission identified the priority corridors which are necessary to allow the Union to meet its ambitious energy and climate targets by 2020 for the purposes of completing the internal energy market, ensuring security of supply, enabling the integration of renewable sources of energy and preparing the networks for further decarbonisation of the energy system beyond 2020.

(22) Major investment is needed to modernise and expand Europe's energy infrastructure and to interconnect networks across borders and end the energy isolation of Member States, in order to meet the Union's energy and climate policy objectives of competitiveness, sustainability and security of supply in a cost-effective way. According to the Commission, the estimated investment needs in energy infrastructure up to 2020 amount to EUR 1 000 000 million, including investment of approximately EUR 200 000 million in electricity and gas transmission and storage infrastructures considered to be of European relevance. According to the Commission Staff Working Paper entitled "Energy infrastructure investment needs and financing requirements" submitted to the Council, among projects of European relevance, approximately EUR 100 000 million worth of investment is at risk of not being delivered due to obstacles relating to the granting of permits, regulation and financing.

([1]) Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight (OJ L 276, 20.10.2010, p. 22).

([2]) http://ec.europa.eu/transport/infrastructure/ten-t-policy/review/doc/expert-groups/expert_group_5_final_report.pdf

(23) The urgent need to build the energy infrastructure of the future and the significant increase in investment volumes compared to past trends require a step change in the way energy infrastructure is supported at Union level. In its conclusions of 28 February 2011, the Council endorsed the energy corridors as priorities for Europe.

(24) As regards the energy sector, the European Council of 4 February 2011 called upon the Commission to streamline and improve authorisation procedures and to promote a regulatory framework attractive to investment. It underlined that the bulk of the investment would have to be delivered by the market with costs recovered through tariffs. The European Council recognised that public finance is needed for projects required from a security of supply or solidarity perspective which are unable to attract market-based financing. It furthermore underlined the need to modernise and expand Europe's energy infrastructure and to interconnect networks across borders, in order to make solidarity between Member States operational, to provide for alternative supply or transit routes and sources of energy and to develop renewable energy sources in competition with traditional sources. It insisted that the internal energy market should be completed by 2014 so as to allow gas and electricity to flow freely and that no Member State should remain isolated from the European gas and electricity networks after 2015 or see its energy security jeopardised by a lack of the appropriate connections. The first two annual work programmes adopted under this Regulation should give priority consideration to projects of common interest and related actions aimed at ending energy isolation and eliminating energy bottlenecks, so as to move towards completion of the internal energy market.

(25) Regulation (EU) No 347/2013 of the European Parliament and of the Council [1] identifies the trans-European energy infrastructure priorities which need to be implemented by 2020 in order to meet the Union's energy and climate policy objectives, sets rules to identify projects of common interest necessary to implement those priorities, and lays down measures in the field of the granting of permits, public involvement and regulation to speed up and/or facilitate the implementation of those projects, including criteria for the eligibility of such projects for Union financial assistance.

(26) Telecommunications are increasingly becoming internet-based infrastructures, with broadband networks infrastructure catalysing the use of digital services across a whole range of activities in society. The internet is becoming the dominant platform for communication, for doing business, for providing public and private services and for social and cultural cohesion. Furthermore, cloud computing and software-as-a-service are emerging as the new paradigms of computing. Therefore, the trans-European availability of ubiquitous, fast internet access and innovative digital services is essential for economic growth and the single market.

(27) Modern fast internet networks are a crucial infrastructure for the future in terms of connectivity for European companies, in particular small and medium-sized enterprises ("SMEs") that want to use cloud computing in order to improve cost-efficiency. In order to avoid duplication of infrastructure, prevent the displacement of private investment and enhance capacity-building with a view to creating new investment opportunities and promoting the implementation of cost-reduction measures, actions should be taken to improve coordination of Union support to broadband from the CEF and broadband support from all other available sources, including through national broadband plans.

(28) The Europe 2020 Strategy calls for the implementation of the Digital Agenda for Europe, which establishes a stable legal framework to stimulate investment in an open and competitive high-speed internet infrastructure and in related services. The aim should be for Europe to have the fastest broadband in the world by 2020 based on state-of-the-art technologies.

(29) On 31 May 2010, the Council concluded that the Union should put the necessary resources into the development of a digital single market based on fast and ultra-fast internet and interoperable applications, and acknowledged that efficient and competitive investment in next-generation broadband networks would be necessary for innovation, consumer choice and the competitiveness of the Union, and could provide a better quality of life through improved health care, safer transport, new media opportunities and easier access to goods, services and knowledge, in particular across borders.

(30) The private sector should play a leading role in rolling out and modernising broadband networks, supported by a competitive and investment-friendly regulatory framework. Where private investment falls short, Member States should undertake the necessary efforts to achieve the targets of the Digital Agenda. Public financial assistance to broadband should be limited to

[1] Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115, 25.4.2013, p. 39).

financial instruments for programmes or initiatives targeting projects which cannot be financed solely by the private sector, confirmed by an ex-ante assessment identifying market imperfections or sub-optimal investment situations.

(31) Consequently, it is essential to stimulate, in accordance with the principle of technological neutrality, Union-wide deployment of fast and ultra-fast broadband networks and to facilitate the development and deployment of trans-European digital services. Public investment through financial instruments in fast and ultra-fast broadband networks must not lead to market distortions or create disincentives to invest. It should be used to attract private investment, and should be resorted to only in cases where there is a lack of commercial interest to invest.

(32) Several methods of implementation are necessary and require different funding rates and financial instruments to increase the efficiency and impact of the Union financial assistance, to encourage private investment and to respond to the specific requirements of individual projects.

(33) A Regulation on guidelines for trans-European networks in the area of telecommunications infrastructure will identify the criteria according to which projects of common interest may be financially supported under this Regulation.

(34) Horizon 2020 – the Framework Programme for Research and Innovation ([1]) – will focus inter alia on tackling societal challenges (e.g. through smart, green, accessible and integrated transport, secure, clean and efficient energy, and information- and communication technology-enabled health, government and sustainable development) in order to respond directly to the challenges identified in the Europe 2020 Strategy, by supporting activities covering the entire spectrum from research to market. Horizon 2020 will support all stages in the innovation chain, especially activities closer to the market, including innovative financial instruments. With the aim of ensuring that the Union funding has a greater impact, and in order to ensure coherence, the CEF will develop close synergies with Horizon 2020.

(35) In its Communication of 20 July 2010 entitled "Towards a European road safety area: policy orientations on road safety 2011-2020", the Commission set a framework for policy actions in favour of safe infrastructure as a key element to reduce road casualties by 50 % by 2020. The CEF should therefore ensure that requests for Union funding comply with the safety requirements, recommendations and targets established in all relevant Union road safety law. The evaluation of the performance of the CEF should take into account the reduction of casualties on the road network of the Union.

(36) The Union and most Member States are party to the United Nations Convention on the Rights of Persons with Disabilities, while the remaining Member States are in the process of ratifying it. It is important in the implementation of the relevant projects that accessibility for persons with disabilities, as mentioned in that Convention, be considered in the specification of the projects.

(37) Even though a large proportion of the investment under the Europe 2020 Strategy can be delivered by the market and regulatory measures, the financing challenges may require public actions and Union support in the form of grants and innovative financial instruments.

(38) In order to optimise the use of the Union budget, grants should be targeted at those projects which receive insufficient financing from the private sector.

(39) Railway projects should not be excluded from receiving grants under this Regulation because they generate revenue from mandatory charges under Directive 2012/34/EU of the European Parliament and of the Council ([2]).

(40) Fiscal measures in many Member States will drive, or have already driven, public authorities to reassess their infrastructure investment programmes. In this context, PPPs have been viewed as an effective means of delivering infrastructure projects which ensure the achievement of policy objectives such as combating climate change, promoting alternative energy sources and energy and resource efficiency, and supporting sustainable transport and the deployment of broadband networks. In its Communication of 19 November 2009 entitled: "Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships", the Commission committed itself to improving access to finance for PPPs by broadening the scope of existing financial instruments.

(41) In its Communication of 19 October 2010 entitled "EU Budget Review", the Commission emphasised that the norm for projects with long-term commercial potential should be the use of Union funds in partnership with the financial and banking sectors, particularly the European Investment Bank and Member States' public financial

([1]) Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 - The Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (OJ L 347, 20.12.2013, p. 104).

([2]) Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ L 343, 14.12.2012, p. 32).

institutions, but also with other international financial institutions and the private financial sector, including at national and regional level.

(42) Financial instruments should be used to address specific market needs, for actions which have a clear European added value and which are in line with the objectives of the CEF, and should not crowd out private financing. They should improve the leverage effect of the Union budget spending and achieve a higher multiplier effect in terms of attracting private-sector financing. This is particularly relevant in the context of difficulties in accessing credit and constraints on public finances, and in view of the need to underpin Europe's economic recovery. Before deciding to use financial instruments, the Commission should carry out an ex-ante assessment of the instrument concerned, as required by Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council [1].

(43) In the Europe 2020 Strategy, the Commission pledged to mobilise Union financial instruments as part of a consistent funding strategy that pulls together Union and national public and private funding for infrastructures. This is based on the rationale that in many cases sub-optimal investment situations and market imperfections may be more efficiently tackled by financial instruments than by grants.

(44) The CEF should provide for financial instruments to promote substantial participation in infrastructure investment by private-sector investors and financial institutions. To be sufficiently attractive to the private sector, financial instruments should be designed and implemented with due regard to simplification and reduction of the administrative burden but should also be able to respond to identified financing needs in a flexible manner. The design of those instruments should draw upon the experience gained in the implementation of financial instruments in the MFF (2007-2013), such as the Loan Guarantee instrument for TEN-T projects (LGTT), the Risk-Sharing Finance Facility (RSFF), the 2020 European Fund for Energy, Climate Change and Infrastructure (the 'Marguerite Fund') and the Europe 2020 Project Bond Initiative.

(45) The potential for innovative financial instruments, such as project bonds, to support the financing of transport infrastructure with European added value should be explored, in line with the results of ex-ante assessments and other related evaluations, in particular the independent evaluation of the Europe 2020 Project Bond Initiative in 2015.

(46) In order to optimise the use of budgetary funds allocated to the CEF, the Commission should ensure continuity of all financial instruments established under Regulation (EC) No 680/2007 of the European Parliament and of the Council [2] and the risk-sharing instrument for project bonds established under Decision No 1639/2006/EC of the European Parliament and of the Council [3] within their succeeding debt and equity financial instruments under this Regulation, on the basis of an ex-ante assessment, as provided for by Regulation (EU, Euratom) No 966/2012.

(47) In the selection of the most effective form of financial assistance, due consideration should be given to the sector- and project-specific characteristics of eligible projects. To allow for the most efficient use of the Union budget and to enhance the multiplier effect of Union financial assistance, as regards the energy sector, the Commission should, to the extent possible and subject to market take-up, endeavour to give priority to the use of financial instruments whenever appropriate, whilst respecting the ceiling for the use of financial instruments in accordance with this Regulation. Energy project promoters should be encouraged to explore the possibility of using financial instruments before applying for grants for works. In this respect, the Commission should give appropriate support to maximising the uptake of financial instruments.

(48) Projects of common interest in the fields of electricity, gas and carbon dioxide should be eligible to receive Union financial assistance for studies and, under certain conditions, for works in the form of grants or in the form of innovative financial instruments. This will ensure that tailor-made support can be provided to those projects of common interest which are not viable under the existing regulatory framework and market conditions. In the field of energy, it is important to avoid any distortion of competition, in particular between projects contributing to the achievement of the same Union priority corridor. Such financial assistance should ensure the necessary synergies with the European Structural and Investment Funds, which will finance smart energy distribution networks of local or regional importance. A three-step logic applies to investments in projects of common interest. First, the market should have the priority to invest. Second, if

[1] Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

[2] Regulation (EC) No 680/2007 of the European Parliament and of the Council of 20 June 2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks (OJ L 162, 22.6.2007, p. 1).

[3] Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Competitiveness and Innovation Framework Programme (2007 to 2013) (OJ L 310, 9.11.2006, p. 15).

investments are not made by the market, regulatory solutions should be explored, if necessary the relevant regulatory framework should be adjusted, and the correct application of the relevant regulatory framework should be ensured. Third, where the first two steps are not sufficient to deliver the necessary investment in projects of common interest, Union financial assistance could be granted if the project of common interest fulfils the applicable eligibility criteria.

(49) Pursuant to Article 14 of Regulation (EU) No 347/2013, all projects of common interest falling under the categories set out in Annex II.1, 2 and 4 to that Regulation are eligible for Union financial assistance in the form of grants for studies and financial instruments. Grants for works may be used for actions contributing to those projects of common interest that, in accordance with Article 14 of Regulation (EU) No 347/2013, demonstrate, in particular, significant positive externalities and are not commercially viable, according to the project's business plan and other assessments carried out by, in particular, potential investors, creditors or national regulatory authorities.

(50) In order to ensure sectoral diversification of beneficiaries of financial instruments as well as to encourage gradual geographical diversification across the Member States, and with particular regard to those Member States which are eligible for support from the Cohesion Fund, the Commission in partnership with the European Investment Bank, through joint initiatives such as the European PPP Expertise Centre (EPEC) and the Joint Assistance to Support Projects in European Regions (Jaspers), should provide support to the Member States in developing an appropriate pipeline of projects that could be considered for project financing.

(51) The financial instruments under this Regulation should reflect the rules laid down in Title VIII of Regulation (EU, Euratom) No 966/2012and in Commission Delegated Regulation (EU) No 1268/2012 [1], and should be in line with best practice rules applicable to financial instruments.

(52) With respect to the conditions for the financial instruments, it might be necessary to add additional requirements in the work programmes, for example in order to ensure competitive markets with a view to the development of the Union's policies, technological developments and other factors that may become relevant.

(53) Multi-annual programming for support from the CEF should be directed towards supporting the Union's priorities by ensuring the availability of the necessary financial resources and the consistency, transparency and continuity of joint action by the Union and the Member States. For proposals submitted following the implementation of the first multiannual work programme in the sector of transport, eligibility of cost should start on 1 January 2014, so as to ensure the continuity of projects already covered by Regulation (EC) No 680/2007.

(54) Due to the substantial budget needed for the implementation of some infrastructure projects, provision should be made for the possibility of dividing budgetary commitments relating to the financial assistance for some actions into annual instalments.

(55) Given the resources available at Union level, concentration on projects with the highest European added value is necessary in order to achieve the desired impact. Support should therefore be focused on the core network and on projects of common interest in the field of traffic management systems, in particular the air traffic management systems resulting from the new-generation European air traffic management system (the SESAR system), which require Union budgetary resources of about EUR 3 000 million, as well as the Intelligent Transport System (ITS), Vessel Traffic Monitoring and Information Systems (VTMIS), River Information Services (RIS) and the European Rail Traffic Management System (ERTMS). In the energy sector, financial assistance should focus on completing the internal energy market, ensuring security of supply, promoting sustainability, inter alia by ensuring the transmission of renewable electricity from generation to centres of demand and storage, and attracting public and private investment. In the telecommunications sector, financial assistance should be targeted primarily at projects that will generate demand for broadband, including the building of a European digital service infrastructure, which should in turn stimulate investment in broadband network deployment.

(56) In the energy sector, the budget envisaged should, as a priority, be allocated in the form of financial instruments, subject to market uptake. Projects of common interest in the telecommunications sector should be eligible for Union financial support in the form of grants and procurement for core service platforms, generic services and horizontal actions. Actions in the field of broadband deployment, including actions generating demand for broadband, should be eligible for Union financial support in the form of financial instruments.

[1] Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).

(57) According to the analysis carried out in the impact assessment for Regulation (EU) No 347/2013, the number of projects of common interest contributing the most to the implementation of the strategic energy infrastructure priority corridors and areas is estimated to be approximately 100 in the field of electricity and 50 in the field of gas. Furthermore, based on the expected preponderance of electricity in Europe's energy system over the next two decades, it is estimated that assistance to electricity projects of common interest will account for the major part of the energy financial envelope under the CEF. While noting that this estimate will be subject to change as more information becomes available, and taking into account the need to ensure compliance with Regulation (EU) No 347/2013, the Commission should give due consideration to electricity projects, with the aim of making the major part of the financial assistance available to those projects over the period 2014 to 2020, subject to market uptake, the quality and maturity of actions proposed and their financing requirements. This aim is without prejudice to any possible re-allocation of available funding for energy projects.

(58) Mid-term and ex-post evaluations should be carried out by the Commission and communicated to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions in order to assess the effectiveness and efficiency of the funding and its impact on the overall goals of the CEF and the priorities of the Europe 2020 Strategy. The Commission should make public the information about specific projects under the CEF. That information should be updated annually.

(59) As far as transport and energy are concerned, on the basis of the sector-specific guidelines laid down in Regulation (EU) No 1315/2013 and in Regulation (EU) No 347/2013, lists of projects, priority corridors and areas for which this Regulation should apply have been drawn up and should be included in an annex to this Regulation. As for transport, in order to take into account possible changes in political priorities and technological capabilities, as well as traffic flows, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU) should be delegated to the Commission in respect of adopting amendments to Part I of Annex I and detailing the funding priorities for eligible actions under Article 7(2) to be reflected in the work programmes.

(60) In order to take into account the actual level of demand for funding under the specific transport objectives and to give effect to the findings of the mid-term evaluation, where it proves necessary to deviate from the allocation for a specific transport objective set out in Part IV of Annex I to this Regulation by more than five percentage points, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission to amend the indicative percentages for each of the specific transport objectives. The indicative allocations for specific transport objectives do not prevent the amount of EUR 11 305 500 000 transferred from the Cohesion Fund from being spent entirely on projects implementing the core network or on projects and horizontal priorities identified in Part I of Annex I to this Regulation.

(61) In order to reflect the conclusions drawn from the implementation of the CEF, including those contained in the mid-term evaluation, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission to modify the list of general orientations to be taken into account when setting award criteria.

(62) When adopting delegated acts under this Regulation, it is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure the simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(63) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission as regards multi-annual and annual work programmes. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council [1].

(64) The financial interests of the Union should be protected through proportionate measures throughout the expenditure cycle, including the prevention, detection and investigation of irregularities, the recovery of funds lost, wrongly paid or incorrectly used and, where appropriate, the imposition of penalties in accordance with Regulation (EU, Euratom) No 966/2012. The European Parliament should be kept informed of all such measures.

(65) In order to ensure broad and fair competition for projects benefitting from CEF funds, the form of the contract should be consistent with the objectives and circumstances of the project. Contract conditions should be drafted in such a way as to fairly allocate the risks associated with the contract, in order to maximise cost-effectiveness and enable the contract to be performed with the optimum efficiency. This principle should apply irrespective of whether a national or international contract model is used.

[1] Regulation (EU) No 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 the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

(66) Some of the infrastructure projects of common interest might need to link with and pass through neighbourhood, pre-accession and other third countries. The CEF should offer simplified means of linking and financing those infrastructures, in order to ensure coherence between internal and external instruments of the Union budget.

(67) When third countries and entities established in third countries participate in actions contributing to projects of common interest, grants should be available only if the action is unlikely to be adequately supported by other forms of financial assistance under the CEF or under other Union programmes.

(68) The general orientation on the basis of which the Commission is to take into account the social, climate and environmental impact, as detailed in Part V of Annex I to this Regulation, should not be applied in the field of energy, in accordance with the approach taken in Article 4(4) of Regulation (EU) No 347/2013.

(69) In the telecommunications sector, the general orientation whereby account is to be taken of the stimulating effect of Union support on public and private investment should be applicable only to those digital service infrastructures which aim at triggering additional investments.

(70) The general orientation whereby account is to be taken of the cross-border dimension should not be applicable in relation to broadband networks, because all investments in broadband, including those happening within Member States' borders, will enhance the connectivity of trans-European telecommunications networks.

(71) The participation of European Free Trade Association (EFTA) States which are parties to the Agreement on the European Economic Area ('the EEA Agreement') in the CEF should be in accordance with the conditions laid down in the EEA Agreement. For that purpose, each sector covered by this Regulation should be considered a separate programme. The participation of EFTA States in the CEF should be provided for, in particular, in the field of telecommunications.

(72) As far as transport is concerned, for the purpose of the eligibility of projects of common interest in third countries under this Regulation, the indicative maps contained in Annex III to Regulation (EU) No 1315/2013 should apply. In third countries for which that Regulation does not include indicative maps, projects of common interest should be eligible when there is ongoing mutual cooperation with a view to agreeing on such indicative maps.

(73) Since the objectives of this Regulation, namely the coordination, development and financing of the trans-European networks, cannot be sufficiently achieved by the Member States but can rather, by reason of the need for coordination of those objectives, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(74) Regulations (EC) No 680/2007 and (EC) No 67/2010 of the European Parliament and of the Council [1] should, for reasons of clarity, be repealed.

(75) This Regulation should enter into force on the day following that of its publication in the *Official Journal of the European Union*, in order to allow for the timely adoption of the delegated and implementing acts provided for by this Regulation,

HAVE ADOPTED THIS REGULATION:

TITLE I

COMMON PROVISIONS

CHAPTER I

The connecting europe facility

Article 1

Subject-matter

This Regulation establishes the Connecting Europe Facility ("CEF"), which determines the conditions, methods and procedures for providing Union financial assistance to trans-European networks in order to support projects of common interest in the sectors of transport, telecommunications and energy infrastructures and to exploit potential synergies between those sectors. It also establishes the breakdown of the resources to be made available under the multiannual financial framework for the years 2014-2020.

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

(1) "project of common interest" means a project identified in Regulation (EU) No 1315/2013 or Regulation (EU) No 347/2013 or in a Regulation on guidelines for trans-European networks in the area of telecommunications infrastructure;

(2) 'cross-border section' means, in the transport sector, the section which ensures the continuity of a project of common interest between the nearest urban nodes on both sides of the border of two Member States or between a Member State and a neighbouring country;

[1] Regulation (EC) No 67/2010 of the European Parliament and of the Council of 30 November 2009 laying down general rules for the granting of Community financial aid in the field of trans-European networks (OJ L 27, 30.1.2010, p. 20).

(3) 'neighbouring country' means a country falling within the scope of the European Neighbourhood Policy including the Strategic Partnership, the Enlargement Policy, and the European Economic Area or the European Free Trade Association;

(4) 'third country' means any neighbouring country or any other country with which the Union may cooperate to achieve the objectives pursued by this Regulation;

(5) "works" means the purchase, supply and deployment of components, systems and services including software, the carrying-out of development and construction and installation activities relating to a project, the acceptance of installations and the launching of a project;

(6) "studies" means activities needed to prepare project implementation, such as preparatory, mapping, feasibility, evaluation, testing and validation studies, including in the form of software, and any other technical support measure, including prior action to define and develop a project and decide on its financing, such as reconnaissance of the sites concerned and preparation of the financial package;

(7) 'programme support actions' means, at the level of the CEF, all accompanying measures necessary for its implementation and the implementation of the individual sector-specific guidelines, such as services, in particular the provision of technical assistance, including for the use of financial instruments, as well as preparatory, feasibility, coordination, monitoring, stakeholder consultation, control, audit and evaluation activities which are required directly for the management of the CEF and the achievement of its objectives. Programme support actions include, in particular, studies, meetings, infrastructure mapping, information, dissemination, communication and awareness raising actions, expenditure linked to IT tools and networks focusing on exchanges of information about the CEF, together with all other technical and administrative assistance expenditure incurred by the Commission that may be required for the management of the CEF or implementation of the individual sector-specific guidelines. Programme support actions also include activities required in order to facilitate the preparation of projects of common interest, in particular in the Member States, eligible for financing from the Cohesion Fund, with a view to obtaining financing under this Regulation or on the financial market. Programme support actions shall also include, where appropriate, meeting the costs of the Executive Agency entrusted by the Commission with the implementation of specific parts of the CEF ("Executive Agency");

(8) "action" means any activity which has been identified as financially and technically independent, has a set timeframe and is necessary for the implementation of a project of common interest;

(9) "eligible costs" has the same meaning as in Regulation (EU, Euratom) No 966/2012;

(10) "beneficiary" means a Member State, an international organisation, or a public or private undertaking or body that has been selected to receive Union financial assistance under this Regulation and in accordance with the arrangements established in the relevant work programme referred to in Article 17;

(11) "implementing body" means a public or private undertaking or body designated by a beneficiary, where the beneficiary is a Member State or an international organisation, to implement the action concerned. Such designation shall be decided upon by the beneficiary under its own responsibility and, if it requires the award of a procurement contract, in compliance with the applicable Union and national public procurement rules;

(12) "comprehensive network" means the transport infrastructure identified in accordance with Chapter II of Regulation (EU) No 1315/2013;

(13) "core network" means the transport infrastructure identified in accordance with Chapter III of Regulation (EU) No 1315/2013;

(14) "core network corridors" means an instrument to facilitate the coordinated implementation of the core network as provided for in Chapter IV of Regulation (EU) No 1315/2013 and listed in Part I of Annex I to this Regulation;

(15) "bottleneck" in the transport sector means a physical, technical or functional barrier which leads to a system break affecting the continuity of long-distance or cross-border flows and which can be surmounted by creating new infrastructure, or substantially upgrading existing infrastructure, that could bring significant improvements which will solve the bottleneck constraints;

(16) "priority" means any priority electricity corridors, priority gas corridors or priority thematic areas designated in Regulation (EU) No 347/2013;

(17) "telematic applications" means the applications as defined in Regulation (EU) No 1315/2013;

(18) "energy infrastructure" means the infrastructure as defined in Regulation (EU) No 347/2013;

(19) "synergies between sectors" means the existence, across at least two of the transport, telecommunications and energy sectors, of similar or complementary actions that may enable costs or results to be optimised through the pooling of financial, technical or human resources;

(20) 'isolated network' means the rail network of a Member State, or a part thereof, as defined in Regulation (EU) No 1315/2013.

Article 3

General objectives

The CEF shall enable projects of common interest to be prepared and implemented within the framework of the trans-European networks policy in the sectors of transport, telecommunications and energy. In particular, the CEF shall support the implementation of those projects of common interest which aim at the development and construction of new infrastructures and services, or at the upgrading of existing infrastructures and services, in the transport, telecommunications and energy sectors. It shall give priority to missing links in the transport sector. The CEF shall also contribute to supporting projects with a European added value and significant societal benefits which do not receive adequate financing from the market. The following general objectives shall apply to the transport, telecommunications and energy sectors:

(a) contributing to smart, sustainable and inclusive growth, in line with the Europe 2020 Strategy, by developing modern and high-performing trans-European networks which take into account expected future traffic flows, thus benefiting the entire Union in terms of improving competitiveness on the global market and economic, social and territorial cohesion in the internal market and creating an environment more conducive to private, public or public-private investment through a combination of financial instruments and Union direct support where projects could benefit from such a combination of instruments and by appropriately exploiting synergies across the sectors.

The achievement of this objective shall be measured by the volume of private, public or public-private partnership investment in projects of common interest, and in particular the volume of private investment in projects of common interest achieved through the financial instruments under this Regulation. Special focus shall be placed on the efficient use of public investment;

(b) enabling the Union to achieve its sustainable development targets, including a minimum 20 % reduction of greenhouse gas emissions compared to 1990 levels and a 20 % increase in energy efficiency, and raising the share of renewable energy to 20 % by 2020, thus contributing to the Union's mid-term and long-term objectives in terms of decarbonisation, while ensuring greater solidarity among Member States.

Article 4

Specific sectoral objectives

1. Without prejudice to the general objectives set out in Article 3, the CEF shall contribute to the achievement of the specific sectoral objectives referred to in paragraphs 2, 3 and 4 of this Article.

2. In the transport sector, the CEF shall support projects of common interest, as identified in Article 7(2) of Regulation (EU) No 1315/2013, that pursue the objectives set out below, as further specified under Article 4 of that Regulation:

(a) removing bottlenecks, enhancing rail interoperability, bridging missing links and, in particular, improving cross-border sections. The achievement of this objective shall be measured by:

(i) the number of new or improved cross-border connections;

(ii) the number of kilometres of railway line adapted to the European nominal gauge standard and fitted with ERTMS;

(iii) the number of removed bottlenecks and sections of increased capacity on transport routes for all modes which have received funding from the CEF;

(iv) the length of the inland waterway network by class in the Union; and

(v) the length of the railway network in the Union upgraded following the requirements set out in Article 39(2) of Regulation (EU) No 1315/2013;

(b) ensuring sustainable and efficient transport systems in the long run, with a view to preparing for expected future transport flows, as well as enabling all modes of transport to be decarbonised through transition to innovative low-carbon and energy-efficient transport technologies, while optimising safety. The achievement of this objective shall be measured by:

(i) the number of supply points for alternative fuels for vehicles using the TEN-T core network for road transport in the Union;

(ii) the number of inland and maritime ports of the TEN-T core network equipped with supply points for alternative fuels in the Union; and

(iii) the reduction in casualties on the road network in the Union;

(c) optimising the integration and interconnection of transport modes and enhancing the interoperability of transport services, while ensuring the accessibility of transport infrastructures. The achievement of this objective shall be measured by:

(i) the number of multimodal logistic platforms, including inland and maritime ports and airports, connected to the railway network;

(ii) the number of improved rail-road terminals, and the number of improved or new connections between ports through motorways of the sea;

(iii) the number of kilometres of inland waterways fitted with RIS; and

(iv) the level of deployment of the SESAR system, VTMIS and ITS for the road sector.

The indicators referred to in this paragraph shall not apply to Member States which do not have a rail network or an inland waterway network, as appropriate.

Those indicators shall not constitute selection or eligibility criteria for actions for support from the CEF.

Indicative percentages reflecting the proportion of the overall budgetary resources referred to in point (a) of Article 5(1) to be allocated to each of the three transport-specific objectives are set out in Part IV of Annex I to this Regulation. The Commission shall not deviate from those indicative percentages by more than 5 percentage points;

3. In the energy sector, the CEF shall support projects of common interest that pursue one or more of the following objectives:

(a) increasing competitiveness by promoting the further integration of the internal energy market and the interoperability of electricity and gas networks across borders. The achievement of this objective shall be measured ex post by:

(i) the number of projects effectively interconnecting Member States' networks and removing internal constraints;

(ii) the reduction or elimination of Member States' energy isolation;

(iii) the percentage of electricity cross-border transmission power in relation to installed electricity generation capacity in the relevant Member States;

(iv) price convergence in the gas and/or electricity markets of the Member States concerned; and

(v) the percentage of the highest peak demand of the two Member States concerned covered by reversible flow interconnections for gas;

(b) enhancing Union security of energy supply;

The achievement of this objective shall be measured ex post by:

(i) the number of projects allowing diversification of supply sources, supplying counterparts and routes;

(ii) the number of projects increasing storage capacity;

(iii) system resilience, taking into account the number of supply disruptions and their duration;

(iv) the amount of avoided curtailment of renewable energy;

(v) the connection of isolated markets to more diversified supply sources;

(vi) the optimal use of energy infrastructure assets;

(c) contributing to sustainable development and protection of the environment, inter alia by the integration of energy from renewable sources into the transmission network, and by the development of smart energy networks and carbon dioxide networks.

The achievement of this objective shall be measured ex post by:

(i) the amount of renewable electricity transmitted from generation to major consumption centres and storage sites;

(ii) the amount of avoided curtailment of renewable energy;

(iii) the number of deployed smart grid projects which benefited from the CEF and the demand response enabled by them;

(iv) the amount of CO_2 emissions prevented by the projects which benefited from the CEF.

The indicators referred to in this paragraph, used for the ex post measurement of the achievement of the objectives, shall not constitute selection or eligibility criteria for actions of support from the CEF.

The conditions of eligibility for Union financial assistance for projects of common interest are set out in Article 14 of Regulation (EU) No 347/2013, whilst the selection criteria for projects of common interest are set out in Article 4 of that Regulation.

4. In the telecommunications sector, the CEF shall support actions that pursue the objectives specified in a Regulation on guidelines for trans-European networks in the area of telecommunications infrastructure.

Article 5

Budget

1. The financial envelope for the implementation of the CEF for the period 2014 to 2020 is set at EUR 33 242 259 000 [1] in current prices. That amount shall be distributed as follows:

(a) transport sector: EUR 26 250 582 000, of which EUR 11 305 500 000 shall be transferred from the Cohesion Fund to be spent in line with this Regulation exclusively in Member States eligible for funding from the Cohesion Fund;

[1] The financial enveloppe of the CEF for the period 2014 to 2020 in constant 2011 prices is EUR 29 300 000 000, distributed as follows: EUR 23 174 000 000, including EUR 10 000 000 000 for Cohesion countries (transport), EUR 5 126 000 000 (energy), EUR 1 000 000 000 (telecommunications).

(b) telecommunications sector: EUR 1 141 602 000;

(c) energy sector: EUR 5 850 075 000.

These amounts are without prejudice to the application of the flexibility mechanism provided for under Council Regulation (EU, Euratom) No 1311/2013 ([1]).

2. The financial envelope for the implementation of the CEF shall cover expenses pertaining to:

(a) actions contributing to projects of common interest and programme support actions as provided for in Article 7;

(b) programme support actions consisting of technical and administrative assistance expenses incurred by the Commission for the management of the CEF, including those necessary to ensure the transition between the CEF and the measures adopted under Regulation (EC) No 680/2007, up to 1 % of the financial envelope; the costs of the Executive Agency shall be included under this ceiling.

3. Following the mid-term evaluation referred to in Article 27(1), the European Parliament and the Council may, upon a proposal by the Commission, transfer appropriations between the transport, telecommunications and energy sectors of the allocation set out in paragraph 1, with the exception of the amount of EUR 11 305 500 000 transferred from the Cohesion Fund to finance transport sector projects in the Cohesion Fund-eligible Member States.

4. The annual appropriations shall be authorised by the European Parliament and the Council within the limits of the multiannual financial framework for the years 2014-2020.

CHAPTER II

Forms of financing and financial provisions

Article 6

Forms of financial assistance

1. The CEF shall be implemented by one or more of the forms of financial assistance provided for by Regulation (EU, Euratom) No 966/2012, in particular, grants, procurement and financial instruments.

2. For the purposes of this Regulation, the work programmes referred to in Article 17 shall establish the forms of financial assistance, in particular grants, procurement and financial instruments.

3. The Commission may entrust, subject to a cost-benefit analysis, part of the implementation of the CEF to the bodies referred to in point (a) of Article 58(1) and Article 62 of Regulation (EU, Euratom) No 966/2012, and in particular to the Executive Agency, with a view to the optimum management and efficiency requirements of the CEF in the transport, telecommunications and energy sectors. The Commission may also entrust part of the implementation of the CEF to the bodies referred to in point (c) of Article 58(1) of Regulation (EU, Euratom) No 966/2012.

Article 7

Eligibility and conditions for financial assistance

1. Only actions contributing to projects of common interest in accordance with Regulations (EU) No 1315/2013 and (EU) No 347/2013 and a Regulation on guidelines for trans-European networks in the area of telecommunications infrastructure, as well as programme support actions, shall be eligible for support through Union financial assistance in the form of grants, procurement and financial instruments.

2. In the transport sector, only actions contributing to projects of common interest in accordance with Regulation (EU) No 1315/2013 and programme support actions shall be eligible for support through Union financial assistance in the form of procurement and financial instruments under this Regulation. Only the following shall be eligible to receive Union financial assistance in the form of grants under this Regulation:

(a) actions implementing the core network in accordance with Chapter III of Regulation (EU) No 1315/2013, including the deployment of new technologies and innovation in accordance with Article 33 of that Regulation, and projects and horizontal priorities identified in Part I of Annex I to this Regulation;

(b) actions implementing the comprehensive network in accordance with Chapter II of Regulation (EU) No 1315/2013, when such actions contribute to bridging missing links, facilitating cross-border traffic flows or removing bottlenecks and when those actions also contribute to the development of the core network or interconnect core network corridors, or when such actions contribute to the deployment of ERTMS on principal routes of rail freight corridors as defined in the Annex to Regulation (EU) No 913/2010, up to a ceiling of 5 % of the financial envelope for transport as specified in Article 5 of this Regulation;

(c) studies for projects of common interest as defined in points (b) and (c) of Article 8(1) of Regulation (EU) No 1315/2013;

(d) studies for cross-border priority projects as defined in Annex III to Decision No 661/2010/EU of the European Parliament and of the Council ([2]);

(e) actions supporting projects of common interest as defined in points (a), (d) and (e) of Article 8(1) of Regulation (EU) No 1315/2013;

([1]) Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-20 (OJ L 347, 20.12.2013, p. 884).

([2]) Decision No 661/2010/EU of the European Parliament and of the Council of 7 July 2010 on Union guidelines for the development of the trans-European transport network (OJ L 204, 5.8.2010, p. 1).

(f) actions implementing transport infrastructure in nodes of the core network, including urban nodes, as defined in Article 41 of Regulation (EU) No 1315/2013;

(g) actions supporting telematic applications systems in accordance with Article 31 of Regulation (EU) No 1315/2013;

(h) actions supporting freight transport services in accordance with Article 32 of Regulation (EU) No 1315/2013;

(i) actions to reduce rail freight noise, including by retrofitting existing rolling stock in cooperation with, inter alia, the railway industry;

(j) programme support actions;

(k) actions implementing safe and secure infrastructure in accordance with Article 34 of Regulation (EU) No 1315/2013;

(l) actions supporting motorways of the sea as provided for in Article 21 of Regulation (EU) No 1315/2013.

Transport-related actions involving a cross-border section or a part of such a section shall be eligible to receive Union financial assistance only if there is a written agreement between the Member States concerned or between the Member States and third countries concerned relating to the completion of the cross-border section.

3. In the energy sector, all actions implementing those projects of common interest that relate to the priority corridors and areas referred to in Part II of Annex I to this Regulation and that meet the conditions set out in Article 14 of Regulation (EU) No 347/2013, as well as programme support actions, shall be eligible for Union financial assistance in the form of financial instruments, procurement and grants under this Regulation.

To allow for the most efficient use of the Union budget so as to enhance the multiplier effect of Union financial assistance, the Commission shall provide financial assistance as a priority in the form of financial instruments whenever appropriate, subject to market take-up and whilst respecting the ceiling for the use of financial instruments in accordance with Article 14(2) and Article 21(4).

4. In the telecommunications sector, all actions implementing the projects of common interest and programme support actions identified in a Regulation on guidelines for trans-European networks in the area of telecommunications infrastructure and meeting eligibility criteria laid down in accordance with that Regulation shall be eligible to receive Union financial assistance under this Regulation, as follows:

(a) generic services, core service platforms and programme support actions shall be financed though grants and/or procurement;

(b) actions in the field of broadband networks shall be financed through financial instruments.

5. Actions with synergies between sectors contributing to projects of common interest eligible under at least two Regulations referred to in point (1) of Article 2 shall be eligible to receive financial assistance under this Regulation for the purpose of multi-sectoral calls for proposals as referred to in Article 17(7) only if the components and costs of such an action can be clearly separated per sector within the meaning of paragraphs (2), (3) and (4) of this Article.

CHAPTER III

Grants

Article 8

Forms of grants and eligible costs

1. Grants under this Regulation may take any of the forms provided for by Regulation (EU, Euratom) No 966/2012.

The work programmes referred to in Article 17 of this Regulation shall establish the forms of grants that may be used to fund the actions concerned.

2. Without prejudice to Regulation (EU, Euratom) No 966/2012, expenditure for actions resulting from projects included in the first multiannual and annual work programmes may be eligible as from 1 January 2014.

3. Only expenditure incurred in Member States may be eligible, except where the project of common interest involves the territory of one or more third countries and where the action is indispensable to the achievement of the objectives of the project concerned.

4. The cost of equipment and infrastructure which is treated as capital expenditure by the beneficiary may be eligible up to its entirety.

5. Expenditure related to environmental studies on the protection of the environment and on compliance with the relevant Union law may be eligible.

6. Expenditure related to the purchase of land shall not be an eligible cost, except for funds transferred from the Cohesion Fund in the transport sector in accordance with a Regulation laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provision on the European Regional Development Fund, the European Social Fund and the Cohesion Fund.

7. Eligible costs shall include value added tax ("VAT") in accordance with point (c) of Article 126(3) of Regulation (EU, Euratom) No 966/2012.

As regards the amount of EUR 11 305 500 000 transferred from the Cohesion Fund to be spent in Member States eligible for funding from the Cohesion Fund, the eligibility rules concerning VAT shall be those applicable to the Cohesion Fund referred to in a Regulation laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provision on the European Regional Development Fund, the European Social Fund and the Cohesion Fund.

8. Rules on the eligibility of costs incurred by beneficiaries shall apply mutatis mutandis to costs incurred by implementing bodies.

Article 9

Conditions for participation

1. Proposals shall be submitted by one or more Member States or, with the agreement of the Member States concerned, by international organisations, joint undertakings, or public or private undertakings or bodies established in Member States.

2. Proposals may be submitted by entities which do not have legal personality under the applicable national law, provided that their representatives have the capacity to assume legal obligations on their behalf and offer a guarantee for the protection of the Union's financial interests equivalent to that offered by legal persons.

3. Proposals submitted by natural persons shall not be eligible.

4. Where necessary in order to achieve the objectives of a given project of common interest and where their participation is duly justified, third countries and entities established in third countries may participate in actions contributing to projects of common interest.

They may not receive financial assistance under this Regulation except where it is indispensable to the achievement of the objectives of a given project of common interest.

5. Multiannual and annual work programmes referred to in Article 17 may contain additional specific rules on the submission of proposals.

Article 10

Funding rates

1. Except in those cases referred to in Regulation (EU, Euratom) No 966/2012, proposals shall be selected on the basis of calls for proposals based on the work programmes referred to in Article 17 of this Regulation.

2. In the transport sector, the amount of Union financial assistance shall not exceed:

(a) with regard to grants for studies, 50 % of the eligible costs;

(b) with regard to grants for works:

(i) for railway networks, and road networks in the case of Member States with no railway network established in their territory or in the case of a Member State, or part thereof, with an isolated network without long-distance rail freight transport: 20 % of the eligible costs; the funding rate may be increased to a maximum of 30 % for actions addressing bottlenecks and to 40 % for actions concerning cross-border sections and actions enhancing rail interoperability;

(ii) for inland waterways: 20 % of the eligible costs; the funding rate may be increased to a maximum of 40 % for actions addressing bottlenecks and to a maximum of 40 % for actions concerning cross-border sections;

(iii) for inland transport, connections to and the development of multimodal logistics platforms including connections to inland and maritime ports and airports, as well as the development of ports: 20 % of the eligible costs;

(iv) for actions to reduce rail freight noise including by retrofitting existing rolling stock: 20 % of the eligible costs up to a combined ceiling of 1 % of the budgetary resources referred to in point (a) of Article 5(1);

(v) for better accessibility to transport infrastructure for disabled persons: 30 % of the eligible cost of adaptation works, not exceeding in any case 10 % of the total eligible cost of works;

(vi) for actions supporting new technologies and innovation for all modes of transport: 20 % of the eligible costs;

(vii) for actions to support cross-border road sections: 10 % of the eligible costs;

(c) with regard to grants for telematic applications systems and services:

(i) for land-based components of the ERTMS, of the SESAR system, of RIS and of VTMIS: 50 % of the eligible costs;

(ii) for land-based components of ITS for the road sector: 20 % of the eligible costs;

(iii) for on-board components of ERTMS: 50 % of the eligible costs;

(iv) for on-board components of the SESAR system, of RIS, of VTMIS and of ITS for the road sector: 20 % of the eligible costs, up to a combined ceiling of 5 % of the budgetary resources referred to in point (a) of Article 5(1);

(v) for actions to support the development of motorways of the sea: 30 % of the eligible costs.

The Commission shall create conditions conducive to the development of projects involving motorways of the sea with third countries;

(vi) for telematic applications systems other than those mentioned in points (i) to (iv), freight transport services and secure parkings on the road core network: 20 % of the eligible costs.

3. In the energy sector, the amount of Union financial assistance shall not exceed 50 % of the eligible cost of studies and/or works. The funding rates may be increased to a maximum of 75 % for actions which, based on the evidence referred to in Article 14(2) of Regulation (EU) No 347/2013, provide a high degree of regional or Union-wide security of supply, strengthen the solidarity of the Union or comprise highly innovative solutions.

4. In the telecommunications sector, the amount of Union financial assistance shall not exceed:

(a) for actions in the field of generic services: 75 % of the eligible costs;

(b) for horizontal actions including infrastructure mapping, twinning and technical assistance: 75 % of the eligible costs.

The core service platforms shall be typically funded by procurement. In exceptional cases, they may be funded by a grant covering up to 100 % of eligible costs, without prejudice to the co-financing principle.

5. The funding rates may be increased by up to 10 percentage points over the percentages laid down in paragraphs 2, 3 and 4 for actions with synergies between at least two of the sectors covered by the CEF. This increase shall not apply to the funding rates referred to in Article 11.

6. The amount of financial assistance to be granted to the actions selected shall be modulated on the basis of a cost-benefit analysis of each project, the availability of Union budget resources and the need to maximise the leverage of Union funding.

Article 11

Specific calls for funds transferred from the Cohesion Fund in the transport sector

1. As regards the amount of EUR 11 305 500 000 transferred from the Cohesion Fund to be spent exclusively in Member States eligible for funding from the Cohesion Fund, specific calls shall be launched for projects implementing the core network or for projects and horizontal priorities identified in Part I of Annex I exclusively in Member States eligible for funding from the Cohesion Fund.

2. Applicable rules for the transport sector under this Regulation shall apply to such specific calls. Until 31 December 2016, the selection of projects eligible for financing shall respect the national allocations under the Cohesion Fund. With effect from 1 January 2017, resources transferred to the CEF which have not been committed to a transport infrastructure project shall be made available to all Member States eligible for funding from the Cohesion Fund, to finance transport infrastructure projects in accordance with this Regulation.

3. In order to support Member States eligible for funding from the Cohesion Fund which may experience difficulties in designing projects that are of sufficient maturity and/or quality and which have sufficient added value for the Union, particular attention shall be given to programme support actions aimed at strengthening institutional capacity and the efficiency of public administrations and public services in relation to the development and implementation of projects listed in Part I of Annex I. To ensure the highest possible absorption of the transferred funds in all Member States eligible for funding from the Cohesion Fund, the Commission may organise additional calls.

4. The amount of EUR 11 305 500 000 transferred from the Cohesion Fund may be used to commit budgetary resources to financial instruments under this Regulation only as from 1 January 2017. From that date, the amount of EUR 11 305 500 000 transferred from the Cohesion Fund may be used to commit budgetary resources to projects for which contractual commitments have already been entered into by the entrusted entities.

5. Notwithstanding Article 10, and as regards the amount of EUR 11 305 500 000 transferred from the Cohesion Fund to be spent exclusively in Member States eligible for funding from the Cohesion Fund, the maximum funding rates shall be those applicable to the Cohesion Fund as referred to in a Regulation laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provision on the European Regional Development Fund, the European Social Fund and the Cohesion Fund for the following:

(a) actions with regard to grants for studies;

(b) actions with regard to grants for works:

(i) railways and inland waterways;

(ii) actions to support cross-border road sections and, in the case of Member States with no rail networks, the TEN-T road network;

(iii) actions for inland transport, connections to and the development of multimodal logistics platforms including connections to inland and maritime ports and airports, including automatic gauge-changing facilities, and the development of ports including ice-breaking capacities, as well as interconnecting points, with particular attention being given to rail connections, except in the case of Member States with no rail network;

(c) actions with regard to grants for telematic applications systems and services:

(i) ERTMS, RIS and VTMIS, the SESAR system and ITS for the road sector;

(ii) other telematic applications systems;

(iii) actions to support the development of motorways of the sea;

(d) actions with regard to grants to support new technologies and innovation for all modes of transport.

Article 12

Cancellation, reduction, suspension and termination of the grant

1. Except in duly justified cases, the Commission shall cancel financial assistance granted for studies which have not been started within one year following the start date laid down in the conditions governing the granting of aid or within two years of that date for all other actions eligible for financial assistance under this Regulation.

2. The Commission may suspend, reduce, recover or terminate financial assistance in accordance with the conditions set out in Regulation (EU, Euratom) No 966/2012 or following an evaluation of the progress of the project, in particular in the event of major delays in the implementation of the action.

3. The Commission may require the complete or partial reimbursement of the financial assistance granted if, within two years of the completion date laid down in the conditions governing the granting of aid, the implementation of the action receiving the financial assistance has not been completed.

4. Before the Commission takes any of the decisions provided for in paragraphs 1, 2 and 3 of this Article, it shall examine the case comprehensively in coordination with the bodies respectively mentioned in Article 6(3) and consult the beneficiaries concerned so that they may present their observations within a reasonable time-frame. After the mid-term evaluation, the Commission shall notify the European Parliament and the Council of all decisions taken on the annual adoption of the work programmes under Article 17.

CHAPTER IV

Procurement

Article 13

Procurement

1. Public procurement procedures carried out by the Commission or one of the bodies referred to in Article 6(3) on its own behalf or jointly with Member States may:

(a) provide for specific conditions, such as the place of performance of the procured activities, where such conditions are duly justified by the objectives of the actions and provided such conditions do not infringe Union and national public procurement principles;

(b) authorise the multiple award of contracts within the same procedure ("multiple sourcing").

2. Where duly justified and required by the implementation of the actions, paragraph 1 may also apply to procurement procedures carried out by beneficiaries of grants.

CHAPTER V

Financial instruments

Article 14

Types of financial instruments

1. Financial instruments set up in accordance with Title VIII of Regulation (EU, Euratom) No 966/2012 may be used to facilitate access to finance by entities implementing actions contributing to projects of common interest as defined in Regulations (EU) No 1315/2013 and (EU) No 347/2013 and in a Regulation on guidelines for trans-European networks in the area of telecommunications infrastructure, and to the achievement of their objectives. The financial instruments shall be based on ex-ante assessments of market imperfections or sub-optimal investment situations and investment needs. The main terms, conditions and procedures for each financial instrument are laid down in Part III of Annex I to this Regulation.

2. The overall contribution from the Union budget to the financial instruments shall not exceed 10 % of the overall financial envelope of the CEF as referred to in Article 5(1).

3. All financial instruments established under Regulation (EC) No 680/2007 and the risk-sharing instrument for project bonds established under Decision No 1639/2006/EC may, if applicable and subject to a prior evaluation, be merged together with those under this Regulation.

The merging of project bonds shall be subject to the interim report to be carried out in the second half of 2013 as defined in Regulation (EC) No 680/2007 and in Decision No 1639/2006/EC. The Project Bond Initiative shall start up progressively within a ceiling of EUR 230 000 000 during the years 2014 and 2015. The full implementation of the initiative shall be subject to independent full-scale evaluation to be carried out in 2015 as provided for in Regulation (EC) No 680/2007 and in Decision No 1639/2006/EC. In the light of that evaluation, taking into account all options, the Commission shall consider proposing appropriate regulatory changes, including legislative changes, in particular if the predicted market uptake is not satisfactory or in the event that sufficient alternative sources of long-term debt financing become available.

4. The following financial instruments may be used:

(a) equity instruments, such as investment funds with a focus on providing risk capital for actions contributing to projects of common interest;

(b) loans and/or guarantees facilitated by risk-sharing instruments, including the credit enhancement mechanism for project bonds, backing individual projects or portfolios of projects issued by a financial institution on its own resources with a Union contribution to the provisioning and/or capital allocation.

Article 15

Conditions for granting financial assistance through financial instruments

1. Actions supported by means of financial instruments shall be selected on the basis of maturity and shall seek sectoral diversification in accordance with Articles 3 and 4 as well as geographical balance across the Member States. They shall:

(a) represent European added value;

(b) respond to the objectives of the Europe 2020 Strategy;

(c) present a leverage effect with regard to Union support, i.e. aim at mobilising a global investment exceeding the size of the Union contribution according to the indicators defined in advance.

2. The Union, any Member State and other investors may provide financial assistance in addition to contributions received by financial instruments, provided that the Commission agrees to any changes to the eligibility criteria of actions and/or the investment strategy of the instrument which may be necessary due to the additional contribution.

3. The financial instruments shall aim to enhance the multiplier effect of Union spending by attracting additional resources from private investors. The financial instruments may generate acceptable returns to meet the objectives of other partners or investors, whilst aiming to preserve the value of assets provided by the Union budget.

4. Financial instruments under this Regulation may be combined with grants funded from the Union budget.

5. The Commission may lay down additional conditions in the work programmes referred to in Article 17 according to the specific needs of the transport, telecommunications and energy sectors.

Article 16

Actions in third countries

Actions in third countries may be supported by means of the financial instruments if those actions are necessary for the implementation of a project of common interest.

CHAPTER VI

Programming, implementation and control

Article 17

Multiannual and/or annual work programmes

1. The Commission shall adopt, by means of implementing acts, multiannual and annual work programmes for each of the transport, telecommunications and energy sectors. The Commission may also adopt multiannual and annual work programmes that cover more than one sector. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 25(2).

2. The Commission shall review the multiannual work programmes at least at mid-term. If necessary, it shall revise the multiannual work programme by means of an implementing act. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 25(2).

3. The Commission shall adopt the multiannual work programmes in the transport sector for projects of common interest as listed in Part I of Annex I.

The amount of the financial envelope shall lie within a range of 80 % to 85 % of the budgetary resources referred to in point (a) of Article 5(1).

The projects detailed in Part I of Annex I are not binding on the Member States for their programming decisions. The decision to implement those projects is a competence of Member States and depends on public financing capacities, and on their socio-economic viability in accordance with Article 7 of Regulation (EU) No 1315/2013.

4. The Commission shall adopt the annual work programmes for the transport, telecommunications and energy sectors for projects of common interest which are not included in the multiannual work programmes.

5. The Commission, when adopting multiannual and sectoral annual work programmes, shall establish the selection and award criteria in line with the objectives and priorities laid down in Articles 3 and 4 of this Regulation and in Regulations (EU) No 1315/2013 and (EU) No 347/2013 or in a Regulation on guidelines for trans-European networks in the area of telecommunications infrastructure. When setting the award criteria, the Commission shall take into account the general orientations laid down in Part V of Annex I to this Regulation.

6. In the energy sector, in the first two annual work programmes, priority consideration shall be given to projects of common interest and related actions aimed at ending energy isolation and eliminating energy bottlenecks, and at the completion of the internal energy market.

7. Work programmes shall be coordinated in such a way as to exploit the synergies between transport, energy and telecommunications, in particular in such areas as smart energy grids, electric mobility, intelligent and sustainable transport systems, joint rights of way or infrastructure coupling. The Commission shall adopt at least one multi-sectoral call for proposals for actions eligible under Article 7(5), with the financial amounts allocated for each sector being weighted according to each sector's relative involvement in the eligible costs of the actions selected for financing under the CEF.

Article 18

Granting of Union financial assistance

1. Following every call for proposals based on a multiannual or annual work programme as referred to in Article 17, the Commission, acting in accordance with the examination procedure referred to in Article 25, shall decide on the amount of financial assistance to be granted to the projects selected or to parts thereof. The Commission shall specify the conditions and methods for their implementation.

2. The beneficiaries and the Member States concerned shall be informed by the Commission of any financial assistance to be granted.

Article 19

Annual instalments

The Commission may divide budgetary commitments into annual instalments. In that case, it shall commit the annual instalments taking into account the progress of the actions receiving financial assistance, their estimated needs and the budget available.

The Commission shall communicate to the beneficiaries of grants, to the Member States concerned and, if applicable for financial instruments, to the financial institutions concerned an indicative timetable covering the commitment of the individual annual instalments.

Article 20

Carry-over of annual appropriations

Appropriations which have not been used at the end of the financial year for which they were entered shall be carried over in accordance with Regulation (EU, Euratom) No 966/2012.

Article 21

Delegated acts

1. Subject to the approval of the Member State(s) concerned as provided for in the second paragraph of Article 172 TFEU, the Commission shall be empowered to adopt delegated acts in accordance with Article 26 of this Regulation concerning the modification of Part I of Annex I to this Regulation, to take account of changing financing priorities in the trans-European networks and of changes relating to projects of common interest identified in Regulation (EU) No 1315/2013. When amending Part I of Annex I to this Regulation, the Commission shall ensure:

(a) that the projects of common interest in accordance with Regulation (EU) No 1315/2013 are likely to be realised fully or partly under the multiannual financial framework for the years 2014-2020;

(b) that the modifications comply with the eligibility criteria set out in Article 7 of this Regulation;

(c) as regards Part I of Annex I to this Regulation, that all sections include infrastructure projects the realisation of which will necessitate their inclusion in a multiannual work programme under Article 17(3) of this Regulation, without changing the alignment of the core network corridors.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 26 of this Regulation to modify the main terms, conditions and procedures laid down in Part III of Annex I to this Regulation governing the Union contribution to each financial instrument established under the Debt Framework or Equity Framework laid down in Part III of Annex I to this Regulation in accordance with the results of the interim report and the independent full -scale evaluation of the pilot phase of the Europe 2020 Project Bond Initiative established under Decision No 1639/2006/EC and Regulation (EC) No 680/2007, and in order to take into account changing market conditions with a view to optimising the design and implementation of the financial instruments under this Regulation.

When amending Part III of Annex I to this Regulation in the cases set out in the first subparagraph, the Commission shall at all times ensure that:

(a) the amendments are made in accordance with the requirements laid down in Regulation (EU, Euratom) No 966/2012, including the ex ante evaluation referred to in point (f) of Article 140(2) thereof, and

(b) the amendments are limited to:

(i) modification of the threshold of the subordinated debt financing as referred to in I.1(a) and I.1(b) of Part III of Annex I to this Regulation, with a view to seeking sectoral diversification and geographical balance across the Member States in accordance with Article 15;

(ii) modification of the threshold of the senior debt financing as referred in I.1(a) of Part III of Annex I to this Regulation, with a view to seeking sectoral diversification and geographical balance across the Member States in accordance with Article 15;

(iii) the combination with other sources of funding as referred in I.3 and II.3 of Part III of Annex I;

(iv) the selection of entrusted entities as referred in I.4 and II.4 of Part III of Annex I; and

(v) pricing, risk and revenue-sharing as referred in I.6 and II.6 of Part III of Annex I.

3. In the transport sector, and within the general objectives set out in Article 3 and the specific sectoral objectives referred to in Article 4(2), the Commission shall be empowered to adopt delegated acts in accordance with Article 26 detailing the funding priorities to be reflected in the work programmes referred to in Article 17 for the duration of the CEF for eligible actions under Article 7(2). The Commission shall adopt a delegated act by 22 December 2014.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 26 to raise the ceiling set out in Article 14(2) up to 20 %, provided the following conditions are met:

(i) the evaluation of the pilot phase of the Project Bond Initiative carried out in 2015 is positive; and

(ii) the take-up of financial instruments exceeds 8 % in terms of project contractual commitments.

5. Where it proves necessary to deviate from the allocation for a specific transport objective by more than five percentage points, the Commission shall be empowered to adopt delegated acts in accordance with Article 26 to amend the indicative percentages set out in Part IV of Annex I.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 26 to modify the list of general orientations in Part V of Annex I to be taken into account when setting award criteria in order to reflect the mid-term evaluation of this Regulation or conclusions drawn from its implementation. This shall be done in a manner compatible with the respective sectoral guidelines.

Article 22

Responsibility of beneficiaries and Member States

Within their respective responsibilities, and without prejudice to the obligations incumbent on beneficiaries under the conditions governing grants, beneficiaries and Member States shall make every effort to implement the projects of common interest which receive Union financial assistance granted under this Regulation.

Member States shall undertake the technical monitoring and financial control of actions in close cooperation with the Commission and shall certify that the expenditure incurred in respect of projects or parts thereof has been disbursed and that the disbursement was in conformity with the relevant rules. The Member States may request the Commission to participate during on-the-spot checks and inspections.

Member States shall inform the Commission annually, if relevant through an interactive geographical and technical information system, about the progress made in implementing projects of common interest and the investments made for this purpose, including the amount of support used with a view to attaining climate-change objectives. On that basis, the Commission shall make public, and update at least annually, information about the specific projects under the CEF.

Article 23

Compliance with Union policies and Union law

Only actions which are in conformity with Union law and which are in line with the relevant Union policies shall be financed under this Regulation.

Article 24

Protection of the Union's financial interests

1. The Commission shall take appropriate measures to ensure that, when actions financed under this Regulation are implemented, the financial interests of the Union are protected by the application of preventive measures against fraud, corruption and any other illegal activities, by effective checks and, if irregularities are detected, by the recovery of the amounts unduly paid and, where appropriate, by effective, proportionate and dissuasive administrative and financial penalties.

2. The Commission or its representatives and the Court of Auditors shall have the power to audit, on the basis of documents and on the spot checks, the actions of all grant beneficiaries, implementing bodies, contractors and subcontractors who have received Union funds under this Regulation.

3. The European Anti-Fraud Office (OLAF) may carry out investigations, including on-the-spot checks and inspections, in accordance with the provisions and procedures laid down in Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council [1] and Council Regulation (Euratom, EC) No 2185/96 [2], with a view to establishing whether there has been fraud, corruption or any other illegal activity affecting the financial interests of the Union in connection with a grant agreement or grant decision or a contract funded under this Regulation.

[1] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248, 18.9.2013, p. 1).

[2] Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ L 292, 15.11.1996, p. 2).

4. Without prejudice to paragraphs 1, 2 and 3, cooperation agreements with third countries and with international organisations, grant agreements and grants decisions and contracts resulting from the implementation of this Regulation shall contain provisions expressly empowering the Commission, the Court of Auditors and OLAF to conduct such audits and investigations, according to their respective competences.

TITLE II

GENERAL AND FINAL PROVISIONS

Article 25

Committee procedure

1. The Commission shall be assisted by the CEF Coordination Committee. The Committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

3. The committee shall ensure a horizontal overview of the work programmes referred to in Article 17 to ensure that they are consistent and that synergies are identified, exploited and assessed between the transport, telecommunications and energy sectors. It shall seek, in particular, to coordinate those work programmes with a view to allowing multi-sectoral calls for proposals.

Article 26

Exercise of delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 21 shall be conferred on the Commission from 1 January 2014 to 31 December 2020.

3. The delegation of power referred to in Article 21 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 21 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and to the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 27

Evaluation

1. No later than 31 December 2017, the Commission, in cooperation with the Member States and beneficiaries concerned, shall prepare an evaluation report to be presented to the European Parliament and the Council by the Commission on the achievement of the objectives of all the measures (at the level of results and impacts), the efficiency of the use of resources and the European added value of the CEF, with a view to deciding on the renewal, modification or suspension of the measures. The evaluation shall also address the scope for simplification, the internal and external coherence of the measures, the continued relevance of all objectives and their contribution to the Union priorities of smart, sustainable and inclusive growth, including their impact on economic, social and territorial cohesion. The evaluation report shall include an assessment of the economies of scale made by the Commission at a financial, technical and human level when managing the CEF and, where applicable, of the total number of projects harnessing the synergies between the sectors. That assessment shall also examine how to make financial instruments more effective. The evaluation report shall take into account evaluation results concerning the long-term impact of the predecessor measures.

2. The CEF shall take into account the independent full-scale evaluation of the Europe 2020 Project Bond Initiative, to be carried out in 2015. On the basis of that evaluation, the Commission and the Member States shall assess the relevance of the Europe 2020 Project Bond Initiative and its effectiveness in increasing the volume of investment in priority projects and enhancing the efficiency of Union spending.

3. The Commission shall carry out ex post evaluation in close cooperation with the Member States and beneficiaries. The ex post evaluation shall examine the effectiveness and efficiency of the CEF and its impact on economic, social and territorial cohesion, as well as its contribution to the Union priorities of smart, sustainable and inclusive growth and the scale and results of support used with a view to attaining climate-change objectives.

4. Evaluations shall take account of progress as measured against the performance indicators referred to in Articles 3 and 4.

5. The Commission shall communicate the conclusions of those evaluations to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

6. The Commission and the Member States, assisted by the other possible beneficiaries, may undertake an evaluation of the methods of carrying out projects as well as the impact of their implementation, in order to assess whether the objectives, including those relating to environmental protection, have been attained.

7. The Commission may request a Member State concerned by a project of common interest to provide a specific evaluation of the actions and the linked projects financed under this Regulation or, where appropriate, to supply it with the information and assistance required to undertake an evaluation of such projects.

Article 28

Information, communication and publicity

1. Beneficiaries and, where appropriate, Member States concerned shall ensure that suitable publicity is given, and transparency applied, to aid granted under this Regulation in order to inform the public of the role of the Union in the implementation of the projects.

2. The Commission shall implement information and communication actions relating to the CEF projects and results. Resources allocated to communication actions under Article 5(2) shall also contribute to the corporate communication of the political priorities of the Union as far as they are related to the general objectives referred to in Article 3.

Article 29

Amendment of Regulation (EU) No 913/2010

Regulation (EU) No 913/2010 is hereby amended as follows:

The Annex to Regulation (EU) No 913/2010 is replaced by the text of Annex II to this Regulation. Consequently, the rail freight corridors revised shall remain subject to the provisions of Regulation (EU) No 913/2010.

Article 30

Transitional provisions

This Regulation shall not affect the continuation or modification, including the total or partial cancellation, of the projects concerned, until their closure, or of financial assistance awarded by the Commission pursuant to Regulations (EC) No 680/2007 and (EC) No 67/2010, or any other law applying to that assistance on 31 December 2013, which shall continue to apply to the actions concerned until their closure.

Article 31

Repeal

Without prejudice to Article 30 of this Regulation, Regulations (EC) No 680/2007 and (EC) No 67/2010 are repealed with effect from 1 January 2014.

Article 32

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2014.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 11 December 2013.

For the European Parliament
The President
M. SCHULZ

For the Council
The President
V. LEŠKEVIČIUS

I

(Legislative acts)

REGULATIONS

REGULATION (EU, EURATOM) No 966/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 October 2012

on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002

CONTENTS

2. The own resources made available to the Commission and any amount receivable that is identified as being certain, of a fixed amount and due shall be established by a recovery order to the accounting officer followed by a debit note sent to the debtor, both drawn up by the authorising officer responsible.

3. Amounts wrongly paid shall be recovered.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the establishment of amounts receivable, including procedures and supporting documents, and of default interest.

Section 4

Authorisation of recovery

Article 79

Authorisation of recovery

1. The authorisation of recovery is the act by which the authorising officer responsible instructs the accounting officer, by issuing a recovery order, to recover an amount receivable which that authorising officer responsible has established.

2. The institution may formally establish an amount as being receivable from persons other than Member States by means of a decision which shall be enforceable within the meaning of Article 299 TFEU.

If the efficient and timely protection of the Union's financial interests so requires, the Commission may also, in exceptional circumstances, adopt such an enforceable decision for the benefit of other institutions at their request with respect to claims arising in relation to staff to whom the Staff Regulations apply.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the establishment of the recovery order.

Section 5

Recovery

Article 80

Rules on recovery

1. The accounting officer shall act on recovery orders for amounts receivable duly established by the authorising officer responsible. The accounting officer shall exercise due diligence to ensure that the Union receives its revenue and shall ensure that the Union's rights are safeguarded.

The accounting officer shall recover amounts by offsetting them against equivalent claims that the Union has on any debtor who in turn has a claim on the Union. Such claims shall be certain, of a fixed amount and due.

2. Where the authorising officer by delegation plans to waive or partially waive recovery of an established amount receivable, he or she shall ensure that the waiver is in order and is in accordance with the principles of sound financial management and proportionality. The waiver decision shall be substantiated. The authorising officer may delegate the waiver decision.

The authorising officer by delegation may cancel an established amount receivable in full or in part. The partial cancellation of an established amount receivable does not imply a waiver of an established Union entitlement.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the manner of recovery, including recovery by offsetting, the recovery procedure failing voluntary payment, additional time for payment, recovery of fines and other penalties, waiver of recovery and cancellation of an established amount receivable.

3. The Member States shall in the first instance be responsible for carrying out controls and audits and for recovering amounts unduly spent, as provided for in the sector-specific rules. To the extent that Member States detect and correct irregularities on their own account, they shall be exempt from financial corrections by the Commission concerning those irregularities.

4. The Commission shall make financial corrections on Member States in order to exclude from Union financing expenditure incurred in breach of applicable law. The Commission shall base its financial corrections on the identification of amounts unduly spent, and the financial implications for the budget. Where such amounts cannot be identified precisely, the Commission may apply extrapolated or flat-rate corrections in accordance with the sector-specific rules.

The Commission shall, when deciding on the amount of a financial correction, take account of the nature and gravity of the breach of applicable law and the financial implications for the budget, including the case of deficiencies in management and control systems.

The criteria for establishing financial corrections and the procedure to be applied may be laid down in the sector-specific rules.

5. The methodology for applying extrapolated or flat-rate corrections shall be laid down in accordance with the sector-specific rules with a view to enabling the Commission to protect the financial interests of the Union.

Article 81

Limitation period

1. Without prejudice to the provisions of specific regulations and the application of Decision 2007/436/EC, Euratom, entitlements of the Union in respect of third parties and entitlements of third parties in respect of the Union shall be subject to a limitation period of five years.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the limitation period.

Article 82

National treatment for Union entitlements

In the event of insolvency proceedings, Union entitlements shall be given the same preferential treatment as entitlements of the same nature due to public bodies in the Member States where the recovery proceedings are being conducted.

Article 83

Fines, penalties and accrued interest imposed by the Commission

1. Amounts received by way of fines, penalties and sanctions, and any accrued interest or other income generated by them shall not be recorded as budgetary revenue as long as the decisions imposing them may be overruled by the Court of Justice of the European Union.

2. The amounts referred to in paragraph 1 shall be recorded as budgetary revenue as soon as possible and at the latest in the year following the exhaustion of all legal remedies. Amounts that are to be returned to the entity that paid them, following a judgment of the Court of Justice of the European Union, shall not be recorded as budgetary revenue.

3. Paragraph 1 shall not apply to decisions on clearance of accounts or financial corrections.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the amounts received by way of fines, penalties and accrued interest.

CHAPTER 6

Expenditure operations

Article 84

Financing decisions

1. Every item of expenditure shall be committed, validated, authorised and paid.

2. Except in the case of appropriations which can be implemented without a basic act in accordance with point (e) of the first subparagraph of Article 54(2), the commitment of expenditure shall be preceded by a financing decision adopted by the institution or the authorities to which powers have been delegated by the institution.

3. The financing decision referred to in paragraph 2 shall specify the objective pursued, the expected results, the method of implementation and its total amount. It shall also contain a description of the actions to be financed and an indication of the amount allocated to each action, and an indicative implementation timetable.

In the case of indirect management, the financing decision shall also specify the entity or person entrusted pursuant to point (c) of Article 58(1), the criteria used to select the entity or person and the tasks entrusted to that entity or person.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on financing decisions.

Section 1

Commitment of expenditure

Article 85

Types of commitments

1. A budgetary commitment is the operation by which the appropriation necessary to cover subsequent payments to honour legal commitments is reserved.

A legal commitment is the act whereby the authorising officer enters into or establishes an obligation which results in a charge.

Budgetary commitments and legal commitments shall be adopted by the same authorising officer, except in duly justified cases as provided for in the delegated acts adopted pursuant to this Regulation.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the types of commitment, adoption of global commitments, single signature, and administrative expenditure covered by provisional commitments.

3. Budgetary commitments shall fall into one of the following categories:

(a) individual: the budgetary commitment is individual when the beneficiary and the amount of the expenditure are known;

(b) global: the budgetary commitment is global when at least one of the elements necessary to identify the individual commitment is still not known;

(c) provisional: the budgetary commitment is provisional when it is intended to cover the expenditure referred to in Article 170 or routine administrative expenditure and either the amount or the final payees are not definitively known.

4. Budgetary commitments for actions extending over more than one financial year may be broken down over several years into annual instalments only where the basic act so provides or where they relate to administrative expenditure.

TITLE VI

GRANTS

CHAPTER 1

Scope and form of grants

Article 121

Scope of grants

1. Grants are direct financial contributions, by way of donation, from the budget in order to finance any of the following:

(a) an action intended to help achieve a Union policy objective;

(b) the functioning of a body which pursues an aim of general Union interest or has an objective forming part of, and supporting, a Union policy ('operating grants').

Grants shall be covered either by a written agreement or by a Commission decision notified to the successful applicant of a grant.

The Commission may establish secure electronic systems for exchanges with the beneficiaries.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the detailed specification of the scope of grants, and concerning rules determining whether grant agreements or grant decisions are to be used. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning details of the electronic exchange system, including the conditions under which documents submitted by means of such systems, including grant agreements, are to be deemed originals and to have been signed, and the use of framework partnerships.

2. The following do not constitute grants within the meaning of this Title:

(a) expenditure on the members and staff of the institutions and contributions to the European schools;

(b) public contracts as referred to in Article 101, aid paid as macro-financial assistance, and budget support;

(c) financial instruments, as well as shareholdings or equity participation in international financial institutions such as the European Bank for Reconstruction and Development (EBRD) or specialised Union bodies such as the European Investment Fund;

(d) contributions paid by the Union as subscriptions to bodies of which it is a member;

(e) expenditure implemented under shared management and indirect management within the meaning of Articles 58, 59 and 60, unless specified otherwise in the financial rules applicable to the budget of the entities or persons entrusted pursuant to point (c) of Article 58(1) or in delegation agreements;

(f) contributions to executive agencies referred to in Article 62, made by virtue of each agency's constitutive act;

(g) expenditure relating to fisheries markets as referred to in point (f) of Article 3(2) of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [1];

(h) repayment of travel and subsistence expenses incurred by, or where appropriate any other indemnities paid to, persons invited or mandated by the institutions;

(i) prizes given as rewards for a contest, to which Title VII of Part One applies.

3. Interest rate rebates and guarantee fee subsidies shall be treated as grants, provided that they are not combined in a single measure with financial instruments as referred to in Title VIII of Part One.

Such rebates and subsidies shall be subject to the provisions of this Title, with the exception of the following:

(a) the co-financing principle as set out in Article 125(3);

(b) the no-profit principle as set out in Article 125(4);

(c) for actions where the objective is to reinforce the financial capacity of a beneficiary or to generate an income, the assessment of the financial capacity of the applicant as referred to in Article 132(1).

4. Each institution may award grants for communication activities where, for duly justified reasons, the use of public procurement procedures is not appropriate.

Article 122

Beneficiaries

1. Where several entities satisfy the criteria for being awarded a grant and together form one entity, that entity may be treated as the sole beneficiary, including where the entity is specifically established for the purpose of implementing the action to be financed by the grant.

[1] OJ L 209, 11.8.2005, p. 1.

2. For the purpose of this Title, the following entities shall be considered as entities affiliated to the beneficiary:

(a) entities forming the beneficiary in accordance with paragraph 1;

(b) entities that satisfy the eligibility criteria and that do not fall within one of the situations referred to in Article 131(4) and that have a link with the beneficiary, in particular a legal or capital link, which is neither limited to the action nor established for the sole purpose of its implementation.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the minimum content of grant agreements or decisions, in particular, where a grant is awarded to several entities, the specific obligations of the coordinator, if any, and of the other beneficiaries, the applicable responsibility regime and the conditions for adding or removing a beneficiary.

Article 123

Forms of grants

1. Grants may take any of the following forms:

(a) reimbursement of a specified proportion of the eligible costs, referred to in Article 126, actually incurred;

(b) reimbursement on the basis of unit costs;

(c) lump sums;

(d) flat-rate financing;

(e) a combination of the forms referred to in points (a) to (d).

2. When determining the appropriate form of a grant, the potential beneficiaries' interests and accounting methods shall be taken into account to the greatest possible extent.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning rules for the different forms of grants, including low value grants.

Article 124

Lump sums, unit costs and flat-rate financing

1. Without prejudice to the provisions of the basic act, the use of lump sums, unit costs or flat-rate financing shall be authorised by way of a Commission decision ensuring respect for the principle of equal treatment of beneficiaries for the same category of actions or work programmes.

Where the maximum amount per grant does not exceed the amount of a low value grant, the authorisation may be given by the authorising officer responsible.

2. The authorisation shall at least be supported by the following:

(a) justification concerning the appropriateness of such forms of financing with regard to the nature of the supported actions or work programmes, as well as to the risks of irregularities and fraud and costs of control;

(b) identification of the costs or categories of costs covered by lump sums, unit costs or flat-rate financing, which shall exclude ineligible costs under the applicable Union rules;

(c) description of the methods for determining lump sums, unit costs or flat-rate financing, and of the conditions for reasonably ensuring that the no-profit and co-financing principles are complied with and that double financing of costs is avoided. Those methods shall be based on:

(i) statistical data or similar objective means; or

(ii) a beneficiary-by-beneficiary approach, by reference to certified or auditable historical data of the beneficiary or to its usual cost accounting practices.

3. Where recourse to the usual cost accounting practices of the beneficiary is authorised, the authorising officer responsible may assess compliance of those practices *ex ante* with the conditions set out in paragraph 2 or through an appropriate strategy for *ex post* controls.

If the compliance of the beneficiary's usual cost accounting practices with the conditions referred to in paragraph 2 has been established *ex ante*, the amounts of lump sums, unit costs or flat-rate financing determined by application of those practices shall not be challenged by *ex post* controls.

The authorising officer responsible may consider that the usual cost accounting practices of the beneficiary are compliant with the conditions referred to in paragraph 2 if they are accepted by national authorities under comparable funding schemes.

4. The grant decision or agreement may authorise or impose, in the form of flat-rates, funding of the beneficiary's indirect costs up to a maximum of 7 % of total eligible direct costs for the action, except where the beneficiary is in receipt of an operating grant financed from the budget. The 7 % ceiling may be exceeded on the basis of a reasoned decision of the Commission.

5. SME owners and other natural persons who do not receive a salary may declare eligible personnel costs for the work carried out under an action or work programme, on the basis of unit costs determined by way of a Commission decision.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules regarding lump sums, unit costs and flat-rate financing.

CHAPTER 2

Principles

Article 125

General principles applicable to grants

1. Grants shall be subject to the principles of transparency and equal treatment.

2. Without prejudice to Article 130, grants shall not be cumulative or awarded retrospectively.

3. Grants shall involve co-financing without prejudice to the specific rules laid down in Title IV of Part Two.

Unless otherwise specified in this Regulation, the regulations governing political parties at European level and the rules regarding their funding are laid down in Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding ([1]).

4. Grants shall not have the purpose or effect of producing a profit within the framework of the action or the work programme of the beneficiary ('no-profit principle').

The first subparagraph shall not apply to:

(a) actions the objective of which is the reinforcement of the financial capacity of a beneficiary, or actions which generate an income to ensure their continuity after the period of Union financing provided for in the grant decision or agreement;

(b) study, research or training scholarships paid to natural persons;

(c) other direct support paid to natural persons most in need, such as unemployed persons and refugees;

(d) grants based on flat rates and/or lump sums and/or unit costs where these comply with the conditions set out in Article 124(2);

(e) low value grants.

Where a profit is made, the Commission shall be entitled to recover the percentage of the profit corresponding to the Union contribution to the eligible costs actually incurred by the beneficiary to carry out the action or work programme.

5. For the purpose of this Title, profit shall be defined as a surplus of the receipts over the eligible costs incurred by the beneficiary, when the request is made for payment of the balance.

The receipts referred to in the first subparagraph shall be limited to income generated by the action or work programme, as well as financial contributions specifically assigned by donors to the financing of the eligible costs.

In the case of an operating grant, amounts dedicated to the building up of reserves shall not be taken into account for the purpose of verifying compliance with the no-profit principle.

6. If a political party at Union level realises a surplus of income over expenditure at the end of a financial year in which it received an operating grant, the part of that surplus corresponding to up to 25 % of the total income for that year may, by derogation from the no-profit principle laid down in paragraph 4, be carried over to the following year provided that it is used before the end of the first quarter of that following year.

For the purpose of verifying compliance with the no-profit principle, the own resources, in particular donations and membership fees, aggregated in the annual operations of a political party at Union level, which exceed 15 % of the eligible costs to be borne by the beneficiary, shall not be taken into account.

The second subparagraph shall not apply if the financial reserves of a political party at Union level exceed 100 % of its average annual income.

7. Grants may be awarded without a call for proposals to the EIB or the European Investment Fund for actions of technical assistance. In such cases Articles 131(2) to (5) and 132(1) shall not apply.

8. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 complementing the general principles applicable to grants, including the no-profit principle and the co-financing principle. Furthermore, the Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning the definition of technical assistance.

Article 126

Eligible costs

1. Grants shall not exceed an overall ceiling expressed in terms of an absolute value which shall be established on the basis of estimated eligible costs.

([1]) OJ L 297, 15.11.2003, p. 1.

Grants shall not exceed the eligible costs.

2. Eligible costs are costs actually incurred by the beneficiary of a grant which meet all of the following criteria:

(a) they are incurred during the duration of the action or of the work programme, with the exception of costs relating to final reports and audit certificates;

(b) they are indicated in the estimated overall budget of the action or work programme;

(c) they are necessary for the implementation of the action or of the work programme which is the subject of the grant;

(d) they are identifiable and verifiable, in particular being recorded in the accounting records of the beneficiary and determined according to the applicable accounting standards of the country where the beneficiary is established and according to the usual cost accounting practices of the beneficiary;

(e) they comply with the requirements of applicable tax and social legislation;

(f) they are reasonable, justified, and comply with the principle of sound financial management, in particular regarding economy and efficiency.

3. Calls for proposals shall specify the categories of costs considered as eligible for Union funding.

Without prejudice to the basic act and in addition to paragraph 2, the following categories of costs shall be eligible where the authorising officer responsible has declared them as such under the call for proposals:

(a) costs relating to a pre-financing guarantee lodged by the beneficiary of the grant, where that guarantee is required by the authorising officer responsible pursuant to Article 134(1);

(b) costs relating to external audits where such audits are required in support of the requests for payments by the authorising officer responsible;

(c) value added tax ("VAT") where it is not recoverable under the applicable national VAT legislation and is paid by a beneficiary other than a non-taxable person as defined in the first subparagraph of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ([1]);

(d) depreciation costs, provided they are actually incurred by the beneficiary;

(e) salary costs of the personnel of national administrations to the extent that they relate to the cost of activities which the relevant public authority would not carry out if the project concerned were not undertaken.

4. Costs incurred by entities affiliated to a beneficiary as described in Article 122 may be accepted as eligible by the authorising officer responsible under the call for proposals. In such a case, the following conditions shall apply cumulatively:

(a) the entities concerned are identified in the grant agreement or decision;

(b) the entities concerned abide by the rules applicable to the beneficiary under the grant agreement or decision with regard to eligibility of costs and rights of checks and audits by the Commission, OLAF and the Court of Auditors.

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning further specifications on eligible costs.

Article 127

Co-financing in kind

1. For the purpose of calculating the profit generated by the grant, co-financing in the form of contributions in kind shall not be taken into account.

2. The authorising officer responsible may accept contributions in kind as co-financing, if considered necessary or appropriate. Where co-financing inkind is offered in support of low value grants and the authorising officer responsible has decided to refuse this, he or she shall justify why it is unnecessary or inappropriate.

Such contributions shall not exceed:

(a) either the costs actually incurred by third parties and duly supported by accounting documents;

(b) or, in the absence of such documents, the costs that correspond to those generally accepted on the market in question.

Contributions in kind shall be presented separately in the estimated budget to reflect the total resources allocated to the action. Their unit value shall be evaluated in the provisional budget and shall not be subject to subsequent changes.

Contributions in kind shall comply with national tax and social security rules.

([1]) OJ L 347, 11.12.2006, p. 1.

Article 128

Transparency

1. Grants shall be subject to a work programme, to be published prior to its implementation.

That work programme shall be implemented through the publication of calls for proposals, except in duly justified exceptional cases of urgency or where the characteristics of the beneficiary or of the action leave no other choice for a given action, or where the beneficiary is identified in a basic act.

The first subparagraph shall not apply to crisis management aid, civil protection operations or humanitarian aid operations.

2. Calls for proposals shall specify the planned date by which all applicants shall have been informed of the outcome of the evaluation of their application and the indicative date for the signature of grant agreements or notification of grant decisions.

Those dates shall be fixed on the basis of the following periods:

(a) for informing all applicants of the outcome of the evaluation of their application, a maximum of six months from the final date for submission of complete proposals;

(b) for signing grant agreements with applicants or notifying grant decisions to them, a maximum of three months from the date of informing applicants they have been successful.

Those periods may be adjusted in order to take into account any time needed to comply with specific procedures that may be required by the basic act in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council [1] and may be exceeded in exceptional, duly justified cases, in particular for complex actions, where there is a large number of proposals or delays attributable to the applicants.

The authorising officer by delegation shall report in his or her annual activity report on the average time taken to inform applicants, sign grant agreements or notify grant decisions. In the event of the periods referred to in the second subparagraph being exceeded, the authorising officer by delegation shall give reasons and, where not duly justified in accordance with the third subparagraph, shall propose remedial action.

3. All grants awarded in the course of a financial year shall be published annually in accordance with Article 35(2) and (3).

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the requirements regarding the work programme, the content of calls for proposals, the exceptions to calls for proposals, information for applicants and *ex post* publication.

Article 129

Principle of non-cumulative award

1. Each action may give rise to the award of only one grant from the budget to any one beneficiary, except where otherwise authorised in the relevant basic acts.

A beneficiary may be awarded only one operating grant from the budget per financial year.

The applicant shall immediately inform the authorising officers of any multiple applications and multiple grants relating to the same action or to the same work programme.

In no circumstances shall the same costs be financed twice by the budget.

2. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the principle of the non-cumulative award of grants.

Article 130

Principle of non-retroactivity

1. A grant may be awarded for an action which has already begun provided that the applicant can demonstrate the need for starting the action priorto signature of the grant agreement or notification of the grant decision.

In such cases, costs eligible for financing shall not have been incurred prior to the date of submission of the grant application, except in duly justified exceptional cases as provided for in the basic act or in the event of extreme urgency for crisis management aid, civil protection operations and humanitarian aid operations, or in situations of imminent or immediate danger threatening to escalate into armed conflict or to destabilise a country, whereby an early engagement by the Union would be of major importance in promoting conflict prevention.

No grant may be awarded retroactively for actions already completed.

The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the principle of non-retroactivity.

2. In the case of operating grants, the grant agreement shall be signed or notification of the grant decision given within six months of the start of the beneficiary's financial year. Costs eligible for financing may neither have been incurred before the grant application was submitted nor before the start of the beneficiary's financial year.

[1] OJ L 55, 28.2.2011, p. 13.

CHAPTER 3

Award procedure

Article 131

Applications for grants

1. Grant applications shall be submitted in writing, including, where appropriate, in a secure electronic format.

The Commission shall provide, where it deems it feasible, the possibility of making online grant applications.

2. Grant applications shall be eligible if submitted by the following:

(a) legal persons; or

(b) natural persons, in so far as this is required by the nature or characteristics of the action or the objective pursued by the applicant.

For the purposes of point (a) of the first subparagraph, grant applications may be eligible if submitted by entities which do not have legal personality under the applicable national law, provided that their representatives have the capacity to undertake legal obligations on behalf of the entity and offer guarantees for the protection of the Union's financial interests equivalent to those offered by legal persons.

3. The application shall state the legal status of the applicant and demonstrate his or her financial and operational capacity to carry out the proposed action or work programme.

For that purpose the applicant shall submit a declaration on his or her honour and, unless the grant is a low value grant, any supporting documents requested, on the basis of a risk assessment, by the authorising officer responsible. The prerequisite documents shall be indicated in the call for proposals.

The verification of financial capacity shall not apply to natural persons in receipt of scholarships, to natural persons most in need and in receipt of direct support, to public bodies or international organisations. The authorising officer responsible may, depending on a risk assessment, waive the obligation to verify the operational capacity of public bodies or international organisations.

4. Article 106(1) and Articles 107, 108 and 109 shall also apply to grant applicants. Applicants shall certify that they are not in one of the situations referred to in those Articles. However, the authorising officer responsible shall not require such certification in the following cases:

(a) low value grants;

(b) when such certification has recently been provided in another award procedure.

5. Administrative and financial penalties which are effective, proportionate and dissuasive may be imposed on applicants by the authorising officer responsible, in accordance with Article 109.

Those penalties may also be imposed on beneficiaries who at the moment of the submission of the application or during the implementation of the grant, have made false declarations in supplying the information required by the authorising officer responsible or fail to supply that information.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the arrangements for grant applications, evidence of not falling within an exclusion situation, applicants without legal personality, legal persons forming one applicant, financial and administrative penalties, eligibility criteria and low value grants.

Article 132

Selection and award criteria

1. The selection criteria announced in advance in the call for proposals shall be such as to make it possible to assess the applicant's ability to complete the proposed action or work programme.

2. The award criteria announced in advance in the call for proposals shall be such as to make it possible to assess the quality of the proposals submitted in the light of the objectives and priorities set.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on selection and award criteria.

Article 133

Evaluation procedure

1. Proposals shall be evaluated, on the basis of pre-announced selection and award criteria, with a view to determining which proposals may be financed.

2. The authorising officer responsible shall, on the basis of the evaluation provided for in paragraph 1, draw up the list of beneficiaries and the amounts approved.

3. The authorising officer responsible shall inform applicants in writing of the decision on their application. If the grant requested is not awarded, the institution concerned shall give the reasons for the rejection of the application, with reference in particular to the selection and award criteria.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the evaluation and award of grants and information to applicants.

CHAPTER 4

Payment and control

Article 134

Pre-financing guarantee

1. The authorising officer responsible may, if he or she deems it appropriate and proportionate, on a case-by-case basis and subject to risk analysis, require the beneficiary to lodge a guarantee in advance in order to limit the financial risks connected with the payment of pre-financing.

2. Notwithstanding paragraph 1, guarantees shall not be required in the case of low value grants.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the pre-financing guarantee.

Article 135

Payment of grants and controls

1. The amount of the grant shall not become final until after the authorising officer responsible has approved the final reports and accounts, without prejudice to subsequent checks by the institution concerned, which shall be carried out in a timely manner.

2. Where the award procedure proves to have been subject to substantial errors, irregularities or fraud, the authorising officer responsible shall suspend the procedure and may take whatever measures are necessary, including the cancellation of the procedure. The authorising officer responsible shall inform OLAF immediately of suspected cases of fraud.

3. Where, after the award of the grant, the award procedure or the implementation of the grant proves to have been subject to substantial errors, irregularities, fraud, or breach of obligations, the authorising officer responsiblemay, depending on the stage reached in the procedure and, provided that the applicant or beneficiary has been given the opportunity to make observations:

(a) refuse to sign the grant agreement or to give notification of the grant decision;

(b) suspend implementation of the grant; or

(c) where appropriate, terminate the grant agreement or decision.

4. Where such errors, irregularities or fraud are attributable to the beneficiary, or should the beneficiary breach his or her obligations under a grant agreement or decision, the authorising officer responsible may, in addition, reduce the grant or recover amounts unduly paid under the grant agreement or decision, in proportion to the seriousness of the errors, irregularities or fraud or of the breach of obligations, provided that the beneficiary has been given the opportunity to make observations.

5. Where controls or audits demonstrate systemic or recurrent errors, irregularities, fraud or breach of obligations attributable to the beneficiary and having a material impact on a number of grants awarded to that beneficiary under similar conditions, the authorising officer responsible may suspend implementation of all the grants concerned or, where appropriate, terminate the concerned grant agreements or decisions with that beneficiary, in proportion to the seriousness of the errors, irregularities, fraud or of the breach of obligations, provided that the beneficiary has been given the opportunity to make observations.

The authorising officer responsible may, in addition, following an adversarial procedure, reduce the grants or recover amounts unduly paid in respect of all the grants affected by the systemic or recurrent errors, irregularities, fraud or breach of obligations referred to in the first subparagraph that may be audited in accordance with the grant agreements or decisions.

6. The authorising officer responsible shall determine the amounts to be reduced or recovered, wherever possible and practicable, on the basis of costs unduly declared as eligible for each grant concerned, following acceptance of the revised financial statements submitted by the beneficiary.

7. Where it is not possible or practicable to quantify precisely the amount of ineligible costs for each grant concerned, the amounts to be reduced or recovered may be determined by extrapolating the reduction or recovery rate applied to the grants for which the systemic or recurrent errors or irregularities have been demonstrated, or, where ineligible costs cannot serve as a basis for determining the amounts to be reduced or recovered, by applying a flat rate, having regard to the principle of proportionality. The beneficiary shall be given the opportunity to make observations on the extrapolation method or flat rate to be applied and to propose a duly substantiated alternative method or rate before the reduction or recovery is made.

8. The Commission shall ensure equal treatment of beneficiaries of a programme, in particular where it is implemented by several authorising officers responsible.

Beneficiaries shall be informed of the means for challenging decisions taken under paragraphs 3, 4, 5, 6 and 7 of this Article, in accordance with Article 97.

9. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules for the payment of grants and controls, including rules concerning supporting documents and the suspension and reduction of grants.

Article 136

Periods for record-keeping

1. Beneficiaries shall keep records, supporting documents, statistical records and other records pertaining to a grant for five years following the payment of the balance, and for three years in the case of low value grants.

2. Records pertaining to audits, appeals, litigation, or the pursuit of claims arising out of the performance of the project shall be retained until such audits, appeals, litigation or claims have been disposed of.

CHAPTER 5

Implementation

Article 137

Implementation contracts and financial support to third parties

1. Where implementation of an action or a work programme requires financial support to be given to third parties, the beneficiary may give such financial support provided that the following conditions are met:

(a) before awarding the grant, the authorising officer responsible has verified that the beneficiary offers adequate guarantees as regards the recovery of amounts due to the Commission;

(b) the conditions for the giving of such support are strictly defined in the grant decision or agreement between the beneficiary and the Commission, in order to avoid the exercise of discretion by the beneficiary;

(c) the amounts concerned are small, except where the financial support is the primary aim of the action.

2. Each grant decision or agreement shall provide expressly for the Commission and the Court of Auditors to exercise their powers of control, concerning documents premises and information, including that stored on electronic media, over all third parties who have received Union funds.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on implementation contracts and financial support to third parties.

TITLE VII

PRIZES

Article 138

General rules

1. Prizes shall respect the principles of transparency and equal treatment and shall promote the achievement of policy objectives of the Union.

2. For this purpose, prizes shall be subject to a work programme to be published prior to its implementation. The work programme shall be implemented through the publication of contests.

Contests for prizes with a unit value of EUR 1 000 000 or more may only be published if they are provided for in the statements or any other relevant document referred to in point (e) of Article 38(3).

The rules of the contest shall at least lay down the conditions for participation including the exclusion criteria provided for in Article 106(1) and Articles 107, 108 and 109, the award criteria, the amount of the prize and the payment arrangements.

Prizes may not be awarded directly without a contest and shall be published annually in accordance with Article 35(2) and (3).

3. Entries in a contest shall be evaluated by a panel of experts on the basis of the published rules of the contest.

Prizes shall then be awarded by the authorising officer responsible, on the basis of the evaluation provided by the panel of experts who shall be free to decide whether to recommend the award of prizes, depending on their appraisal of the quality of the entries.

4. The amount of the prize shall not be linked to costs incurred by the winner.

5. Where implementation of an action or work programme requires prizes to be given to third parties by a beneficiary of a Union grant, that beneficiary may give such prizes provided that the minimum content of the rules of the contest, as laid down in paragraph 2, is strictly defined in the grant decision or agreement between the beneficiary and the Commission, with no margin for discretion.

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on prizes, including programming, rules of contest, *ex post* publication, evaluation, information and notification of winners.

REGULATION (EU) No 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

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 [1],

Whereas:

(1) Where uniform conditions for the implementation of legally binding Union acts are needed, those acts (hereinafter 'basic acts') are to confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.

(2) It is for the legislator, fully respecting the criteria laid down in the Treaty on the Functioning of the European Union ('TFEU'), to decide in respect of each basic act whether to confer implementing powers on the Commission in accordance with Article 291(2) of that Treaty.

(3) Hitherto, the exercise of implementing powers by the Commission has been governed by Council Decision 1999/468/EC [2].

(4) The TFEU now requires the European Parliament and the Council to lay down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

(5) It is necessary to ensure that the procedures for such control are clear, effective and proportionate to the nature of the implementing acts and that they reflect the institutional requirements of the TFEU as well as the experience gained and the common practice followed in the implementation of Decision 1999/468/EC.

(6) In those basic acts which require the control of the Member States for the adoption by the Commission of implementing acts, it is appropriate, for the purposes of such control, that committees composed of the representatives of the Member States and chaired by the Commission be set up.

(7) Where appropriate, the control mechanism should include referral to an appeal committee which should meet at the appropriate level.

(8) In the interests of simplification, the Commission should exercise implementing powers in accordance with one of only two procedures, namely the advisory procedure or the examination procedure.

(9) In order to simplify further, common procedural rules should apply to the committees, including the key provisions relating to their functioning and the possibility of delivering an opinion by written procedure.

(10) Criteria should be laid down to determine the procedure to be used for the adoption of implementing acts by the Commission. In order to achieve greater consistency, the procedural requirements should be proportionate to the nature and impact of the implementing acts to be adopted.

(11) The examination procedure should in particular apply for the adoption of acts of general scope designed to implement basic acts and specific implementing acts with a potentially important impact. That procedure should ensure that implementing acts cannot be adopted by the Commission if they are not in accordance with the opinion of the committee, except in very exceptional circumstances, where they may apply for a limited period of time. The procedure should also ensure that the Commission is able to review the draft implementing acts where no opinion is delivered by the committee, taking into account the views expressed within the committee.

(12) Provided that the basic act confers implementing powers on the Commission relating to programmes with substantial budgetary implications or directed to third countries, the examination procedure should apply.

[1] Position of the European Parliament of 16 December 2010 (not yet published in the Official Journal) and decision of the Council of 14 February 2011.

[2] OJ L 184, 17.7.1999, p. 23.

(13) The chair of a committee should endeavour to find solutions which command the widest possible support within the committee or the appeal committee and should explain the manner in which the discussions and suggestions for amendments have been taken into account. For that purpose, the Commission should pay particular attention to the views expressed within the committee or the appeal committee as regards draft definitive anti-dumping or countervailing measures.

(14) When considering the adoption of other draft implementing acts concerning particularly sensitive sectors, notably taxation, consumer health, food safety and protection of the environment, the Commission, in order to find a balanced solution, will, as far as possible, act in such a way as to avoid going against any predominant position which might emerge within the appeal committee against the appropriateness of an implementing act.

(15) The advisory procedure should, as a general rule, apply in all other cases or where it is considered more appropriate.

(16) It should be possible, where this is provided for in a basic act, to adopt implementing acts which are to apply immediately on imperative grounds of urgency.

(17) The European Parliament and the Council should be promptly informed of committee proceedings on a regular basis.

(18) Either the European Parliament or the Council should be able at any time to indicate to the Commission that, in its view, a draft implementing act exceeds the implementing powers provided for in the basic act, taking into account their rights relating to the review of the legality of Union acts.

(19) Public access to information on committee proceedings should be ensured in accordance with 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 ([1]).

(20) A register containing information on committee proceedings should be kept by the Commission. Consequently, rules relating to the protection of classified documents applicable to the Commission should also apply to the use of the register.

(21) Decision 1999/468/EC should be repealed. In order to ensure the transition between the regime provided for in Decision 1999/468/EC and this Regulation, any reference in existing legislation to the procedures provided for in that Decision should, with the exception of the regulatory procedure with scrutiny provided for in Article 5a thereof, be understood as a reference to the corresponding procedures provided for in this Regulation. The effects of Article 5a of Decision 1999/468/EC should be provisionally maintained for the purposes of existing basic acts which refer to that Article.

(22) The Commission's powers, as laid down by the TFEU, concerning the implementation of the competition rules are not affected by this Regulation,

HAVE ADOPTED THIS REGULATION:

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.

([1]) OJ L 145, 31.5.2001, p. 43.

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 prejudge 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

Review

By 1 March 2016, the Commission shall present a report to the European Parliament and the Council on the implementation of this Regulation, accompanied, if necessary, by appropriate legislative proposals.

Article 16

Entry into force

This Regulation shall enter into force on 1 March 2011.

This Regulation is binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 16 February 2011.

For the European Parliament
The President
J. BUZEK

For the Council
The President
MARTONYI J.

I

(Acts whose publication is obligatory)

DIRECTIVE 2004/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 31 March 2004

coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) and Article 55 and Article 95 thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the Opinion of the Economic and Social Committee ([2]),

Having regard to the Opinion of the Committee of the Regions ([3]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([4]), in the light of the joint text approved by the Conciliation Committee on 9 December 2003,

Whereas:

(1) On the occasion of new amendments being made to Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ([5]), which are necessary to meet requests for simplification and modernisation made by contracting entities and economic operators alike in their responses to the Green Paper adopted by the Commission on 27 November 1996, the Directive should, in the interests of clarity, be recast. This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting entities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting entity, are expressly mentioned and comply with the fundamental principles mentioned in recital 9.

(2) One major reason for the introduction of rules coordinating procedures for the award of contracts in these sectors is the variety of ways in which national authorities can influence the behaviour of these entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies.

(3) Another main reason why it is necessary to coordinate procurement procedures applied by the entities operating in these sectors is the closed nature of the markets in which they operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

(4) Community legislation, and in particular Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector ([6]) and Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector ([7]), is designed to introduce more competition between carriers providing air transport services to the public. It is therefore not appropriate to include such entities in the scope of this Directive. In view of the competitive position of Community shipping, it would also be inappropriate to make the contracts awarded in this sector subject to the rules of this Directive.

([1]) OJ C 29 E, 30.1.2001, p. 112 and OJ C 203 E, 27.8.2002, p. 183.
([2]) OJ C 193, 10.7.2001, p. 1.
([3]) OJ C 144, 16.5.2001, p. 23.
([4]) Opinion of the European Parliament of 17 January 2002 (OJ C 271 E, 7.11.2002, p. 293), Council Common Position of 20 Mars 2003 (OJ C 147 E, 24.6.2003, p. 137) and Position of the European Parliament of 2 July 2003 (not yet published in the Official Journal). Legislative Resolution of the European Parliament of 29 January 2004 and Decision of the Council of 2 February 2004.
([5]) OJ L 199, 9.8.1993, p. 84. Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1).
([6]) OJ L 374, 31.12.1987, p. 1. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).
([7]) OJ L 374, 31.12.1987, p. 9. Regulation as last amended by the 1994 Act of Accession.

(5) The scope of Directive 98/38/EEC covers, at present, certain contracts awarded by contracting entities operating in the telecommunications sector. A legislative framework, as mentioned in the Fourth report on the implementation of the telecommunications regulations of 25 November 1998, has been adopted to open this sector. One of its consequences has been the introduction of effective competition, both de jure and de facto, in this sector. For information purposes, and in the light of this situation, the Commission has published a list of telecommunications services [1] which may already be excluded from the scope of that Directive by virtue of Article 8 thereof. Further progress has been confirmed in the Seventh report on the implementation of telecommunications regulations of 26 November 2001. It is therefore no longer necessary to regulate purchases by entities operating in this sector.

(6) It is therefore no longer appropriate to maintain the Advisory Committee on Telecommunications Procurement set up by Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy transport and telecommunications sectors [2].

(7) Nevertheless, it is appropriate to continue to monitor developments in the telecommunications sector and to reconsider the situation if it is established that there is no longer effective competition in that sector.

(8) Directive 93/38/EEC excludes from its scope purchases of voice telephony, telex, mobile telephone, paging and satellite services. Those exclusions were introduced to take account of the fact that the services in question could frequently be provided only by one service provider in a given geographical area because of the absence of effective competition and the existence of special or exclusive rights. The introduction of effective competition in the telecommunications sector removes the justification for these exclusions. It is therefore necessary to include the procurement of such telecommunications services in the scope of this Directive.

(9) In order to guarantee the opening up to competition of public procurement contracts awarded by entities operating in the water, energy, transport and postal services sectors, it is advisable to draw up provisions for Community coordination of contracts above a certain value. Such coordination is based on the requirements inferable from Articles 14, 28 and 49 of the EC Treaty and from Article 97 of the Euratom Treaty, namely the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression, the principle of mutual recognition, the principle of proportionality, as well as the principle of transparency. In view of the nature of the sectors affected by such coordination, the latter should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

For public contracts the value of which is lower than that triggering the application of provisions of Community coordination, it is advisable to recall the case-law developed by the Court of Justice according to which the rules and principles of the Treaties referred to above apply.

(10) To ensure a real opening up of the market and a fair balance in the application of procurement rules in the water, energy, transport and postal services sectors it is necessary for the entities covered to be identified on a basis other than their legal status. It should be ensured, therefore, that the equal treatment of contracting entities operating in the public sector and those operating in the private sector is not prejudiced. It is also necessary to ensure, in keeping with Article 295 of the Treaty, that the rules governing the system of property ownership in Member States are not prejudiced.

(11) Member States should ensure that the participation of a body governed by public law as a tenderer in a procedure for the award of a contract does not cause any distortion of competition in relation to private tenderers.

(12) Under Article 6 of the Treaty, environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of the Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.

(13) Nothing in this Directive should prevent the imposition or enforcement of measures necessary to protect public morality, public policy, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty.

[1] OJ C 156, 3.6.1999, p. 3.
[2] OJ L 297, 29.10.1990, p. 1. Directive as last amended by Directive 94/22/EC of the European Parliament and of the Council (OJ L 164, 30.6.1994, p. 3).

(14) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) ([1]), approved in particular the WTO Agreement on Government Procurement (hereinafter referred to as the 'Agreement'), the aim of which is to establish a multilateral framework of balanced rights and obligations relating to public contracts with the aim of achieving the liberalisation and expansion of world trade. In view of the international rights and commitments devolving on the Community as a result of the acceptance of the Agreement, the arrangements to be applied to tenderers and products from signatory third countries are those defined by the Agreement. The Agreement does not have direct effect. The contracting entities covered by the Agreement which comply with this Directive and which apply the latter to economic operators of third countries which are signatories to the Agreement should therefore be in conformity with the Agreement. It is also appropriate that this Directive should guarantee for Community economic operators conditions for participation in public procurement which are just as favourable as those reserved for economic operators of third countries which are signatories to the Agreement.

(15) Before launching a procurement procedure, contracting entities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications, provided, however, that such advice does not have the effect of precluding competition.

(16) In view of the diversity of works contracts, contracting entities should be able to make provision for contracts for the design and execution of work to be awarded either separately or jointly. It is not the intention of this Directive to prescribe either joint or separate contract awards. The decision to award contracts separately or jointly should be determined by qualitative and economic criteria, which may be defined by national law.

A contract may be considered to be a works contract only if its subject-matter specifically covers the execution of activities listed in Annex XII, even if the contract covers the provision of other services necessary for the execution of such activities. Service contracts, in particular in the sphere of property management services, may in certain circumstances include works. However, insofar as such works are incidental to the principal subject-matter of the contract, and are a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of the contract as a works contract.

For the purpose of calculating the estimated value of a works contract it is appropriate to take as a basis the value of the works themselves as well as the estimated value of supplies and services, if any, that the contracting entities place at the disposal of contractors, insofar as these services or supplies are necessary for the execution of the works in question. It should be understood that, for the purposes of this paragraph, the services concerned are those rendered by the contracting entities through their own personnel. On the other hand, calculation of the value of services contracts, whether or not to be placed at the disposal of a contractor for the subsequent execution of works, follows the rules applicable to service contracts.

(17) The field of services is best delineated, for the purpose of applying the procedural rules of this Directive and for monitoring purposes, by subdividing it into categories corresponding to particular headings of a common classification and by bringing them together in two Annexes, XVII A and XVII B, according to the regime to which they are subject. As regards services in Annex XVII B, the relevant provisions of this Directive should be without prejudice to the application of Community rules specific to the services in question.

(18) As regards service contracts, full application of this Directive should be limited, for a transitional period, to contracts where its provisions will permit the full potential for increased cross-frontier trade to be realised. Contracts for other services need to be monitored during this transitional period before a decision is taken on the full application of this Directive. In this respect, the mechanism for such monitoring needs to be defined. This mechanism should, at the same time, enable interested parties to have access to the relevant information.

(19) Obstacles to the free provision of services should be avoided. Therefore, service providers may be either natural or legal persons. This Directive should not, however, prejudice the application, at national level, of rules concerning the conditions for the pursuit of an activity or a profession, provided that they are compatible with Community law.

(20) Certain new electronic purchasing techniques are continually being developed. Such techniques help to increase competition and streamline public purchasing, particularly in terms of the savings in time and money which their use will allow. Contracting entities may make use of electronic purchasing techniques, provided that such use complies with the rules of this Directive

([1]) OJ L 336, 23.12.1994, p. 1.

and the principles of equal treatment, non-discrimination and transparency. To that extent, a tender submitted by a tenderer, in particular under a framework agreement or where a dynamic purchasing system is being used, may take the form of that tenderer's electronic catalogue if the latter uses the means of communication chosen by the contracting entity in accordance with Article 48.

(21) In view of the rapid expansion of electronic purchasing systems, appropriate rules should now be introduced to enable contracting entities to take full advantage of the possibilities afforded by these systems. Against this background, it is necessary to define a completely electronic dynamic purchasing system for commonly used purchases and to lay down specific rules for setting up and operating such a system in order to ensure the fair treatment of any economic operator who wishes to join. Any economic operator which submits an indicative tender in accordance with the specification and meets the selection criteria should be allowed to join such a system. This purchasing technique allows the contracting entity, through the establishment of a list of tenderers already selected and the opportunity given to new tenderers to join, to have a particularly broad range of tenders, as a result of the electronic facilities available, and hence to ensure optimum use of funds through broad competition.

(22) Since use of the technique of electronic auctions is likely to increase, such auctions should be given a Community definition and be governed by specific rules in order to ensure that they operate fully in accordance with the principles of equal treatment, non-discrimination and transparency. To that end, provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts. With the same objective, it should also be possible to establish the respective ranking of the tenderers at any stage of the electronic auction. Recourse to electronic auctions enables contracting entities to ask tenderers to submit new prices, revised downwards, and, when the contract is awarded to the most economically advantageous tender, also to improve elements of the tenders other than prices. In order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting entity, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions. Consequently, certain works contracts and certain service contracts having as their subject-matter intellectual performances, such as the design of works, should not be the object of electronic auctions.

(23) Certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding contracts/framework agreements for contracting entities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing. Provision should therefore be made for a Community definition of central purchasing bodies used by contracting entities. A definition should also be given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting entities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with this Directive.

(24) In order to take account of the different circumstances obtaining in Member States, Member States should be allowed to choose whether contracting entities may use central purchasing bodies, dynamic purchasing systems or electronic auctions, as defined and regulated by this Directive.

(25) There has to be an appropriate definition of the concept of special or exclusive rights. The consequence of the definition is that the fact that, for the purpose of constructing networks or port or airport facilities, an entity may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway will not in itself constitute exclusive or special rights within the meaning of this Directive. Nor does the fact that an entity supplies drinking water, electricity, gas or heat to a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned in itself constitute an exclusive or special right within the meaning of this Directive. Nor may rights granted by a Member State in any form, including by way of acts of concession, to a limited number of undertakings on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria to enjoy those rights be considered special or exclusive rights.

(26) It is appropriate for the contracting entities to apply common procurement procedures in respect of their activities relating to water and for such rules also to apply where contracting authorities within the meaning of this Directive award contracts in respect of their projects in the field of hydraulic engineering, irrigation, land drainage or the disposal and treatment of sewage. However, procurement rules of the type proposed for supplies of goods are inappropriate for purchases of water, given the need to procure water from sources near the area in which it will be used.

(27) Certain entities providing bus transport services to the public were already excluded from the scope of Directive 93/38/EEC. Such entities should also be excluded from the scope of this Directive. In order to forestall the existence of a multitude of specific arrangements applying to certain sectors only, the general procedure that permits the effects of opening up to competition to be taken into account should also apply to all entities providing bus transport services that are not excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.

(28) Taking into account the further opening up of Community postal services to competition and the fact that such services are provided through a network by contracting authorities, public undertakings and other undertakings, contracts awarded by contracting entities providing postal services should be subject to the rules of this Directive, including those in Article 30, which, safeguarding the application of the principles referred to in recital 9, create a framework for sound commercial practice and allow greater flexibility than is offered by 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 [1]. For a definition of the activities in question, it is necessary to take into account the definitions of 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 [2].

Whatever their legal status, entities providing postal services are not currently subject to the rules set out in Directive 93/38/EEC. The adjustment of contract award procedures to this Directive could therefore take longer to implement for such entities than for entities already subject to those rules which will merely have to adapt their procedures to the amendments made by this Directive. It should therefore be permissible to defer application of this Directive to accommodate the additional time required for this adjustment. Given the varying situations of such entities, Member States should have the option of providing for a transitional period for the application of this Directive to contracting entities operating in the postal services sector.

(29) Contracts may be awarded for the purpose of meeting the requirements of several activities, possibly subject to different legal regimes. It should be clarified that the legal regime applicable to a single contract intended to cover several activities should be subject to the rules applicable to the activity for which it is principally intended. Determination of the activity for which the contract is principally intended may be based on an analysis of the requirements which the specific contract must meet, carried out by the contracting entity for the purposes of estimating the contract value and drawing up the tender documents. In certain cases, such as the purchase of a single piece of equipment for the pursuit of activities for which information allowing an estimation of the respective rates of use would be unavailable, it might be objectively impossible to determine for which activity the contract is principally intended. The rules applicable to such cases should be indicated.

(30) Without prejudice to the international commitments of the Community, it is necessary to simplify the implementation of this Directive, particularly by simplifying the thresholds and by rendering applicable to all contracting entities, regardless of the sector in which they operate, the provisions regarding the information to be given to participants concerning decisions taken in relation to contract award procedures and the results thereof. Furthermore, in the context of Monetary Union, such thresholds should be established in euro in such a way as to simplify the application of these provisions while at the same time ensuring compliance with the thresholds laid down in the Agreement, which are expressed in Special Drawing Rights (SDR). In this context, provision should also be made for periodic reviews of the thresholds expressed in euro so as to adjust them, where necessary, in line with possible variations in the value of the euro in relation to the SDR. In addition, the thresholds applicable to design contests should be identical to those applicable to service contracts.

(31) Provision should be made for cases in which it is possible to refrain from applying the measures for coordinating procedures on grounds relating to State security or secrecy, or because specific rules on the awarding of contracts which derive from international agreements, relating to the stationing of troops, or which are specific to international organisations are applicable.

[1] See page 114 of this Official Journal.
[2] OJ L 15, 21.1.1998, p. 14. Directive as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

(32) It is appropriate to exclude certain service, supply and works contracts awarded to an affiliated undertaking having as its principal activity the provision of such services, supply or works to the group of which it is part, rather than offering them on the market. It is also appropriate to exclude certain service, supply and works contracts awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive and of which that entity is part. However, it is appropriate to ensure that this exclusion does not give rise to distortions of competition to the benefit of the undertakings or joint ventures that are affiliated with the contracting entities; it is appropriate to provide a suitable set of rules, in particular as regards the maximum limits within which the undertakings may obtain a part of their turnover from the market and above which they would lose the possibility of being awarded contracts without calls for competition, the composition of joint ventures and the stability of links between these joint ventures and the contracting entities of which they are composed.

(33) In the context of services, contracts for the acquisition or rental of immovable property or rights to such property have particular characteristics which make the application of procurement rules inappropriate.

(34) Arbitration and conciliation services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules.

(35) In accordance with the Agreement, the financial services covered by this Directive do not include contracts relating to the issue, purchase, sale or transfer of securities or other financial instruments; in particular, transactions by the contracting entities to raise money or capital are not covered.

(36) This Directive should cover the provision of services only where based on contracts.

(37) Pursuant to Article 163 of the Treaty, the encouragement of research and technological development is a means of strengthening the scientific and technological basis of Community industry, and the opening up of service contracts contributes to this end. This Directive should not cover the cofinancing of research and development programmes: research and development contracts other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting entity, are therefore not covered by this Directive.

(38) To forestall the proliferation of specific arrangements applicable to certain sectors only, the current special arrangements created by Article 3 of Directive 93/38/EEC and Article 12 of Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons [1] governing entities exploiting a geographical area for the purpose of exploring for or extracting oil, gas, coal or other solid fuels should be replaced by the general procedure allowing for exemption of sectors directly exposed to competition. It has to be ensured, however, that this will be without prejudice to Commission Decision 93/676/EEC of 10 December 1993 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the Netherlands an activity defined by Article 2(2)(b)(i) of Council Directive 90/531/EEC and that entities carrying on such an activity are not to be considered in the Netherlands as operating under special or exclusive rights within the meaning of Article 2(3)(b) of the Directive [2], Commission Decision 97/367/EC of 30 May 1997 establishing that the exploitation of geographical areas for the purpose of exploring for or extracting oil or gas does not constitute in the United Kingdom an activity defined by Article 2(2)(b)(i) of Council Directive 93/38/EEC and that entities carrying on such an activity are not to be considered in the United Kingdom as operating under special or exclusive rights within the meaning of Article 2(3)(b) of the Directive [3], Commission Decision 2002/205/EC of 4 March 2002 following a request by Austria applying for the special regime provided for in Article 3 of Directive 93/38/EEC [4] and Commission Decision 2004/73/EC on a request from Germany to apply the special procedure laid down in Article 3 of Directive 93/38/EEC [5].

(39) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.

[1] OJ L 164, 30.6.1994, p. 3.
[2] OJ L 316, 17.12.1993, p. 41.
[3] OJ L 156, 13.6.1997, p. 55.
[4] OJ L 68, 12.3.2002, p. 31.
[5] OJ L 16, 23.1.2004, p.57.

(40) This Directive should apply neither to contracts intended to permit the performance of an activity referred to in Articles 3 to 7 nor to design contests organised for the pursuit of such an activity if, in the Member State in which this activity is carried out, it is directly exposed to competition on markets to which access is not limited. It is therefore appropriate to introduce a procedure, applicable to all sectors covered by this Directive, that will enable the effects of current or future opening up to competition to be taken into account. Such a procedure should provide legal certainty for the entities concerned, as well as an appropriate decision-making process, ensuring, within short time limits, uniform application of Community law in this area.

(41) Direct exposure to competition should be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. The implementation and application of appropriate Community legislation opening a given sector, or a part of it, will be considered to provide sufficient grounds for assuming there is free access to the market in question. Such appropriate legislation should be identified in an annex which can be updated by the Commission. When updating, the Commission takes in particular into account the possible adoption of measures entailing a genuine opening up to competition of sectors other than those for which a legislation is already mentioned in Annex XI, such as that of railway transports. Where free access to a given market does not result from the implementation of appropriate Community legislation, it should be demonstrated that, de jure and de facto, such access is free. For this purpose, application by a Member State of a Directive, such as Directive 94/22/EC opening up a given sector to competition, to another sector, such as the coal sector, is a circumstance to be taken into account for the purposes of Article 30.

(42) The technical specifications drawn up by purchasers should allow public procurement to be opened up to competition. To this end, it should be possible to submit tenders which reflect the diversity of technical solutions. Accordingly, it should be possible to draw up the technical specifications in terms of functional performance and requirements and, where reference is made to the European standard or, in the absence thereof, to the national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety should be considered by the contracting entities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting entities should be able to provide a reason for any decision that equivalence does not exist in a given case. Contracting entities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method**,** and/or specific environmental effects of product groups or services. They may use, but are not obliged to use appropriate specifications that are defined in eco-labels, such as the European Eco-label, (multi-) national eco-labels or any other eco-label provided that the requirements for the label are drawn up and adopted on the basis of scientific information using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and provided that the label is accessible and available to all interested parties. Contracting entities should, whenever possible, lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. The technical specifications should be clearly indicated, so that all tenderers know what the requirements established by the contracting entity cover.

(43) In order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, it is advisable to include provisions on subcontracting.

(44) Contract performance conditions are compatible with the Directive provided that they are not directly or indirectly discriminatory and are indicated in the notice used to make the call for competition, or in the specifications. They may in particular be intended to encourage on-site vocational training, the employment of people experiencing particular difficulty in integration, the fight against unemployment or the protection of the environment. For example, mention may be made of the requirements — applicable during the performance of the contract — to recruit long-term jobseekers or to implement training measures for the unemployed or for young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

(45) The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during the performance of a contract, provided that such rules, and their application, comply with Community law. In cross-border situations where workers from one Member State provide services in another Member State for the purpose of performing a contract, 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 [1] lays down the minimum conditions which must be observed by the host country in respect of such posted workers. If national law contains provisions to this effect, non-compliance with those obligations may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a contract.

(46) In view of new developments in information and telecommunications technology, and the simplifications these can bring in terms of publicising contracts and the efficiency and transparency of procurement procedures, electronic means should be put on a par with traditional means of communication and information exchange. As far as possible, the means and technology chosen should be compatible with the technologies used in the other Member States.

(47) The use of electronic means leads to savings in time. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Community level. However, it is necessary to ensure that the cumulative effect of reductions of time limits does not lead to excessively short time limits.

(48) Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [2] and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') [3] should, in the context of this Directive, apply to the transmission of information by electronic means. The public procurement procedures and the rules applicable to service contests require a level of security and confidentiality higher than that required by these Directives. Accordingly, the devices for the electronic receipt of offers, requests to participate and plans and projects should comply with specific additional requirements. To this end, use of electronic signatures, in particular advanced electronic signatures, should, as far as possible, be encouraged. Moreover, the existence of voluntary accreditation schemes could constitute a favourable framework for enhancing the level of certification service provision for these devices.

(49) It is appropriate that the participants in an award procedure are informed of decisions to conclude a framework agreement or to award a contract or to abandon the procedure within time limits that are sufficiently short so as not to render the lodging of requests for review impossible; this information should therefore be given as soon as possible and in general within 15 days following the decision.

(50) It should be clarified that contracting entities which establish selection criteria in an open procedure should do so in accordance with objective rules and criteria, just as the selection criteria in restricted and negotiated procedures should be objective. These objective rules and criteria, just as the selection criteria, do not necessarily imply weightings.

(51) It is important to take into account Court of Justice case-law in cases where an economic operator claims the economic, financial or technical capabilities of other entities, whatever the legal nature of the link between itself and those entities, in order to meet the selection criteria or, in the context of qualification systems, in support of its application for qualification. In the latter case, it is for the economic operator to prove that those resources will actually be available to it throughout the period of validity of the qualification. For the purposes of that qualification, a contracting entity may therefore determine the level of requirements to be met and in particular, for example where the operator lays claim to the financial standing of another entity, it may require that that entity be held liable, if necessary jointly and severally.

Qualification systems should be operated in accordance with objective rules and criteria, which, at the contracting entities' choice, may concern the capacities of the economic operators and/or the characteristics of the works, supplies or services covered by the system. For the purposes of qualification, contracting entities may conduct their own tests in order to evaluate the characteristics of the works, supplies or services concerned, in particular in terms of compatibility and safety.

(52) The relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest.

(53) In appropriate cases, in which the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a contract, the application of such measures or schemes may be required. Environmental management schemes

[1] OJ L 18, 21.1.1997, p. 1.
[2] OJ L 13, 19.1.2000, p. 12.
[3] OJ L 178, 17.7.2000, p. 1.

whether or not they are registered under Community instruments such as Regulation (EC) No 761/2001 (EMAS) [1], can demonstrate that the economic operator has the technical capability to perform the contract. Moreover, a description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence.

(54) The award of public contracts to economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering should be avoided. Given that contracting entities, which are not contracting authorities, might not have access to indisputable proof on the matter, it is appropriate to leave the choice of whether or not to apply the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC to these contracting entities. The obligation to apply Article 45(1) should therefore be limited only to contracting entities that are contracting authorities. Where appropriate, the contracting entities should ask applicants for qualification, candidates or tenderers to supply relevant documents and, where they have doubts concerning the personal situation of these economic operators, they may seek the cooperation of the competent authorities of the Member State concerned. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgment concerning such offences rendered in accordance with national law that has the force of res judicata.

If national law contains provisions to this effect, non-compliance with environmental legislation or legislation on unlawful agreements in contracts which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

Non-observance of national provisions implementing the Council Directives 2000/78/EC [2] and 76/207/EEC [3] concerning equal treatment of workers, which has been the subject of a final judgment or a decision having equivalent effect may be considered an offence concerning the professional conduct of the economic operator concerned or grave misconduct.

(55) Contracts must be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: 'the lowest price' and 'the most economically advantageous tender'.

To ensure compliance with the principle of equal treatment in the award of contracts, it is appropriate to lay down an obligation — established by case-law — to ensure the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It is therefore the responsibility of contracting entities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders. Contracting entities may derogate from indicating the weighting of the criteria for the award of the contract in duly justified cases for which they must be able to give reasons, where the weighting cannot be established in advance, in particular on account of the complexity of the contract. In such cases, they must indicate the descending order of importance of the criteria.

Where contracting entities choose to award a contract to the most economically advantageous tender, they should assess the tenders in order to determine which one offers the best value for money. In order to do this, they should determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting entity. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. In order to guarantee equal treatment, the criteria for the award of the contract must enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting entity to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting entity may use criteria aiming to meet social requirements, in particular in response to the needs — defined in the specifications of the contract — of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong.

[1] Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing a voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) (OJ L 114, 24.4.2001, p. 1).

[2] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2.12.2000, p. 16).

[3] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, (OJ L 39 of 14.2.1976, p. 40). Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

(56) The award criteria must not affect the application of national provisions on the remuneration of certain services, such as the services provided by architects, engineers or lawyers.

(57) Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits [1] should apply to the calculation of the time limits contained in this Directive.

(58) This Directive should be without prejudice to the existing international obligations of the Community or of the Member States and should not prejudice the application of the provisions of the Treaty, in particular Articles 81 and 86 thereof.

(59) This Directive should not prejudice the time-limits set out in Annex XXV, within which Member States are required to transpose and apply Directive 93/38/EEC.

(60) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, [2].

HAVE ADOPTED THIS DIRECTIVE:

CONTENTS

[1] OJ L 124, 8.6.1971, p. 1.
[2] OJ L 184, 17.7.1999, p. 23.

TITLE I

GENERAL PROVISIONS APPLICABLE TO CONTRACTS AND DESIGN CONTESTS

CHAPTER I

Basic terms

Article 1

Definitions

1. For the purposes of this Directive, the definitions set out in this Article shall apply.

2. (a) 'Supply, works and service contracts' are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers.

(b) 'Works contracts' are contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex XII or a work, or the realisation by whatever means of a work corresponding to the requirements specified by the contracting entity. A 'work' means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.

(c) 'Supply contracts' are contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire-purchase, with or without the option to buy, of products.

A contract having as its object the supply of products, which also covers, as an incidental matter, siting and installation operations shall be considered to be a 'supply contract';

(d) 'Service contracts' are contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

A contract having as its object both products and services within the meaning of Annex XVII shall be considered to be a 'service contract' if the value of the services in question exceeds that of the products covered by the contract.

A contract having as its object services within the meaning of Annex XVII and including activities within the meaning of Annex XII that are only incidental to the principal object of the contract shall be considered to be a service contract.

3. (a) A 'works concession' is a contract of the same type as a works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in that right together with payment;

(b) A 'service concession' is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.

4. A 'framework agreement' is an agreement between one or more contracting entities referred to in Article 2(2) and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

5. A 'dynamic purchasing system' is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entity, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

6. An 'electronic auction' is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods. Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions.

7. The terms 'contractor', 'supplier' or 'service provider' mean either a natural or a legal person, or a contracting entity within the meaning of Article 2(2)(a) or (b), or a group of such persons and/or entities which offers on the market, respectively, the execution of works and/or a work, products or services.

The terms 'economic operator' shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interests of simplification.

A 'tenderer' is an economic operator who submits a tender, and 'candidate' means one who has sought an invitation to take part in a restricted or negotiated procedure.

8. A 'central purchasing body' is a contracting authority within the meaning of Article 2(1)(a) or a contracting authority within the meaning of Article 1(9) of Directive 2004/18/EC which:

— acquires supplies and/or services intended for contracting entities or

— awards public contracts or concludes framework agreements for works, supplies or services intended for contracting entities.

9. 'Open, restricted and negotiated procedures' are the procurement procedures applied by contracting entities, whereby:

(a) in the case of open procedures, any interested economic operator may submit a tender;

(b) in the case of restricted procedures, any economic operator may request to participate and only candidates invited by the contracting entity may submit a tender;

(c) in the case of negotiated procedures, the contracting entity consults the economic operators of its choice and negotiates the terms of the contract with one or more of these.

10. 'Design contests' are those procedures which enable the contracting entity to acquire, mainly in the fields of town and country planning, architecture, engineering or data processing, a plan or design selected by a jury after having been put out to competition with or without the award of prizes.

11. 'Written' or 'in writing' means any expression consisting of words or figures that can be read, reproduced and subsequently communicated. It may include information transmitted and stored by electronic means.

12. 'Electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

13. 'Common Procurement Vocabulary (CPV)' means the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002 of 5 November 2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CVP) [1] while ensuring equivalence with the other existing nomenclatures.

In the event of varying interpretations of the scope of this Directive, owing to possible differences between the CPV and NACE nomenclatures listed in Annex XII or between the CPV and CPC (provisional version) nomenclatures listed in Annex XVII, the NACE or the CPC nomenclature respectively shall take precedence.

[1] OJ L 340, 16.12.2002, p. 1.

CHAPTER II

Definition of the activities and entities covered

Section 1

Entities

Article 2

Contracting entities

1. For the purposes of this Directive,

(a) 'Contracting authorities' are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

'A body governed by public law' means any body:

— established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,

— having legal personality and

— financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

(b) a 'public undertaking' is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

— hold the majority of the undertaking's subscribed capital, or

— control the majority of the votes attaching to shares issued by the undertaking, or

— can appoint more than half of the undertaking's administrative, management or supervisory body.

2. This Directive shall apply to contracting entities:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

3. For the purposes of this Directive, 'special or exclusive rights' mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 3 to 7 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

Section 2

Activities

Article 3

Gas, heat and electricity

1. As far as gas and heat are concerned, this Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat; or

(b) the supply of gas or heat to such networks.

2. The supply of gas or heat to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where:

(a) the production of gas or heat by the entity concerned is the unavoidable consequence of carrying out an activity other than those referred to in paragraphs 1 or 3 of this Article or in Articles 4 to 7; and

(b) supply to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20 % of the entity's turnover having regard to the average for the preceding three years, including the current year.

3. As far as electricity is concerned, this Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity; or

(b) the supply of electricity to such networks.

4. The supply of electricity to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 3 where:

(a) the production of electricity by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in paragraphs 1 or 3 of this Article or in Articles 4 to 7; and

(b) supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of energy, having regard to the average for the preceding three years, including the current year.

Article 4

Water

1. This Directive shall apply to the following activities:

(a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water; or

(b) the supply of drinking water to such networks.

2. This Directive shall also apply to contracts or design contests awarded or organised by entities which pursue an activity referred to in paragraph 1 and which:

(a) are connected with hydraulic engineering projects, irrigation or land drainage, provided that the volume of water to be used for the supply of drinking water represents more than 20 % of the total volume of water made available by such projects or irrigation or drainage installations, or

(b) are connected with the disposal or treatment of sewage.

3. The supply of drinking water to networks which provide a service to the public by a contracting entity other than a contracting authority shall not be considered a relevant activity within the meaning of paragraph 1 where:

(a) the production of drinking water by the entity concerned takes place because its consumption is necessary for carrying out an activity other than those referred to in Articles 3 to 7; and

(b) supply to the public network depends only on the entity's own consumption and has not exceeded 30 % of the entity's total production of drinking water, having regard to the average for the preceding three years, including the current year.

Article 5

Transport services

1. This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

2. This Directive shall not apply to entities providing bus transport services to the public which were excluded from the scope of Directive 93/38/EEC pursuant to Article 2(4) thereof.

Article 6

Postal services

1. This Directive shall apply to activities relating to the provision of postal services or, on the conditions set out in paragraph 2(c), other services than postal services.

2. For the purpose of this Directive and without prejudice to Directive 97/67/EC:

(a) 'postal item': means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;

(b) 'postal services': means services consisting of the clearance, sorting, routing and delivery of postal items. These services comprise:

— 'reserved postal services': postal services which are or may be reserved on the basis of Article 7 of Directive 97/67/EC,

— 'other postal services': postal services which may not be reserved on the basis of Article 7 of Directive 97/67/EC; and

(c) 'other services than postal services': means services provided in the following areas:

— mail service management services (services both preceding and subsequent to despatch, such as 'mailroom management services'),

— added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail),

— services concerning postal items not included in point (a), such as direct mail bearing no address,

— financial services, as defined in category 6 of Annex XVII A and in Article 24(c) and including in particular postal money orders and postal giro transfers,

— philatelic services, and

— logistics services (services combining physical delivery and/or warehousing with other non-postal functions),

on condition that such services are provided by an entity which also provides postal services within the meaning of point (b), first or second indent, and provided that the conditions set out in Article 30(1) are not satisfied in respect of the services falling within those indents.

Article 7

Exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports

This Directive shall apply to activities relating to the exploitation of a geographical area for the purpose of:

(a) exploring for or extracting oil, gas, coal or other solid fuels, or

(b) the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway.

Article 8

Lists of contracting entities

The non-exhaustive lists of contracting entities within the meaning of this Directive are contained in Annexes I to X. Member States shall notify the Commission periodically of any changes to their lists.

Article 9

Contracts covering several activities

1. A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.

However, the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding it from the scope of this Directive or, where applicable, Directive 2004/18/EC.

2. If one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned Directive 2004/18/EC and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the abovementioned Directive 2004/18/EC.

3. If one of the activities for which the contract is intended is subject to this Directive and the other is not subject to either this Directive or the abovementioned Directive 2004/18/EC, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with this Directive.

CHAPTER III

General principles

Article 10

Principles of awarding contracts

Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.

TITLE II

RULES APPLICABLE TO CONTRACTS

CHAPTER I

General provisions

Article 11

Economic operators

1. Candidates or tenderers who, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

However, in the case of service and works contracts as well as supply contracts covering in addition services and/or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2. Groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups may not be required by the contracting entities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent to which this change is necessary for the satisfactory performance of the contract.

Article 12

Conditions relating to agreements concluded within the World Trade Organisation

For the purposes of the award of contracts by contracting entities, Member States shall apply in their relations conditions as favourable as those which they grant to economic operators of third countries in implementation of the Agreement. Member States shall, to this end, consult one another within the Advisory Committee for Public Contracts on the measures to be taken pursuant to the Agreement.

Article 13

Confidentiality

1. In the context of provision of technical specifications to interested economic operators, of qualification and selection of economic operators and of award of contracts, contracting entities may impose requirements with a view to protecting the confidential nature of information which they make available.

2. Without prejudice to the provisions of this Directive, in particular those concerning the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 43 and 49, and in accordance with the national law to which the contracting entity is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders.

Article 14

Framework agreements

1. Contracting entities may regard a framework agreement as a contract within the meaning of Article 1(2) and award it in accordance with this Directive.

2. Where contracting entities have awarded a framework agreement in accordance with this Directive, they may avail themselves of Article 40(3)(i) when awarding contracts based on that framework agreement.

3. Where a framework agreement has not been awarded in accordance with this Directive, contracting entities may not avail themselves of Article 40(3)(i).

4. Contracting entities may not misuse framework agreements in order to hinder, limit or distort competition.

Article 15

Dynamic purchasing systems

1. Member States may provide that contracting entities may use dynamic purchasing systems.

2. In order to set up a dynamic purchasing system, contracting entities shall follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system. All tenderers who satisfy the selection criteria and have submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification. With a view to setting up the system and to the award of contracts under that system, contracting entities shall use solely electronic means in accordance with Article 48(2) to (5).

3. For the purposes of setting up the dynamic purchasing system, contracting entities shall:

(a) publish a contract notice making it clear that a dynamic purchasing system is involved;

(b) indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;

(c) offer by electronic means, on publication of the notice and until the system expires, unrestricted, direct and full access to the specification and to any additional documents and shall indicate in the notice the internet address at which such documents may be consulted.

4. Contracting entities shall give any economic operator, throughout the entire period of the dynamic purchasing system, the possibility of submitting an indicative tender and of being admitted to the system under the conditions referred to in paragraph 2. They shall complete evaluation within a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime.

Contracting entities shall inform the tenderer referred to in the first subparagraph at the earliest possible opportunity of its admittance to the dynamic purchasing system or of the rejection of its indicative tender.

5. Each specific contract shall be the subject of an invitation to tender. Before issuing the invitation to tender, contracting entities shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, in accordance with paragraph 4, within a time limit that may not be less than 15 days from the date on which the simplified notice was sent. Contracting entities may not proceed with tendering until they have completed evaluation of all the indicative tenders received within that time limit.

6. Contracting entities shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end, they shall set a time limit for the submission of tenders.

They shall award the contract to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system. Those criteria may, if appropriate, be formulated more precisely in the invitation referred to in the first subparagraph.

7. A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases.

Contracting entities may not resort to this system to prevent, restrict or distort competition.

No charges may be billed to the interested economic operators or to parties to the system.

CHAPTER II

Thresholds and exclusion provisions

Section 1

Thresholds

Article 16

Contract thresholds

Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:

(a) EUR 499 000 in the case of supply and service contracts;

(b) EUR 6 242 000 in the case of works contracts.

Article 17

Methods of calculating the estimated value of contracts, framework agreements and dynamic purchasing systems

1. The calculation of the estimated value of a contract shall be based on the total amount payable, net of VAT, as estimated by the contracting entity. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract.

Where the contracting entity provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.

2. Contracting entities may not circumvent this Directive by splitting works projects or proposed purchases of a certain quantity of supplies and/or services or by using special methods for calculating the estimated value of contracts.

3. With regard to framework agreements and dynamic purchasing systems, the estimated value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the agreement or system.

4. For the purposes of Article 16, contracting entities shall include in the estimated value of a works contract both the cost of the works and the value of any supplies or services necessary for the execution of the works, which they make available to the contractor.

5. The value of supplies or services which are not necessary for the performance of a particular works contract may not be added to the value of the works contract when to do so would result in removing the procurement of those supplies or services from the scope of this Directive.

6. (a) Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 16, this Directive shall apply to the awarding of each lot.

However, the contracting entities may waive such application in respect of lots the estimated value of which, net of VAT, is less than EUR 80 000 for services or EUR 1 million for works, provided that the aggregate value of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

(b) Where a proposal for the acquisition of similar supplies may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots when applying Article 16.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 16, this Directive shall apply to the awarding of each lot.

However, the contracting entities may waive such application in respect of lots, the estimated value of which, net of VAT, is less than EUR 80 000, provided that the aggregate cost of those lots does not exceed 20 % of the aggregate value of the lots as a whole.

7. In the case of supply or service contracts which are regular in nature or which are intended to be renewed within a given period, the calculation of the estimated contract value shall be based on the following:

(a) either the total actual value of the successive contracts of the same type awarded during the preceding twelve months or financial year adjusted, if possible, to take account of the changes in quantity or value which would occur in the course of the 12 months following the initial contract;

(b) or the total estimated value of the successive contracts awarded during the 12 months following the first delivery, or during the financial year if that is longer than 12 months.

8. The basis for calculating the estimated value of a contract including both supplies and services shall be the total value of the supplies and services, regardless of their respective shares. The calculation shall include the value of the siting and installation operations.

9. With regard to supply contracts relating to the leasing, hire, rental or hire purchase of products, the value to be taken as a basis for calculating the estimated contract value shall be as follows:

(a) in the case of fixed-term contracts, if that term is less than or equal to 12 months, the total estimated value for the term of the contract or, if the term of the contract is greater than 12 months, the total value including the estimated residual value;

(b) in the case of contracts without a fixed term or the term of which cannot be defined, the monthly value multiplied by 48.

10. For the purposes of calculating the estimated contract value of service contracts, the following amounts shall, where appropriate, be taken into account:

(a) the premium payable, and other forms of remuneration, in the case of insurance services;

(b) fees, commissions, interest and other modes of remuneration, in the case of banking and other financial services;

(c) fees, commissions payable and other forms of remuneration, in the case of contracts involving design tasks.

11. In the case of service contracts which do not indicate a total price, the value to be used as the basis for calculating the estimated contract value shall be:

(a) in the case of fixed-term contracts, if that term is less than or equal to 48 months: the total value for their full term;

(b) in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.

Section 2

Contracts and concessions and contracts subject to special arrangements

SUBSECTION 1

Article 18

Works and service concessions

This Directive shall not apply to works and service concessions which are awarded by contracting entities carrying out one or more of the activities referred to in Articles 3 to 7, where those concessions are awarded for carrying out those activities.

SUBSECTION 2

Exclusions applicable to all contracting entities and to all types of contract

Article 19

Contracts awarded for purposes of resale or lease to third parties

1. This Directive shall not apply to contracts awarded for purposes of resale or lease to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or lease the subject of such contracts, and other entities are free to sell or lease it under the same conditions as the contracting entity.

2. The contracting entities shall notify the Commission at its request of all the categories of products or activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the *Official Journal of the European Union*, for information purposes, lists of the categories of products and activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding information.

Article 20

Contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country

1. This Directive shall not apply to contracts which the contracting entities award for purposes other than the pursuit of their activities as described in Articles 3 to 7 or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the Community.

2. The contracting entities shall notify the Commission at its request of any activities which they regard as excluded under paragraph 1. The Commission may periodically publish in the *Official Journal of the European Union* for information purposes, lists of the categories of activities which it considers to be covered by this exclusion. In so doing, the Commission shall respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

Article 21

Contracts which are secret or require special security measures

This Directive shall not apply to contracts when they are declared to be secret by a Member State, when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the basic security interests of that Member State so requires.

Article 22

Contracts awarded pursuant to international rules

This Directive shall not apply to contracts governed by different procedural rules and awarded:

(a) pursuant to an international agreement concluded in accordance with the Treaty between a Member State and one or more third countries and covering supplies, works, services or design contests intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 68;

(b) pursuant to a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country;

(c) pursuant to the particular procedure of an international organisation.

Article 23

Contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture

1. For the purposes of this Article, 'affiliated undertaking' means any undertaking the annual accounts of which are consolidated with those of the contracting entity in accordance with the requirements of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 44(2)(g) of the Treaty on consolidated accounts [1] [2], or, in the case of entities not subject to that Directive, any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence within the meaning of Article 2(1)(b) hereof or which may exercise a dominant influence over the contracting entity or which, in common with the contracting entity, is subject to the dominant influence of another undertaking by virtue of ownership, financial participation, or the rules which govern it.

2. Provided that the conditions in paragraph 3 are met, this Directive shall not apply to contracts awarded:

(a) by a contracting entity to an affiliated undertaking, or

(b) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 3 to 7, to an undertaking which is affiliated with one of these contracting entities.

3. Paragraph 2 shall apply:

(a) to service contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to services for the preceding three years derives from the provision of such services to undertakings with which it is affiliated;

(b) to supplies contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to supplies for the preceding three years derives from the provision of such supplies to undertakings with which it is affiliated;

(c) to works contracts provided that at least 80 % of the average turnover of the affiliated undertaking with respect to works for the preceding three years derives from the provision of such works to undertakings with which it is affiliated.

When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it will be sufficient for that undertaking to show that the turnover referred to in points (a), (b) or (c) is credible, particularly by means of business projections.

Where more than one undertaking affiliated with the contracting entity provides the same or similar services, supplies or works, the above percentages shall be calculated taking into account the total turnover deriving respectively from the provision of services, supplies or works by those affiliated undertakings.

4. This Directive shall not apply to contracts awarded:

(a) by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out activities within the meaning of Articles 3 to 7, to one of these contracting entities, or

(b) by a contracting entity to such a joint venture of which it forms part, provided that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that the contracting entities, which form it, will be part thereof for at least the same period.

5. Contracting entities shall notify to the Commission, at its request, the following information regarding the application of paragraphs 2, 3 and 4:

(a) the names of the undertakings or joint ventures concerned,

(b) the nature and value of the contracts involved,

(c) such proof as may be deemed necessary by the Commission that the relationship between the undertaking or joint venture to which the contracts are awarded and the contracting entity complies with the requirements of this Article.

[1] OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

[2] Editorial Note: The title of the Directive has been adjusted to take account of the renumbering of the Articles of the Treaty in accordance with Article 12 of the Treaty of Amsterdam; the original reference was to Article 54(3)(g) of the Treaty.

SUBSECTION 3

Exclusions applicable to all contracting entities, but to service contracts only

Article 24

Contracts relating to certain services excluded from the scope of this Directive

This Directive shall not apply to service contracts for:

(a) the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, shall be subject to this Directive;

(b) arbitration and conciliation services;

(c) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting entities to raise money or capital;

(d) employment contracts;

(e) research and development services other than those where the benefits accrue exclusively to the contracting entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting entity.

Article 25

Service contracts awarded on the basis of an exclusive right

This Directive shall not apply to service contracts awarded to an entity which is itself a contracting authority within the meaning of Article 2(1)(a) or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

SUBSECTION 4

Exclusions applicable to certain contracting entities only

Article 26

Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy

This Directive shall not apply:

(a) to contracts for the purchase of water if awarded by contracting entities engaged in one or both of the activities referred to in Article 4(1).

(b) to contracts for the supply of energy or of fuels for the production of energy, if awarded by contracting entities engaged in an activity referred to in Article 3(1), Article 3(3) or Article 7(a).

SUBSECTION 5

Contracts subject to special arrangements, provisions concerning central purchasing bodies and the general procedure in case of direct exposure to competition

Article 27

Contracts subject to special arrangements

Without prejudice to Article 30 the Kingdom of the Netherlands, the United Kingdom, the Republic of Austria and the Federal Republic of Germany shall ensure, by way of the conditions of authorisation or other appropriate measures, that any entity operating in the sectors mentioned in Decisions 93/676/EEC, 97/367/EEC, 2002/205/EC and 2004/73/EC:

(a) observes the principles of non-discrimination and competitive procurement in respect of the award of supplies, works and service contracts, in particular as regards the information which the entity makes available to economic operators concerning its procurement intentions;

(b) communicates to the Commission, under the conditions defined in Commission Decision 93/327/EEC defining the conditions under which contracting entities exploiting geographical areas for the purpose of exploring for or extracting oil, gas, coal or other solid fuels must communicate to the Commission information relating to the contracts they award ([1]).

Article 28

Reserved contracts

Member States may reserve the right to participate in contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

The notice used to make the call for competition shall make reference to this Article.

([1]) OJ L 129, 27.5.1993, p. 25.

Article 29

Contracts and framework agreements awarded by central purchasing bodies

1. Member States may prescribe that contracting entities may purchase works, supplies and/or services from or through a central purchasing body.

2. Contracting entities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(8) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it or, where appropriate, with Directive 2004/18/EC.

Article 30

Procedure for establishing whether a given activity is directly exposed to competition

1. Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this Directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

2. For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on the basis of criteria that are in conformity with the Treaty provisions on competition, such as the characteristics of the goods or services concerned, the existence of alternative goods or services, the prices and the actual or potential presence of more than one supplier of the goods or services in question.

3. For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the provisions of Community legislation mentioned in Annex XI.

If free access to a given market cannot be presumed on the basis of the first subparagraph, it must be demonstrated that access to the market in question is free de facto and de jure.

4. When a Member State considers that, in compliance with paragraphs 2 and 3, paragraph 1 is applicable to a given activity, it shall notify the Commission and inform it of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in paragraph 1, where appropriate together with the position adopted by an independent national authority that is competent in relation to the activity concerned.

Contracts intended to enable the activity concerned to be carried out shall no longer be subject to this Directive if the Commission:

— has adopted a Decision establishing the applicability of paragraph 1 in accordance with paragraph 6 and within the period it provides for, or

— has not adopted a Decision concerning such applicability within that period.

However, where free access to a given market is presumed on the basis of the first subparagraph of paragraph 3, and where an independent national authority that is competent in the activity concerned has established the applicability of paragraph 1, contracts intended to enable the activity concerned to be carried out shall no longer be subject to this Directive if the Commission has not established the inapplicability of paragraph 1 by a Decision adopted in conformity with paragraph 6 and within the period it provides for.

5. When the legislation of the Member State concerned provides for it, the contracting entities may ask the Commission to establish the applicability of paragraph 1 to a given activity by a Decision in conformity with paragraph 6. In such a case, the Commission shall immediately inform the Member State concerned.

That Member State shall, taking account of paragraphs 2 and 3, inform the Commission of all relevant facts, and in particular of any law, regulation, administrative provision or agreement concerning compliance with the conditions set out in paragraph 1, where appropriate together with the position adopted by an independent national authority that is competent in the activity concerned.

The Commission may also begin the procedure for adoption of a Decision establishing the applicability of paragraph 1 to a given activity on its own initiative. In such a case, the Commission shall immediately inform the Member State concerned.

If, at the end of the period laid down in paragraph 6, the Commission has not adopted a Decision concerning the applicability of paragraph 1 to a given activity, paragraph 1 shall be deemed to be applicable.

6. For the adoption of a Decision under this Article, in accordance with the procedure under Article 68(2), the Commission shall be allowed a period of three months commencing on the first working day following the date on which it receives the notification or the request. However, this period may be extended once by a maximum of three months in duly justified cases, in particular if the information contained in the notification or the request or in the documents annexed thereto is incomplete or inexact or if the facts as reported undergo any substantive changes. This extension shall be limited to one month where an independent national authority that is competent in the activity concerned has established the applicability of paragraph 1 in the cases provided for under the third subparagraph of paragraph 4.

When an activity in a given Member State is already the subject of a procedure under this Article, further requests concerning the same activity in the same Member State before the expiry of the period opened in respect of the first request shall not be considered as new procedures and shall be treated in the context of the first request.

The Commission shall adopt detailed rules for applying paragraphs 4, 5 and 6 in accordance with the procedure under Article 68(2).

These rules shall include at least:

(a) the publication in the Official Journal, for information, of the date on which the three-month period referred to in the first subparagraph begins, and, in case this period is prolonged, the date of prolongation and the period by which it is prolonged;

(b) publication of the possible applicability of paragraph 1 in accordance with the second or third subparagraph of paragraph 4 or in accordance with the fourth subparagraph of paragraph 5; and

(c) the arrangements for forwarding positions adopted by an independent authority that is competent in the activity concerned, regarding questions relevant to paragraphs 1 and 2.

CHAPTER III

Rules applicable to service contracts

Article 31

Service contracts listed in Annex XVII A

Contracts which have as their object services listed in Annex XVII A shall be awarded in accordance with Articles 34 to 59.

Article 32

Service contracts listed in Annex XVII B

Contracts which have as their object services listed in Annex XVII B shall be governed solely by Articles 34 and 43.

Article 33

Mixed service contracts including services listed in Annexes XVII A and services listed in Annex XVII B

Contracts which have as their subject-matter services listed both in Annex XVII A and in Annex XVII B shall be awarded in accordance with Articles 34 to 59 where the value of the services listed in Annex XVII A is greater than the value of the services listed in Annex XVII B. In other cases, contracts shall be awarded in accordance with Articles 34 and 43.

CHAPTER IV

Specific rules governing specifications and contract documents

Article 34

Technical specifications

1. Technical specifications as defined in point 1 of Annex XXI shall be set out in the contract documentation, such as contract notices, contract documents or additional documents. Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users.

2. Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. Without prejudice to legally binding national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

(a) either by reference to technical specifications defined in Annex XXI and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when these do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words 'or equivalent';

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting entities to award the contract;

(c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

(d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

4. Where a contracting entity makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the ground that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting entity, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

5. Where a contracting entity uses the option provided for in paragraph 3 of laying down performance or functional requirements, it may not reject a tender for products, services or works which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard, or a technical reference system established by a European standardisation body, if these specifications address the performance or functional requirements which it has laid down.

In his tender, the tenderer shall prove to the satisfaction of the contracting entity and by any appropriate means that the product, service or work in compliance with the standard meets the performance or functional requirements of the contracting entity.

An appropriate means might be constituted by a technical dossier from the manufacturer or a test report from a recognised body.

6. Where contracting entities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, provided that:

— those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,

— the requirements for the label are drawn up on the basis of scientific information,

— the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations can participate, and

— they are accessible to all interested parties.

Contracting entities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier from the manufacturer or a test report from a recognised body.

7. 'Recognised bodies', within the meaning of this Article, are test and calibration laboratories, and certification and inspection bodies which comply with applicable European standards.

Contracting entities shall accept certificates from recognised bodies established in other Member States.

8. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraphs 3 and 4 is not possible; such reference shall be accompanied by the words 'or equivalent'.

Article 35

Communication of technical specifications

1. Contracting entities shall make available on request to economic operators interested in obtaining a contract the technical specifications regularly referred to in their supply, works or service contracts, or the technical specifications which they intend to apply to contracts covered by periodic indicative notices within the meaning of Article 41(1).

2. Where the technical specifications are based on documents available to interested economic operators, the inclusion of a reference to those documents shall be sufficient.

Article 36

Variants

1. Where the criterion for the award of the contract is that of the most economically advantageous tender, contracting entities may take account of variants which are submitted by a tenderer and meet the minimum requirements specified by the contracting entities.

Contracting entities shall indicate in the specifications whether or not they authorise variants and, if so, the minimum requirements to be met by the variants and any specific requirements for their presentation.

2. In procedures for awarding supply or service contracts, contracting entities which have authorised variants pursuant to paragraph 1 may not reject a variant on the sole ground that it would, if successful, lead either to a service contract rather than a supply contract or to a supply contract rather than a service contract.

Article 37

Subcontracting

In the contract documents, the contracting entity may ask, or may be required by a Member State to ask, the tenderer to indicate in his tender any share of the contract he intends to subcontract to third parties and any proposed subcontractors. This indication shall be without prejudice to the question of the principal economic operator's liability.

Article 38

Conditions for performance of contracts

Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

Article 39

Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

1. A contracting entity may state in the contract documents, or be required by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to protection provisions and to the working conditions which are in force in the Member State, region or locality in which the services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

2. A contracting entity which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the service is to be provided.

The first subparagraph shall be without prejudice to the application of Article 57.

CHAPTER V

Procedures

Article 40

Use of open, restricted and negotiated procedures

1. When awarding supply, works or service contracts, contracting entities shall apply the procedures adjusted for the purposes of this Directive.

2. Contracting entities may choose any of the procedures described in Article 1(9)(a), (b) or (c), provided that, subject to paragraph 3, a call for competition has been made in accordance with Article 42.

3. Contracting entities may use a procedure without prior call for competition in the following cases:

(a) when no tenders or no suitable tenders or no applications have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of contract are not substantially altered;

(b) where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;

(c) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular economic operator;

(d) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for open procedures, restricted procedures and negotiated procedures with a prior call for competition cannot be adhered to;

(e) in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;

(f) for additional works or services which were not included in the project initially awarded or in the contract first concluded but have, through unforeseen circumstances, become necessary to the performance of the contract, on condition that the award is made to the contractor or service provider executing the original contract:

— when such additional works or services cannot be technically or economically separated from the main contract without great inconvenience to the contracting entities, or

— when such additional works or services, although separable from the performance of the original contract, are strictly necessary to its later stages;

(g) in the case of works contracts, for new works consisting in the repetition of similar works assigned to the contractor to which the same contracting entities awarded an earlier contract, provided that such works conform to a basic project for which a first contract was awarded after a call for competition; as soon as the first project is put up for tender, notice shall be given that this procedure might be adopted and the total estimated cost of subsequent works shall be taken into consideration by the contracting entities when they apply the provisions of Articles 16 and 17;

(h) for supplies quoted and purchased on a commodity market;

(i) for contracts to be awarded on the basis of a framework agreement, provided that the condition referred to in Article 14(2) is fulfilled;

(j) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;

(k) for purchases of supplies under particularly advantageous conditions from either a supplier definitively winding up his business activities or the receivers or liquidators of a bankruptcy, an arrangement with creditors or a similar procedure under national laws or regulations;

(l) when the service contract concerned is part of the follow-up to a design contest organised in accordance with the provisions of this Directive and shall, in accordance with the relevant rules, be awarded to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.

CHAPTER VI

Rules on publication and transparency

Section 1

Publication of notices

Article 41

Periodic indicative notices and notices on the existence of a system of qualification

1. Contracting entities shall make known, at least once a year, by means of a periodic indicative notice as referred to in Annex XV A, published by the Commission or by themselves on their 'buyer profile', as described in point 2(b) of Annex XX:

(a) where supplies are concerned, the estimated total value of the contracts or the framework agreements by product area which they intend to award over the following 12 months, where the total estimated value, taking into account the provisions of Articles 16 and 17, is equal to or greater than EUR 750 000.

The product area shall be established by the contracting entities by reference to the CPV nomenclature:

(b) where services are concerned, the estimated total value of the contracts or the framework agreements in each of the categories of services listed in Annex XVII A which they intend to award over the following 12 months, where such estimated total value, taking into account the provisions of Articles 16 and 17, is equal to or greater than EUR 750 000;

(c) where works are concerned, the essential characteristics of the works contracts or the framework agreements which they intend to award over the following 12 months, whose estimated value is equal to or greater than the threshold specified in Article 16, taking into account the provisions of Article 17.

The notices referred to in subparagraphs (a) and (b) shall be sent to the Commission or published on the buyer profile as soon as possible after the beginning of the budgetary year.

The notice referred to in subparagraph (c) shall be sent to the Commission or published on the buyer profile as soon as possible after the decision approving the planning of the works contracts or the framework agreements that the contracting entities intend to award.

Contracting entities which publish a periodic indicative notice on their buyer profiles shall transmit to the Commission, electronically, a notice of the publication of the periodic indicative notice on a buyer profile, in accordance with the format and procedures for the electronic transmission of notices indicated in point 3 of Annex XX.

The publication of the notices referred to in subparagraphs (a), (b) and (c) shall be compulsory only where the contracting entities take the option of reducing the time limits for the receipt of tenders as laid down in Article 45(4).

This paragraph shall not apply to procedures without prior call for competition.

2. Contracting entities may, in particular, publish or arrange for the Commission to publish periodic indicative notices relating to major projects without repeating information previously included in a periodic indicative notice, provided that it is clearly pointed out that these notices are additional ones.

3. Where contracting entities choose to set up a qualification system in accordance with Article 53, the system shall be the subject of a notice as referred to in Annex XIV, indicating the purpose of the qualification system and how to have access to the rules concerning its operation. Where the system is of a duration greater than three years, the notice shall be published annually. Where the system is of a shorter duration, an initial notice shall suffice.

Article 42

Notices used as a means of calling for competition

1. In the case of supply, works or service contracts, the call for competition may be made:

(a) by means of a periodic indicative notice as referred to in Annex XV A; or

(b) by means of a notice on the existence of a qualification system as referred to in Annex XIV; or

(c) by means of a contract notice as referred to in Annex XIII A, B or C.

2. In the case of dynamic purchasing systems, the system's call for competition shall be by contract notice as referred to in paragraph 1(c), whereas calls for competition for contracts based on such systems shall be by simplified contract notice as referred to in Annex XIII D.

3. When a call for competition is made by means of a periodic indicative notice, the notice shall:

(a) refer specifically to the supplies, works or services which will be the subject of the contract to be awarded;

(b) indicate that the contract will be awarded by restricted or negotiated procedure without further publication of a notice of a call for competition and invite interested economic operators to express their interest in writing; and

(c) have been published in accordance with Annex XX not more than 12 months prior to the date on which the invitation referred to in Article 47(5) is sent. Moreover, the contracting entity shall meet the time limits laid down in Article 45.

Article 43

Contract award notices

1. Contracting entities which have awarded a contract or a framework agreement shall, within two months of the award of the contract or framework agreement, send a contract award notice as referred to in Annex XVI under conditions to be laid down by the Commission in accordance with the procedure referred to in Article 68(2).

In the case of contracts awarded under a framework agreement within the meaning of Article 14(2), the contracting entities shall not be bound to send a notice of the results of the award procedure for each contract based on that agreement.

Contracting entities shall send a contract award notice based on a dynamic purchasing system within two months after the award of each contract. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within two months of the end of each quarter.

2. The information provided in accordance with Annex XVI and intended for publication shall be published in accordance with Annex XX. In this connection, the Commission shall respect any sensitive commercial aspects which the contracting entities may point out when forwarding this information, concerning the number of tenders received, the identity of economic operators, or prices.

3. Where contracting entities award a research-and-development service contract ('R&D contract') by way of a procedure without a call for competition in accordance with Article 40(3)(b), they may limit to the reference 'research and development services' the information to be provided in accordance with Annex XVI concerning the nature and quantity of the services provided.

Where contracting entities award an R&D contract which cannot be awarded by way of a procedure without a call for competition in accordance with Article 40(3)(b), they may, on grounds of commercial confidentiality, limit the information to be provided in accordance with Annex XVI concerning the nature and quantity of the services supplied.

In such cases, contracting entities shall ensure that any information published under this paragraph is no less detailed than that contained in the notice of the call for competition published in accordance with Article 42(1).

If they use a qualification system, contracting entities shall ensure in such cases that such information is no less detailed than the category referred to in the list of qualified service providers drawn up in accordance with Article 53(7).

4. In the case of contracts awarded for services listed in Annex XVII B, the contracting entities shall indicate in the notice whether they agree to publication.

5. Information provided in accordance with Annex XVI and marked as not being intended for publication shall be published only in simplified form and in accordance with Annex XX for statistical purposes.

Article 44

Form and manner of publication of notices

1. Notices shall include the information mentioned in Annexes XIII, XIV, XV A, XV B and XVI and, where appropriate, any other information deemed useful by the contracting entity in the format of standard forms adopted by the Commission in accordance with the procedure referred to in Article 68(2).

2. Notices sent by contracting entities to the Commission shall be sent either by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX, or by other means.

The notices referred to in Articles 41, 42 and 43 shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex XX.

3. Notices drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX, shall be published no later than five days after they are sent.

Notices which are not transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX shall be published not later than 12 days after they are transmitted. However, in exceptional cases, the contract notices referred to in Article 42(1)(c) shall be published within five days in response to a request by the contracting entity, provided that the notice has been sent by fax.

4. Contract notices shall be published in full in an official language of the Community as chosen by the contracting entity, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages.

The costs of publication of notices by the Commission shall be borne by the Community.

5. Notices and their contents may not be published at national level before the date on which they are sent to the Commission.

Notices published at national level shall not contain information other than that contained in the notices dispatched to the Commission or published on a buyer profile in accordance with the first subparagraph of Article 41(1), but shall mention the date of dispatch of the notice to the Commission or its publication on the buyer profile.

Periodic indicative notices may not be published on a buyer profile before the dispatch to the Commission of the notice of their publication in that form; they shall mention the date of that dispatch.

6. Contracting entities shall ensure that they are able to supply proof of the dates on which notices are dispatched.

7. The Commission shall give the contracting entity confirmation of the publication of the information sent, mentioning the date of that publication. Such confirmation shall constitute proof of publication.

8. Contracting entities may publish in accordance with paragraphs 1 to 7 contract notices which are not subject to the publication requirements laid down in this Directive.

Section 2

Time limits

Article 45

Time limits for the receipt of requests to participate and for the receipt of tenders

1. When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set by this Article.

2. In the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent.

3. In restricted procedures and in negotiated procedures with a prior call for competition, the following arrangements shall apply:

(a) the time limit for the receipt of requests to participate, in response to a notice published under Article 42(1)(c), or in response to an invitation by the contracting entities under Article 47(5), shall, as a general rule, be fixed at no less than 37 days from the date on which the notice or invitation was sent and may in no case be less than 22 days if the notice is sent for publication by means other than electronic means or fax, and at no less than 15 days if the notice is transmitted by such means;

(b) the time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders;

(c) where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting entity shall fix a time limit which shall, as a general rule, be at least 24 days and shall in no case be less than 10 days from the date of the invitation to tender.

4. If the contracting entities have published a periodic indicative notice as referred to in Article 41(1) in accordance with Annex XX, the minimum time limit for the receipt of tenders in open procedures shall, as a general rule, not be less than 36 days, but shall in no case be less than 22 days from the date on which the notice was sent.

These reduced time limits are permitted, provided that the periodic indicative notice has included, in addition to the information required by Annex XV A, part I, all the information required by Annex XV A, part II, insofar as the latter information is available at the time the notice is published, and that the notice has been sent for publication between 52 days and 12 months before the date on which the contract notice referred to in Article 42(1)(c) is sent.

5. Where notices are drawn up and transmitted by electronic means in accordance with the format and procedures for transmission indicated in point 3 of Annex XX the time-limits for the receipt of requests to participate in restricted and negotiated procedures, and for receipt of tenders in open procedures, may be reduced by seven days.

6. Except in the case of a time limit set by mutual agreement in accordance with paragraph 3(b), time limits for the receipt of tenders in open, restricted and negotiated procedures may be further reduced by five days where the contracting entity offers unrestricted and full direct access to the contract documents and any supplementary documents by electronic means from the date on which the notice used as a means of calling for competition is published, in accordance with Annex XX. The notice should specify the internet address at which this documentation is accessible.

7. In open procedures, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for the receipt of tenders of less than 15 days from the date on which the contract notice is sent.

However, if the contract notice is not transmitted by fax or electronic means, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for receipt of tenders in an open procedure of less than 22 days from the date on which the contract notice is transmitted.

8. The cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case result in a time limit for receipt of requests to participate, in response to a notice published under Article 42(1)(c), or in response to an invitation by the contracting entities under Article 47(5), of less than 15 days from the date on which the contract notice or invitation is sent.

In restricted and negotiated procedures, the cumulative effect of the reductions provided for in paragraphs 4, 5 and 6 may in no case, except that of a time limit set by mutual agreement in accordance with paragraph 3(b), result in a time limit for the receipt of tenders of less than 10 days from the date of the invitation to tender.

9. If, for whatever reason, the contract documents and the supporting documents or additional information, although requested in good time, have not been supplied within the time limits set in Articles 46 and 47, or where tenders can be made only after a visit to the site or after on-the-spot inspection of the documents supporting the contract documents, the time limits for the receipt of tenders shall be extended accordingly, except in the case of a time-limit set by mutual agreement in accordance with paragraph 3(b), so that all economic operators concerned may be aware of all the information needed for the preparation of a tender.

10. A summary table of the time limits laid down in this Article is given in Annex XXII.

Article 46

Open procedures: specifications, additional documents and information

1. In open procedures, where contracting entities do not offer unrestricted and full direct access by electronic means in accordance with Article 45(6) to the specifications and any supporting documents, the specifications and supporting documents shall be sent to economic operators within six days of receipt of the request, provided that the request was made in good time before the time limit for the submission of tenders.

2. Provided that it has been requested in good time, additional information relating to the specifications shall be supplied by the contracting entities or competent departments not later than six days before the time limit fixed for the receipt of tenders.

Article 47

Invitations to submit a tender or to negotiate

1. In restricted procedures and negotiated procedures, contracting entities shall simultaneously and in writing invite the selected candidates to submit their tenders or to negotiate. The invitation to the candidates shall include either:

— a copy of the specifications and any supporting documents, or

— a reference to accessing the specifications and the supporting documents indicated in the first indent, when they are made directly available by electronic means in accordance with Article 45(6).

2. Where the specifications and/or any supporting documents are held by an entity other than the contracting entity responsible for the award procedure, the invitation shall state the address from which those specifications and documents may be requested and, if appropriate, the closing date for requesting such documents, the sum payable for obtaining them and any payment procedures. The competent department shall send that documentation to the economic operator immediately upon receipt of the request.

3. The additional information on the specifications or the supporting documents shall be sent by the contracting entity or the competent department not less than six days before the final date fixed for the receipt of tenders, provided that it is requested in good time.

4. In addition, the invitation shall include at least the following:

(a) where appropriate, the time limit for requesting additional documents, as well as the amount and terms of payment of any sum to be paid for such documents;

(b) the final date for receipt of tenders, the address to which they are to be sent, and the language or languages in which they are to be drawn up;

(c) a reference to any published contract notice;

(d) an indication of any documents to be attached;

(e) the criteria for the award of the contract, where they are not indicated in the notice on the existence of a qualification system used as a means of calling for competition;

(f) the relative weighting of the contract award criteria or, where appropriate, the order of importance of such criteria, if this information is not given in the contract notice, the notice on the existence of a qualification system or the specifications.

5. When a call for competition is made by means of a periodic indicative notice, contracting entities shall subsequently invite all candidates to confirm their interest on the basis of detailed information on the contract concerned before beginning the selection of tenderers or participants in negotiations.

This invitation shall include at least the following information:

(a) nature and quantity, including all options concerning complementary contracts and, if possible, the estimated time available for exercising these options for renewable contracts, the nature and quantity and, if possible, the estimated publication dates of future notices of competition for works, supplies or services to be put out to tender;

(b) type of procedure: restricted or negotiated;

(c) where appropriate, the date on which the delivery of supplies or the execution of works or services is to commence or terminate;

(d) the address and closing date for the submission of requests for tender documents and the language or languages in which they are to be drawn up;

(e) the address of the entity which is to award the contract and the information necessary for obtaining the specifications and other documents;

(f) economic and technical conditions, financial guarantees and information required from economic operators;

(g) the amount and payment procedures for any sum payable for obtaining tender documents;

(h) the form of the contract which is the subject of the invitation to tender: purchase, lease, hire or hire-purchase, or any combination of these; and

(i) the contract award criteria and their weighting or, where appropriate, the order of importance of such criteria, if this information is not given in the indicative notice or the specifications or in the invitation to tender or to negotiate.

Section 3

Communication and information

Article 48

Rules applicable to communication

1. All communication and information exchange referred to in this Title may be carried out by post, by fax, by electronic means in accordance with paragraphs 4 and 5, by telephone in the cases and circumstances referred to in paragraph 6, or by a combination of those means, according to the choice of the contracting entity.

2. The means of communication chosen shall be generally available and thus not restrict economic operators' access to the tendering procedure.

3. Communication and the exchange and storage of information shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting entities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

4. The tools to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

5. The following rules are applicable to devices for the electronic transmission and receipt of tenders and to devices for the electronic receipt of requests to participate:

(a) information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, shall be available to interested parties. Moreover, the devices for the electronic receipt of tenders and requests to participate shall conform to the requirements of Annex XXIV;

(b) Member States may, in compliance with Article 5 of Directive 1999/93/EC, require that electronic tenders be accompanied by an advanced electronic signature in conformity with paragraph 1 thereof;

(c) Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for these devices;

(d) tenderers or candidates shall undertake to submit, before expiry of the time limit laid down for the submission of tenders or requests to participate, the documents, certificates and declarations mentioned in Articles 52(2), 52(3), 53 and 54 if they do not exist in electronic format.

6. The following rules shall apply to the transmission of requests to participate:

(a) requests to participate in procedures for the award of contracts may be made in writing or by telephone;

(b) where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt;

(c) contracting entities may require that requests for participation made by fax should be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit for sending confirmation by post or electronic means, should be stated by the contracting entity in the notice used as a means of calling for competition or in the invitation referred to in Article 47(5).

Article 49

Information to applicants for qualification, candidates and tenderers

1. Contracting entities shall as soon as possible inform the economic operators involved of decisions reached concerning the conclusion of a framework agreement, the award of the contract, or admission to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure, or not to implement a dynamic purchasing system; this information shall be provided in writing if the contracting entities are requested to do so.

2. On request from the party concerned, contracting entities shall, as soon as possible, inform:

— any unsuccessful candidate of the reasons for the rejection of his application,

— any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 34(4) and (5), the reasons for their decision of non-equivalence or their decision that the works, supplies or services do not meet the performance or functional requirements,

— any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement.

The time taken to do so may under no circumstances exceed 15 days from receipt of the written enquiry.

However, contracting entities may decide that certain information on the contract award or the conclusion of the framework agreement or on admission to a dynamic purchasing system, referred to in the paragraph 1, is to be withheld where release of such information would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, including the interests of the economic operator to whom the contract has been awarded, or might prejudice fair competition between economic operators.

3. Contracting entities which establish and operate a system of qualification shall inform applicants of their decision as to qualification within a period of six months.

If the decision will take longer than four months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

4. Applicants whose qualification is refused shall be informed of this decision and the reasons for refusal as soon as possible and under no circumstances more than 15 days later than the date of the decision. The reasons shall be based on the criteria for qualification referred to in Article 53(2).

5. Contracting entities which establish and operate a system of qualification may bring the qualification of an economic operator to an end only for reasons based on the criteria for qualification referred to in Article 53(2). Any intention to bring qualification to an end shall be notified in writing to the economic operator beforehand, at least 15 days before the date on which qualification is due to end, together with the reason or reasons justifying the proposed action.

Article 50

Information to be stored concerning awards

1. Contracting entities shall keep appropriate information on each contract which shall be sufficient to permit them at a later date to justify decisions taken in connection with:

(a) the qualification and selection of economic operators and the award of contracts;

(b) the use of procedures without a prior call for competition by virtue of Article 40(3);

(c) the non-application of Chapters III to VI of this Title by virtue of the derogations provided for in Chapter II of Title I and in Chapter II of this Title.

Contracting entities shall take appropriate steps to document the progress of award procedures conducted by electronic means.

2. The information shall be kept for at least four years from the date of award of the contract so that the contracting entity will be able, during that period, to provide the necessary information to the Commission if the latter so requests.

CHAPTER VII

Conduct of the procedure

Article 51

General provisions

1. For the purpose of selecting participants in their award procedures:

(a) contracting entities having provided rules and criteria for the exclusion of tenderers or candidates in accordance with Article 54(1), (2) or (4) shall exclude economic operators which comply with such rules and meet such criteria;

(b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Article 54;

(c) in restricted procedures and in negotiated procedures with a call for competition, they shall where appropriate reduce in accordance with Article 54 the number of candidates selected pursuant to subparagraphs (a) and (b).

2. When a call for competition is made by means of a notice on the existence of a qualification system and for the purpose of selecting participants in award procedures for the specific contracts which are the subject of the call for competition, contracting entities shall:

(a) qualify economic operators in accordance with the provisions of Article 53;

(b) apply to such qualified economic operators those provisions of paragraph 1 that are relevant to restricted or negotiated procedures.

3. Contracting entities shall verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders and award the contract on the basis of the criteria laid down in Articles 55 and 57.

Section 1

Qualification and qualitative selection

Article 52

Mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence

1. When selecting participants for a restricted or negotiated procedure, in reaching their decision as to qualification or when the criteria and rules are being updated, contracting entities shall not:

(a) impose administrative, technical or financial conditions on certain economic operators which would not be imposed on others;

(b) require tests or evidence which would duplicate objective evidence already available.

2. Where they request the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, contracting entities shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification.

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from economic operators.

3. For works and service contracts, and only in appropriate cases, the contracting entities may require, in order to verify the economic operator's technical abilities, an indication of the environmental management measures which the economic operator will be able to apply when carrying out the contract. In such cases, should the contracting entities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the EMAS or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification.

Contracting entities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators.

Article 53

Qualification systems

1. Contracting entities which so wish may establish and operate a system of qualification of economic operators.

Contracting entities which establish or operate a system of qualification shall ensure that economic operators are at all times able to request qualification.

2. The system under paragraph 1 may involve different qualification stages.

It shall be operated on the basis of objective criteria and rules for qualification to be established by the contracting entity.

Where those criteria and rules include technical specifications, the provisions of Article 34 shall apply. The criteria and rules may be updated as required.

3. The criteria and rules for qualification referred to in paragraph 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), those criteria and rules shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

4. Where the criteria and rules for qualification referred to in paragraph 2 include requirements relating to the economic and financial capacity of the economic operator, the latter may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that these resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to that effect.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the capacity of participants in the group or of other entities.

5. Where the criteria and rules for qualification referred to in paragraph 2 include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators referred to in Article 11 may rely on the abilities of participants in the group or of other entities.

6. The criteria and rules for qualification referred to in paragraph 2 shall be made available to economic operators on request. The updating of these criteria and rules shall be communicated to interested economic operators.

Where a contracting entity considers that the qualification system of certain other entities or bodies meets its requirements, it shall communicate to interested economic operators the names of such other entities or bodies.

7. A written record of qualified economic operators shall be kept; it may be divided into categories according to the type of contract for which the qualification is valid.

8. When establishing or operating a qualification system, contracting entities shall in particular observe the provisions of Article 41(3) concerning notices on the existence of a system of qualification, of Article 49(3), (4) and (5) concerning the information to be delivered to economic operators having applied for qualification, of Article 51(2) concerning the selection of participants when a call for competition is made by means of a notice on the existence of a qualification system as well as the provisions of Article 52 on mutual recognition concerning administrative, technical or financial conditions, certificates, tests and evidence.

9. When a call for competition is made by means of a notice on the existence of a qualification system, tenderers in a restricted procedure or participants in a negotiated procedure shall be selected from the qualified candidates in accordance with such a system.

Article 54

Criteria for qualitative selection

1. Contracting entities which establish selection criteria in an open procedure shall do so in accordance with objective rules and criteria which are available to interested economic operators.

2. Contracting entities which select candidates for restricted or negotiated procedures shall do so according to objective rules and criteria which they have established and which are available to interested economic operators.

3. In restricted or negotiated procedures, the criteria may be based on the objective need of the contracting entity to reduce the number of candidates to a level which is justified by the need to balance the particular characteristics of the procurement procedure with the resources required to conduct it. The number of candidates selected shall, however, take account of the need to ensure adequate competition.

4. The criteria set out in paragraphs 1 and 2 may include the exclusion criteria listed in Article 45 of Directive 2004/18/EC on the terms and conditions set out therein.

Where the contracting entity is a contracting authority within the meaning of Article 2(1)(a), the criteria and rules referred to in paragraphs 1 and 2 of this Article shall include the exclusion criteria listed in Article 45(1) of Directive 2004/18/EC.

5. Where the criteria referred to in paragraphs 1 and 2 include requirements relating to the economic and financial capacity of the economic operator, the latter may where necessary and for a particular contract rely on the capacity of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that the necessary resources will be available to it, for example by delivering an undertaking by those entities to that effect.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the capacities of participants in the group or of other entities.

6. Where the criteria referred to in paragraphs 1 and 2 include requirements relating to the technical and/or professional abilities of the economic operator, the latter may where necessary and for a particular contract rely on the abilities of other entities, whatever the legal nature of the link between itself and those entities. In this case the economic operator must prove to the contracting entity that for the performance of the contract those resources will be available to it, for example by delivering an undertaking by those entities to make the necessary resources available to the economic operator.

Under the same conditions, a group of economic operators as referred to in Article 11 may rely on the abilities of participants in the group or of other entities.

Section 2

Award of the contract

Article 55

Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which the contracting entities shall base the award of contracts shall:

(a) where the contract is awarded on the basis of the most economically advantageous tender from the point of view of the contracting entity, be various criteria linked to the subject-matter of the contract in question, such as delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, environmental characteristics, technical merit, after-sales service and technical assistance, commitments with regard to parts, security of supply, and price or otherwise

(b) the lowest price only.

2. Without prejudice to the provisions of the third subparagraph, in the case referred to in paragraph 1(a), the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting entity, weighting is not possible for demonstrable reasons, the contracting entity shall indicate the criteria in descending order of importance.

The relative weighting or order of importance shall be specified, as appropriate, in the notice used as a means of calling for competition, in the invitation to confirm the interest referred to in Article 47(5), in the invitation to tender or to negotiate, or in the specifications.

Article 56

Use of electronic auctions

1. Member States may provide that contracting entities may use electronic auctions.

2. In open, restricted or negotiated procedures with a prior call for competition, the contracting entities may decide that the award of a contract shall be preceded by an electronic auction when the contract specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 15.

The electronic auction shall be based:

(a) either solely on prices when the contract is awarded to the lowest price,

(b) or on prices and/or on the new values of the features of the tenders indicated in the specification, when the contract is awarded to the most economically advantageous tender.

3. Contracting entities which decide to hold an electronic auction shall state that fact in the notice used as a means of calling for competition.

The specifications shall include, *inter alia*, the following details:

(a) the features whose values will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

4. Before proceeding with the electronic auction, contracting entities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them.

All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all relevant information concerning individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

5. When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tender carried out in accordance with the weighting provided for in the first subparagraph of Article 55(2).

The invitation shall also state the mathematical formula to be used in the electronic auction to determine automatic rerankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in the specifications; for that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

6. Throughout each phase of an electronic auction the contracting entities shall instantaneously communicate to all tenderers sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

7. Contracting entities shall close an electronic auction in one or more of the following manners:

(a) in the invitation to take part in the auction they shall indicate the date and time fixed in advance;

(b) when they receive no more new prices or new values which meet the requirements concerning minimum differences. In that event, the contracting entities shall state in the invitation to take part in the auction the time which they will allow to elapse after receiving the last submission before they close the electronic auction;

(c) when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

When the contracting entities have decided to close an electronic auction in accordance with subparagraph (c), possibly in combination with the arrangements laid down in subparagraph (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

8. After closing an electronic auction the contracting entities shall award the contract in accordance with Article 55 on the basis of the results of the electronic auction.

9. Contracting entities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as defined in the notice used as a means of calling for competition and in the specification.

Article 57

Abnormally low tenders

1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting entity shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

Those details may relate in particular to:

(a) the economics of the manufacturing process, of the services provided and of the construction method;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work;

(c) the originality of the supplies, services or work proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid.

2. The contracting entity shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

3. Where a contracting entity establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting entity, that the aid in question was granted legally. Where the contracting entity rejects a tender in these circumstances, it shall inform the Commission of that fact.

Section 3

Tenders comprising products originating in third countries and relations with those countries

Article 58

Tenders comprising products originating in third countries

1. This Article shall apply to tenders covering products originating in third countries with which the Community has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Community or its Member States in respect of third countries.

2. Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1], exceeds 50 % of the total value of the products constituting the tender. For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.

3. Subject to the second subparagraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 55, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %.

However, a tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.

4. For the purposes of this Article, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.

5. The Commission shall submit an annual report to the Council, commencing in the second half of the first year following the entry into force of this Directive, on progress made in multilateral or bilateral negotiations regarding access for Community undertakings to the markets of third countries in the fields covered by this Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

The Council, acting by a qualified majority on a proposal from the Commission, may amend the provisions of this Article in the light of such developments.

Article 59

Relations with third countries as regards works, supplies and service contracts

1. Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of service contracts in third countries.

2. The Commission shall report to the Council before 31 December 2005, and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with these countries on this subject, particularly within the framework of the WTO.

3. The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service contracts, a third country:

(a) does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that country; or

(b) does not grant Community undertakings national treatment or the same competitive opportunities as are available to national undertakings; or

(c) grants undertakings from other third countries more favourable treatment than Community undertakings.

4. Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by their undertakings and which are due to the non-observance of the international labour law provisions listed in Annex XXIII when these undertakings have tried to secure the award of contracts in third countries.

5. In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council decide to suspend or restrict, over a period to be laid down in the decision, the award of service contracts to:

(a) undertakings governed by the law of the third country in question;

[1] OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council (OJ L 311, 12.12.2000, p. 17).

(b) undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Community but having no direct and effective link with the economy of a Member State;

(c) undertakings submitting tenders which have as their subject-matter services originating in the third country in question.

The Council shall act, by qualified majority, as soon as possible.

The Commission may propose these measures on its own initiative or at the request of a Member State.

6. This Article shall be without prejudice to the commitments of the Community in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.

TITLE III

RULES GOVERNING SERVICE DESIGN CONTESTS

Article 60

General provision

1. The rules for the organisation of a design contest shall be in conformity with paragraph 2 of this Article and with Articles 61 and 63 to 66 and shall be made available to those interested in participating in the contest.

2. The admission of participants to design contests shall not be limited:

(a) by reference to the territory or part of the territory of a Member State;

(b) on the ground that, under the law of the Member State in which the contest is organised, they would have been required to be either natural or legal persons.

Article 61

Thresholds

1. This Title shall apply to design contests organised as part of a procurement procedure for services whose estimated value, net of VAT, is equal to or greater than EUR 499 000. For the purposes of this paragraph, 'threshold' means the estimated value net of VAT of the service contract, including any possible prizes and/or payments to participants.

2. This Title shall apply to all design contests where the total amount of contest prizes and payments to participants is equal to or greater than EUR 499 000.

For the purposes of this paragraph, 'threshold' means the total amount of the prizes and payments, including the estimated value net of VAT of the service contract which might subsequently be concluded under Article 40(3) if the contracting entity does not exclude such an award in the contest notice.

Article 62

Design contests excluded

This Title shall not apply to:

(1) contests which are organised in the same cases as referred to in Articles 20, 21 and 22 for service contracts;

(2) design contests organised for the pursuit, in the Member State concerned, of an activity to which the applicability of paragraph 1 of Article 30 has been established by a Commission decision or has been deemed applicable pursuant to paragraph 4, second or third subparagraph, or to paragraph 5, fourth subparagraph, of that Article.

Article 63

Rules on advertising and transparency

1. Contracting entities which wish to organise a design contest shall call for competition by means of a contest notice. Contracting entities which have held a design contest shall make the results known by means of a notice. The call for competition shall contain the information referred to in Annex XVIII and the notice of the results of a design contest shall contain the information referred to in Annex XIX in accordance with the format of standard forms adopted by the Commission in accordance with the procedure in Article 68(2).

The notice of the results of a design contest shall be forwarded to the Commission within two months of the closure of the design contest and under conditions to be laid down by the Commission in accordance with the procedure referred to in Article 68(2). In this connection, the Commission shall respect any sensitive commercial aspects which the contracting entities may point out when forwarding this information, concerning the number of projects or plans received, the identity of the economic operators and the prices tendered.

2. Article 44(2) to (8) shall also apply to notices relating to design contests.

Article 64

Means of communication

1. Article 48(1), (2) and (4) shall apply to all communications relating to contests.

2. Communications, exchanges and the storage of information shall be such as to ensure that the integrity and the confidentiality of all information communicated by the participants in a contest are preserved and that the jury ascertains the contents of plans and projects only after the expiry of the time-limit for their submission.

3. The following rules shall apply to the devices for the electronic receipt of plans and projects:

(a) the information relating to the specifications which is necessary for the presentation of plans and projects by electronic means, including encryption, shall be available to the parties concerned. In addition, the devices for the electronic receipt of plans and projects shall comply with the requirements of Annex XXIV;

(b) Member States may introduce or maintain voluntary accreditation schemes aiming at enhanced levels of certification service provision for such devices.

Article 65

Rules on the organisation of design contests, the selection of participants and the jury

1. When organising design contests, contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Where design contests are restricted to a limited number of participants, contracting entities shall establish clear and non-discriminatory selection criteria. In any event, the number of candidates invited to participate shall be sufficient to ensure genuine competition.

3. The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required of participants in a contest, at least a third of the jury members shall have the same qualification or an equivalent qualification.

Article 66

Decisions of the jury

1. The jury shall be autonomous in its decisions or opinions.

2. It shall examine the plans and projects submitted by the candidates anonymously and solely on the basis of the criteria indicated in the contest notice.

3. It shall record its ranking of projects in a report, signed by its members, made according to the merits of each project, together with its remarks and any points which may need clarification.

4. Anonymity must be observed until the jury has reached its opinion or decision.

5. Candidates may be invited, if need be, to answer questions which the jury has recorded in the minutes to clarify any aspects of the projects.

6. Complete minutes shall be drawn up of the dialogue between jury members and candidates.

TITLE IV

STATISTICAL OBLIGATIONS, EXECUTORY POWERS AND FINAL PROVISIONS

Article 67

Statistical obligations

1. Member States shall ensure, in accordance with the arrangements to be laid down under the procedure provided for in Article 68(2), that the Commission receives every year a statistical report concerning the total value, broken down by Member State and by category of activity to which Annexes I to X refer, of the contracts awarded below the thresholds set out in Article 16 but which would be covered by this Directive were it not for those thresholds.

2. As regards the categories of activity to which Annexes II, III, V, IX and X refer, Member States shall ensure that the Commission receives a statistical report on contracts awarded no later than 31 October 2004 for the previous year, and before 31 October of each year thereafter, in accordance with arrangements to be laid down under the procedure provided for in Article 68(2). The statistical report shall contain the information required to verify the proper application of the Agreement.

The information required under the first subparagraph shall not include information concerning contracts for the R & D services listed in category 8 of Annex XVII A, for telecommunications services listed in category 5 of Annex XVII A whose CPV positions are equivalent to the CPC reference numbers 7524, 7525 and 7526, or for the services listed in Annex XVII B.

3. The arrangements under paragraphs 1 and 2 shall be laid down in such a way as to ensure that:

(a) in the interests of administrative simplification, contracts of lesser value may be excluded, provided that the usefulness of the statistics is not jeopardised;

(b) the confidential nature of the information provided is respected.

Article 68

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts instituted by Article 1 of Council Decision 71/306/EEC [1] (hereinafter referred to as 'the Committee').

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

3. The Committee shall adopt its rules of procedure.

Article 69

Revision of the thresholds

1. The Commission shall verify the thresholds established in Article 16 every two years from 30 April 2004, and shall, if necessary with regard to the second subparagraph, revise them in accordance with the procedure provided for in Article 68(2).

The calculation of the value of these thresholds shall be based on the average daily value of the euro, expressed in SDR, over the 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euro so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDR, are observed.

2. At the same time as performing the revision under paragraph 1, the Commission shall, in accordance with the procedure provided for in Article 68(2), align the thresholds laid down in Article 61 (design contests) with the revised threshold applicable to service contracts.

The values of the thresholds laid down in accordance with paragraph 1 in the national currencies of Member States not participating in Monetary Union shall, in principle, be revised every two years from 1 January 2004. The calculation of such values shall be based on the average daily values of those currencies, expressed in euro, over the 24 months terminating on the last day of August preceding the revision with effect from 1 January.

3. The revised thresholds referred to in paragraph 1, their values in national currencies and the aligned thresholds referred to in paragraph 2 shall be published by the Commission in the *Official Journal of the European Union* at the beginning of the month of November following their revision.

[1] OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).

Article 70

Amendments

The Commission may amend, in accordance with the procedure provided for in Article 68(2):

(a) the list of contracting entities in Annexes I to X so that they fulfil the criteria set out in Articles 2 to 7;

(b) the procedures for the drawing-up, transmission, receipt, translation, collection and distribution of the notices referred to in Articles 41, 42, 43 and 63;

(c) the procedures for specific references to particular positions in the CPV nomenclature in the notices;

(d) the reference numbers in the nomenclature set out in Annex XVII, in so far as this does not change the material scope of the Directive, and the procedures for reference in the notices to particular positions in this nomenclature within the categories of services listed in the Annex;

(e) the reference numbers in the nomenclature set out in Annex XII, insofar as this does not change the material scope of the Directive, and the procedures for reference to particular positions of this nomenclature in the notices;

(f) Annex XI;

(g) the procedure for sending and publishing data referred to in Annex XX, on grounds of technical progress or for administrative reasons;

(h) the technical details and characteristics of the devices for electronic receipt referred to in points (a), (f) and (g) of Annex XXIV;

(i) in the interests of administrative simplification as provided for in Article 67(3), the procedures for the use, drawing--up, transmission, receipt, translation, collection and distribution of the statistical reports referred to in Article 67(1) and (2);

(j) the technical procedures for the calculation methods set out in Article 69(1) and (2), second subparagraph.

Article 71

Implementation of the Directive

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 January 2006 at the latest. They shall forthwith inform the Commission thereof.

Member States may avail themselves of an additional period of up to 35 months after expiry of the time limit provided for in the first subparagraph for the application of the provisions necessary to comply with Article 6 of this Directive.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such references shall be laid down by Member States.

The provisions of Article 30 are applicable from 30 April 2004.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 72

Monitoring mechanisms

In conformity with Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1], Member States shall ensure implementation of this Directive by effective, available and transparent mechanisms.

For this purpose they may, among other things, appoint or establish an independent body.

Article 73

Repeal

Directive 93/38/EEC is hereby repealed, without prejudice to the obligations of the Member States concerning the time limits for transposition into national law set out in Annex XXV.

References to the repealed Directive shall be construed as being made to this Directive and shall be read in accordance with the correlation table in Annex XXVI.

Article 74

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Article 75

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 31 March 2004.

For the European Parliament	*For the Council*
The President	*The President*
P. COX	D. ROCHE

[1] OJ L 76, 23.03.1992, p. 14. Directive amended by the 1994 Act of Accession (OJ 241, 29.8.1994, p. 228).

DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 February 2014

on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

(Text with EEA relevance)

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 53(1) and Article 62 and Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Having regard to the opinion of the Committee of the Regions ([2]),

Acting in accordance with the ordinary legislative procedure ([3]),

Whereas:

(1) In the light of the results of the Commission staff working paper of 27 June 2011 entitled 'Evaluation Report — Impact and Effectiveness of EU Public Procurement Legislation', it appears appropriate to maintain rules on procurement by entities operating in the water, energy, transport and postal services sectors, since national authorities continue to be able to influence the behaviour of those entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies. Another reason to continue to regulate procurement in those sectors is the closed nature of the markets in which the entities in those sectors operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

(2) In order to ensure the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. In view of the nature of the sectors affected, the coordination of procurement procedures at the level of the Union should, while safeguarding the application of those principles, establish a framework for sound commercial practice and should allow maximum flexibility.

(3) For procurement the value of which is lower than the thresholds triggering the application of the provisions of Union coordination, it is advisable to recall the case-law of the Court of Justice of the European Union regarding the proper application of the rules and principles of the TFEU.

(4) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council ([4]) and Directive 2004/18/EC of the European Parliament and of the Council ([5]) should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

([1]) OJ C 191, 29.6.2012, p. 84.
([2]) OJ C 391, 18.12.2012, p. 49.
([3]) Position of the European Parliament of 15 January 2014 (not yet published in the Official Journal), and decision of the Council of 11 February 2014.
([4]) Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).
([5]) 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 (OJ L 134, 30.4.2004, p. 114).

The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

Based on those targets, the contracting entity may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting entity has indicated in the procurement documents those possibilities and the conditions for their use.

3. Unless otherwise provided for in this Article, contracting entities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve the content thereof.

The minimum requirements and the award criteria shall not be subject to negotiations.

4. During the negotiations, contracting entities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers, whose tenders have not been eliminated, pursuant to paragraph 5, in writing of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements. Following those changes, contracting entities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

In accordance with Article 39, contracting entities shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

5. Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting entity shall indicate whether it will use that option.

6. In selecting candidates, contracting entities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

Only those economic operators invited by the contracting entity following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting entity that cannot be met by existing solutions.

In the procurement documents, the contracting entity shall define the arrangements applicable to intellectual property rights. In the case of an innovation partnership with several partners, the contracting entity shall not, in accordance with Article 39, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

7. The contracting entity shall ensure that the structure of the partnership and, in particular the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The estimated value of supplies, services or works purchased shall not be disproportionate in relation to the investment for their development.

Article 50

Use of the negotiated procedure without prior call for competition

Contracting entities may use a negotiated procedure without prior call for competition in the following cases:

(a) where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not substantially altered;

A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting entity's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Articles 78(1) or 80(1), or does not meet the selection criteria laid down by the contracting entity pursuant to Articles 78 or 80;

(b) where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts which do seek, in particular, those ends;

(c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:

(i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;

(ii) competition is absent for technical reasons;

(iii) the protection of exclusive rights, including intellectual property rights.

The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

(d) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting entity, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting entity;

(e) in the case of supply contracts for additional deliveries by the original supplier which are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire supplies having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance;

(f) for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same contracting entities awarded an earlier contract, provided that such works or services conform to a basic project for which a first contract was awarded according to a procedure in accordance with Article 44(1). The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded. As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting entities when they apply Articles 15 and 16;

(g) for supplies quoted and purchased on a commodity market;

(h) for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;

(i) for purchases of supplies or services under particularly advantageous conditions from either a supplier which is definitively winding up its business activities or the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws or regulations;

(j) where the service contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of that contest; in the latter case, all the winners shall be invited to participate in the negotiations.

CHAPTER II

Techniques and instruments for electronic and aggregated procurement

Article 51

Framework agreements

1. Contracting entities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting entities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

The term of a framework agreement shall not exceed eight years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection rules provided for in Directive 95/46/EC of the European Parliament and of the Council [1] and Directive 2002/58/EC of the European Parliament and of the Council [2].

3. To test the suitability of using the Internal Market Information System (IMI) established by Regulation (EU) No 1024/2012 for the purpose of exchanging information covered by this Directive, a pilot project shall be launched by 18 April 2015.

TITLE V

DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS

Article 103

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Articles 4, 17, 40, 41, 76 and 83 shall be conferred on the Commission for an indeterminate period of time from 17 April 2014.

3. The delegation of power referred to in Articles 4, 17, 40, 41, 76 and 83 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Articles 4, 17, 40, 41, 76 and 83 shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 104

Urgency procedure

1. Delegated acts adopted under this Article shall enter into force without delay and shall apply as long as no objection is expressed in accordance with paragraph 2. The notification of a delegated act to the European Parliament and to the Council shall state the reasons for the use of the urgency procedure.

2. Either the European Parliament or the Council may object to a delegated act in accordance with the procedure referred to in Article 103(5). In such a case, the Commission shall repeal the act without delay following the notification of the decision to object by the European Parliament or by the Council.

Article 105

Committee procedure

1. The Commission shall be assisted by the Advisory Committee on Public Procurement established by Council Decision 71/306/EEC [3]. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 106

Transposition and transitional provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016. They shall forthwith communicate to the Commission the text of those measures.

[1] 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 (OJ L 281, 23.11.1995, p. 31).

[2] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

[3] Council Decision 71/306/EEC of 26 July 1971 setting up an Advisory Committee for Public Works Contracts (OJ L 185, 16.8.1971, p. 15).

2. Notwithstanding paragraph 1 of this Article, Member States may postpone the application of Article 40(1) until 18 October 2018, except where use of electronic means is mandatory pursuant to Articles 52, 53, 54, Article 55(3), Article 71(2) or Article 73.

Notwithstanding paragraph 1 of this Article, Member States may postpone the application of Article 40(1) for central purchasing bodies pursuant to Article 55(3) until 18 April 2017.

Where a Member State chooses to postpone the application of Article 40(1), that Member State shall provide that contracting entities may choose between the following means of communication for all communication and information exchange:

(a) electronic means in accordance with Article 40;

(b) post or other suitable carrier;

(c) fax;

(d) a combination of those means.

3. When Member States adopt the measures referred to in paragraphs 1 and 2, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 107

Repeal

Directive 2004/17/EC is repealed with effect from 18 April 2016.

References to the repealed Directive shall be construed as being made to this Directive and shall be read in accordance with the correlation table in Annex XXI.

Article 108

Review

The Commission shall review the economic effects on the internal market, in particular in terms of factors such as the cross-border award of contracts and transaction costs, resulting from the application of the thresholds set in Article 15 and report thereon to the European Parliament and the Council by 18 April 2019.

The Commission shall, where possible and appropriate, consider suggesting an increase of the threshold amounts applicable under the GPA during the next round of negotiations. In the event of any change to the threshold amounts applicable under the GPA, the report shall, if appropriate, be followed by a legislative proposal amending the thresholds set out in this Directive.

Article 109

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 110

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 26 February 2014.

For the European Parliament	*For the Council*
The President	*The President*
M. SCHULZ	D. KOURKOULAS

COMMISSION DELEGATED REGULATION (EU) 2015/2171

of 24 November 2015

amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([1]), and in particular Article 17 thereof,

Whereas:

(1) By Decision 94/800/EC ([2]) the Council concluded the Agreement on Government Procurement ('the Agreement') ([3]). The Agreement should be applied to any procurement contract with a value that reaches or exceeds the amounts ('thresholds') set in the Agreement and expressed as special drawing rights.

(2) One of the objectives of Directive 2014/25/EU is to allow the contracting entities which apply that Directive to comply at the same time with the obligations laid down in the Agreement. To achieve that, the thresholds laid down by that Directive for public contracts which are also covered by the Agreement should be aligned in order to ensure that they correspond to the euro equivalents, rounded down to the nearest thousand, of the thresholds set out in the Agreement.

(3) For reasons of coherence, it is appropriate to align also the thresholds in Directive 2014/25/EU which are not covered by the Agreement. Directive 2014/25/EU should therefore be amended accordingly.

(4) As the calculation of the revised thresholds is required to be made on the basis of an average value of the euro for a certain period terminating on 31 August and the revised thresholds are to be published in the *Official Journal of the European Union* at the beginning of November, the urgency procedure should be applied when adopting this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Article 15 of Directive 2014/25/EU is amended as follows:

(a) in point (a), the amount 'EUR 414 000' is replaced by 'EUR 418 000',

(b) in point (b), the amount 'EUR 5 186 000' is replaced by 'EUR 5 225 000'.

Article 2

This Regulation shall enter into force on 1 January 2016.

([1]) OJ L 94, 28.3.2014, p. 243.
([2]) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, 23.12.1994, p. 1).
([3]) The Agreement is a plurilateral agreement within the framework of the World Trade Organisation. The aim of the Agreement is to mutually open government procurement markets among its parties.

COMMISSION REGULATION (EU) No 1336/2013

of 13 December 2013

amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of the application thresholds for the procedures for the awards of contract

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ([1]), and in particular Article 69 thereof,

Having regard to 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 ([2]), and in particular Article 78 thereof,

Having regard to Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC ([3]), and in particular Article 68 thereof,

Whereas:

(1) By Decision 94/800/EC ([4]) the Council concluded the Agreement on Government Procurement (hereinafter referred to as 'the Agreement'). The Agreement should be applied to any procurement contract with a value that reaches or exceeds the amounts (hereinafter referred to as 'thresholds') set in the Agreement and expressed as special drawing rights.

(2) One of the objectives of Directives 2004/17/EC and 2004/18/EC is to allow the contracting entities and the contracting authorities which apply those Directives to comply at the same time with the obligations laid down in the Agreement. To achieve this, the thresholds laid down by those Directives for public contracts which are also covered by the Agreement should be aligned in order to ensure that they correspond to the euro equivalents, rounded down to the nearest thousand, of the thresholds set out in the Agreement.

(3) For reasons of coherence, it is appropriate to align also those thresholds in Directives 2004/17/EC and 2004/18/EC which are not covered by the Agreement. At the same time, the thresholds laid down by Directive 2009/81/EC should be aligned to the revised thresholds laid down in Article 16 of Directive 2004/17/EC.

(4) Directives 2004/17/EC, 2004/18/EC and 2009/81/EC should therefore be amended accordingly.

(5) The measures provided for in this Regulation are in accordance with the opinion of the Advisory Committee for Public Contracts,

HAS ADOPTED THIS REGULATION:

Article 1

Directive 2004/17/EC is amended as follows:

(1) Article 16 is amended as follows:

(a) in point (a), the amount 'EUR 400 000' is replaced by 'EUR 414 000';

(b) in point (b), the amount 'EUR 5 000 000' is replaced by 'EUR 5 186 000';

(2) Article 61 is amended as follows:

(a) in paragraph 1, the amount 'EUR 400 000' is replaced by 'EUR 414 000';

(b) in paragraph 2, the amount 'EUR 400 000' is replaced by 'EUR 414 000'.

([1]) OJ L 134, 30.4.2004, p. 1.
([2]) OJ L 134, 30.4.2004, p. 114.
([3]) OJ L 216, 20.8.2009, p. 76.
([4]) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, 23.12.1994, p. 1).

DIRECTIVES

DIRECTIVE 2007/66/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 December 2007

amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) Council Directives 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [4] and 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [5] concern the review procedures with regard to contracts awarded by contracting authorities as referred to in Article 1(9) 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 [6] and contracting entities as referred to in Article 2 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [7]. Directives 89/665/EEC and 92/13/EEC are intended to ensure the effective application of Directives 2004/18/EC and 2004/17/EC.

(2) Directives 89/665/EEC and 92/13/EEC therefore apply only to contracts falling within the scope of Directives 2004/18/EC and 2004/17/EC as interpreted by the Court of Justice of the European Communities, whatever competitive procedure or means of calling for competition is used, including design contests, qualification systems and dynamic purchasing systems. According to the case law of the Court of Justice, the Member States should ensure that effective and rapid remedies are available against decisions taken by contracting authorities and contracting entities as to whether a particular contract falls within the personal and material scope of Directives 2004/18/EC and 2004/17/EC.

(3) Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms

[1] OJ C 93, 27.4.2007, p. 16.
[2] OJ C 146, 30.6.2007, p. 69.
[3] Opinion of the European Parliament of 21 June 2007 (not yet published in the Official Journal) and Council Decision of 15 November 2007.
[4] OJ L 395, 30.12.1989, p. 33. Directive as amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).
[5] OJ L 76, 23.3.1992, p. 14. Directive as last amended by Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).
[6] OJ L 134, 30.4.2004, p. 114. Directive as last amended by Directive 2006/97/EC.
[7] OJ L 134, 30.4.2004, p. 1. Directive as last amended by Directive 2006/97/EC.

5. Article 4 shall be replaced by the following:

'*Article 4*

Implementation

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).';

6. the following article shall be inserted:

'*Article 4a*

Review

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.'.

Article 2

Amendments to Directive 92/13/EEC

Directive 92/13/EEC is hereby amended as follows:

1. Article 1 shall be replaced by the following:

'*Article 1*

Scope and availability of review procedures

1. This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*), unless such contracts are excluded in accordance with Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/17/EC, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of procurement or national rules transposing that law.

2. Member States shall ensure that there is no discrimination between undertakings likely to make a claim in respect of harm in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4. Member States may require that the person wishing to use a review procedure has notified the contracting entity of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting entity. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

Member States shall decide on the appropriate means of communication, including fax or electronic means, to be used for the application for review provided for in the first subparagraph.

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting entity has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contracting entity has sent a reply or at least 10 calendar days with effect from the day following the date of the receipt of a reply.

(*) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).';

2. Article 2 shall be amended as follows:

(a) the title 'Requirements for review procedures' shall be inserted;

(b) paragraphs 2 to 4 shall be replaced by the following:

'2. The powers specified in paragraph 1 and Articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.

3. When a body of first instance, which is independent of the contracting entity, reviews a contract award decision, Member States shall ensure that the contracting entity cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).

3a. Except where provided for in paragraph 3 and Article 1(5), review procedures need not necessarily have an automatic suspensive effect on the contract award procedures to which they relate.

4. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.

A decision not to grant interim measures shall not prejudice any other claim of the person seeking such measures.';

(c) paragraph 6 shall be replaced by the following:

'6. Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.';

(d) in the first subparagraph of paragraph 9, the words 'court or tribunal within the meaning of Article 177 of the Treaty' shall be replaced by the words 'court or tribunal within the meaning of Article 234 of the Treaty';

3. the following articles shall be inserted:

'Article 2a

Standstill period

1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting entities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.

2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2004/17/EC before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

Candidates shall be deemed to be concerned if the contracting entity has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

— a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC, and,

— a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.

Article 2b

Derogations from the standstill period

Member States may provide that the periods referred to in Article 2a(2) of this Directive do not apply in the following cases:

(a) if Directive 2004/17/EC does not require prior publication of a notice in the *Official Journal of the European Union*;

(b) if the only tenderer concerned within the meaning of Article 2a(2) of this Directive is the one who is awarded the contract and there are no candidates concerned;

(c) in the case of specific contracts based on a dynamic purchasing system as provided for in Article 15 of Directive 2004/17/EC.

If this derogation is invoked, Member States shall ensure that the contract is ineffective in accordance with Articles 2d and 2f of this Directive where:

— there is an infringement of Article 15(5) or (6) of Directive 2004/17/EC, and,

— the contract value is estimated to be equal to or to exceed the thresholds set out in Article 16 of Directive 2004/17/EC.

Article 2c

Time limits for applying for review

Where a Member State provides that any application for review of a contracting entity's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/17/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting entity's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of receipt of the contracting entity's decision. The communication of the contracting entity's decision to each tenderer or candidate shall be accompanied by a summary of the relevant reasons. In the case of an application for a review concerning decisions referred to in Article 2(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.

Article 2d

Ineffectiveness

1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/17/EC;

(b) in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/17/EC, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c) in cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a dynamic purchasing system.

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

3. Member States may provide that the review body independent of the contracting entity may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.

Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.

However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

— the contracting entity considers that the award of a contract without prior publication of a notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/17/EC,

— the contracting entity has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

5. The Member States shall provide that paragraph 1(c) of this Article does not apply where:

— the contracting entity considers that the award of a contract is in accordance with Article 15(5) and (6) of Directive 2004/17/EC,

— the contracting entity has sent a contract award decision, together with a summary of reasons as referred to in the first indent of the fourth subparagraph of Article 2a(2) of this Directive, to the tenderers concerned, and,

— the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned if fax or electronic means are used or, if other means of communications are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.

Article 2e

Infringements of this Directive and alternative penalties

1. In case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting entity shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

— the imposition of fines on the contracting entity; or,

— the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting entity and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.

Article 2f

Time limits

1. Member States may provide that the application for review in accordance with Article 2d(1) must be made:

(a) before the expiry of at least 30 calendar days with effect from the day following the date on which:

— the contracting entity published a contract award notice in accordance with Articles 43 and 44 of Directive 2004/17/EC, provided that this notice includes the justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*, or

— the contracting entity informed the tenderers and candidates concerned of the conclusion of the contract, provided that this information contains a summary of the relevant reasons as set out in Article 49(2) of Directive 2004/17/EC. This option also applies to the cases referred to in Article 2b(c) of this Directive;

(b) and in any case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract.

2. In all other cases, including applications for a review in accordance with Article 2e(1), the time limits for the application for a review shall be determined by national law, subject to the provisions of Article 2c.';

4. Articles 3 to 7 shall be replaced by the following:

'*Article 3a*

Content of a notice for voluntary ex ante transparency

The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information:

(a) the name and contact details of the contracting entity;

(b) a description of the object of the contract;

(c) a justification of the decision of the contracting entity to award the contract without prior publication of a notice in the *Official Journal of the European Union*;

(d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

(e) where appropriate, any other information deemed useful by the contracting entity.

Article 3b

Committee procedure

1. The Commission shall be assisted by the Advisory Committee for Public Contracts set up by Article 1 of Council Decision 71/306/EEC of 26 July 1971 (*) (hereinafter referred to as the Committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (**) shall apply, having regard to the provisions of Article 8 thereof.

(*) OJ L 185, 16.8.1971, p. 15. Decision as amended by Decision 77/63/EEC (OJ L 13, 15.1.1977, p. 15).
(**) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).';

5. Article 8 shall be replaced by the following:

'*Article 8*

Corrective mechanism

1. The Commission may invoke the procedure provided for in paragraphs 2 to 5 when, prior to a contract being concluded, it considers that a serious infringement of Community law in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 2004/17/EC, or in relation to Article 27(a) of that Directive in the case of contracting entities to which that provision applies.

2. The Commission shall notify the Member State concerned of the reasons which have led it to conclude that a serious infringement has been committed and request its correction by appropriate means.

3. Within 21 calendar days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

(a) its confirmation that the infringement has been corrected;

(b) a reasoned submission as to why no correction has been made; or

(c) a notice to the effect that the contract award procedure has been suspended either by the contracting entity on its own initiative or on the basis of the powers specified in Article 2(1)(a).

4. A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.';

6. Articles 9 to 12 shall be replaced by the following:

'*Article 12*

Implementation

1. The Commission may request the Member States, in consultation with the Committee, to provide it with information on the operation of national review procedures.

2. Member States shall communicate to the Commission on an annual basis the text of all decisions, together with the reasons therefor, taken by their review bodies in accordance with Article 2d(3).

Article 12a

Review

No later than 20 December 2012, the Commission shall review the implementation of this Directive and report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.';

7. the Annex shall be deleted.

Article 3

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 December 2009. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 11 December 2007.

For the *European Parliament*	*For the Council*
The President	*The President*
H.-G. PÖTTERING	M. LOBO ANTUNES

PROTOCOL (No 7)

ON THE PRIVILEGES AND IMMUNITIES OF THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

CONSIDERING that, in accordance with Article 343 of the Treaty on the Functioning of the European Union and Article 191 of the Treaty establishing the European Atomic Energy Community ('EAEC'), the European Union and the EAEC shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks,

HAVE AGREED upon the following provisions, which shall be annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community:

CHAPTER I
PROPERTY, FUNDS, ASSETS AND OPERATIONS OF THE EUROPEAN UNION

Article 1

The premises and buildings of the Union shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation. The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.

Article 2

The archives of the Union shall be inviolable.

Article 3

The Union, its assets, revenues and other property shall be exempt from all direct taxes.

The governments of the Member States shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property, where the Union makes, for its official use, substantial purchases the price of which includes taxes of this kind. These provisions shall not be applied, however, so as to have the effect of distorting competition within the Union.

No exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.

Article 4

The Union shall be exempt from all customs duties, prohibitions and restrictions on imports and exports in respect of articles intended for its official use: articles so imported shall not be disposed of, whether or not in return for payment, in the territory of the country into which they have been imported, except under conditions approved by the government of that country.

The Union shall also be exempt from any customs duties and any prohibitions and restrictions on import and exports in respect of its publications.

CHAPTER II
COMMUNICATIONS AND LAISSEZ-PASSER

Article 5

(ex Article 6)

For their official communications and the transmission of all their documents, the institutions of the Union shall enjoy in the territory of each Member State the treatment accorded by that State to diplomatic missions.

Official correspondence and other official communications of the institutions of the Union shall not be subject to censorship.

Article 6

(ex Article 7)

Laissez-passer in a form to be prescribed by the Council, acting by a simple majority, which shall be recognised as valid travel documents by the authorities of the Member States, may be issued to members and servants of the institutions of the Union by the Presidents of these institutions. These *laissez-passer* shall be issued to officials and other servants under conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

The Commission may conclude agreements for these *laissez-passer* to be recognised as valid travel documents within the territory of third countries.

CHAPTER III
MEMBERS OF THE EUROPEAN PARLIAMENT

Article 7

(ex Article 8)

No administrative or other restriction shall be imposed on the free movement of Members of the European Parliament travelling to or from the place of meeting of the European Parliament.

Members of the European Parliament shall, in respect of customs and exchange control, be accorded:

(a)by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official missions;

(b)by the government of other Member States, the same facilities as those accorded to representatives of foreign governments on temporary official missions.

Article 8

(ex Article 9)

Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.

Article 9

(ex Article 10)

During the sessions of the European Parliament, its Members shall enjoy:

(a)in the territory of their own State, the immunities accorded to members of their parliament;

(b)in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members.

CHAPTER IV

REPRESENTATIVES OF MEMBER STATES TAKING PART IN THE WORK OF THE INSTITUTIONS OF THE EUROPEAN UNION

Article 10

(ex Article 11)

Representatives of Member States taking part in the work of the institutions of the Union, their advisers and technical experts shall, in the performance of their duties and during their travel to and from the place of meeting, enjoy the customary privileges, immunities and facilities.

This Article shall also apply to members of the advisory bodies of the Union.

CHAPTER V
OFFICIALS AND OTHER SERVANTS OF THE EUROPEAN UNION

Article 11

(ex Article 12)

In the territory of each Member State and whatever their nationality, officials and other servants of the Union shall:

(a) subject to the provisions of the Treaties relating, on the one hand, to the rules on the liability of officials and other servants towards the Union and, on the other hand, to the jurisdiction of the Court of Justice of the European Union in disputes between the Union and its officials and other servants, be immune from legal proceedings in respect of acts performed by them in their official capacity, including their words spoken or written. They shall continue to enjoy this immunity after they have ceased to hold office;

(b) together with their spouses and dependent members of their families, not be subject to immigration restrictions or to formalities for the registration of aliens;

(c) in respect of currency or exchange regulations, be accorded the same facilities as are customarily accorded to officials of international organisations;

(d) enjoy the right to import free of duty their furniture and effects at the time of first taking up their post in the country concerned, and the right to re-export free of duty their furniture and effects, on termination of their duties in that country, subject in either case to the conditions considered to be necessary by the government of the country in which this right is exercised;

(e) have the right to import free of duty a motor car for their personal use, acquired either in the country of their last residence or in the country of which they are nationals on the terms ruling in the home market in that country, and to re-export it free of duty, subject in either case to the conditions considered to be necessary by the government of the country concerned.

Article 12

(ex Article 13)

Officials and other servants of the Union shall be liable to a tax for the benefit of the Union on salaries, wages and emoluments paid to them by the Union, in accordance with the conditions and procedure laid down by the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and after consultation of the institutions concerned.

They shall be exempt from national taxes on salaries, wages and emoluments paid by the Union.

Article 13

(ex Article 14)

In the application of income tax, wealth tax and death duties and in the application of conventions on the avoidance of double taxation concluded between Member States of the Union, officials and other servants of the Union who, solely by reason of the performance of their duties in the service of the Union, establish their residence in the territory of a Member State other than their country of domicile for tax purposes at the time of entering the service of the Union, shall be considered, both in the country of their actual residence and in the country of domicile for tax purposes, as having maintained their domicile in the latter country provided that it is a member of the Union. This provision shall also apply to a spouse, to the extent that the latter is not separately engaged in a gainful occupation, and to children dependent on and in the care of the persons referred to in this Article.

Movable property belonging to persons referred to in the preceding paragraph and situated in the territory of the country where they are staying shall be exempt from death duties in that country; such property shall, for the assessment of such duty, be considered as being in the country of domicile for tax purposes, subject to the rights of third countries and to the possible application of provisions of international conventions on double taxation.

Any domicile acquired solely by reason of the performance of duties in the service of other international organisations shall not be taken into consideration in applying the provisions of this Article.

Article 14

(ex Article 15)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure and after consultation of the institutions concerned, shall lay down the scheme of social security benefits for officials and other servants of the Union.

Article 15

(ex Article 16)

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, and after consulting the other institutions concerned, shall determine the categories of officials and other servants of the Union to whom the provisions of Article 11, the second paragraph of Article 12, and Article 13 shall apply, in whole or in part.

The names, grades and addresses of officials and other servants included in such categories shall be communicated periodically to the governments of the Member States.

CHAPTER VI
PRIVILEGES AND IMMUNITIES OF MISSIONS OF THIRD COUNTRIES ACCREDITED TO THE EUROPEAN UNION

Article 16

(ex Article 17)

The Member State in whose territory the Union has its seat shall accord the customary diplomatic immunities and privileges to missions of third countries accredited to the Union.

CHAPTER VII
GENERAL PROVISIONS

Article 17

(ex Article 18)

Privileges, immunities and facilities shall be accorded to officials and other servants of the Union solely in the interests of the Union.

Each institution of the Union shall be required to waive the immunity accorded to an official or other servant wherever that institution considers that the waiver of such immunity is not contrary to the interests of the Union.

Article 18

(ex Article 19)

The institutions of the Union shall, for the purpose of applying this Protocol, cooperate with the responsible authorities of the Member States concerned.

Article 19

(ex Article 20)

Articles 11 to 14 and Article 17 shall apply to the President of the European Council.

They shall also apply to Members of the Commission.

Article 20

(ex Article 21)

Articles 11 to 14 and Article 17 shall apply to the Judges, the Advocates-General, the Registrars and the Assistant Rapporteurs of the Court of Justice of the European Union, without prejudice to the provisions of Article 3 of the Protocol on the Statute of the Court of Justice of the European Union relating to immunity from legal proceedings of Judges and Advocates-General.

Article 21

(ex Article 22)

This Protocol shall also apply to the European Investment Bank, to the members of its organs, to its staff and to the representatives of the Member States taking part in its activities, without prejudice to the provisions of the Protocol on the Statute of the Bank.

The European Investment Bank shall in addition be exempt from any form of taxation or imposition of a like nature on the occasion of any increase in its capital and from the various formalities which may be connected therewith in the State where the Bank has its seat. Similarly, its dissolution or liquidation shall not give rise to any imposition. Finally, the activities of the Bank and of its organs carried on in accordance with its Statute shall not be subject to any turnover tax.

Article 22

(ex Article 23)

This Protocol shall also apply to the European Central Bank, to the members of its organs and to its staff, without prejudice to the provisions of the Protocol on the Statute of the European System of Central Banks and the European Central Bank.

The European Central Bank shall, in addition, be exempt from any form of taxation or imposition of a like nature on the occasion of any increase in its capital and from the various formalities which may be connected therewith in the State where the bank has its seat. The activities of the Bank and of its organs carried on in accordance with the Statute of the European System of Central Banks and of the European Central Bank shall not be subject to any turnover tax.

PART C. CJEU JURISPRUDENCE

JUDGMENT OF THE COURT (Grand Chamber)

9 July 2020 (*)

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

In Case C-575/18 P,

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

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

appellant,

supported by:

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

intervener in the appeal,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Grand Chamber),

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

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Head of Unit,

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

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

gives the following

Judgment

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

Legal context

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

2 In the period to which the facts giving rise to the dispute relate, two decisions relating to the system of the European Union's own resources were successively applicable: Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42), and then, from 1 January 2007, Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007 L 163, p. 17).

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

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

Regulation No 1150/2000

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

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

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

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

…

3.

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

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

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

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

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

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

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

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

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

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

2. Member States shall be released from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements which prove irrecoverable either:

(a) for reasons of force majeure; or

(b) for other reasons which cannot be attributed to them.

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

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

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

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

3. Within three months of the administrative decision mentioned in paragraph 2 or in accordance with the time limits referred to in that paragraph, Member States shall provide the Commission with

information on those cases where paragraph 2 has been applied provided the established entitlements involved exceed EUR 50 000.

…

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

…’

Background to the dispute and the letter at issue

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

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

14 The report stated that ‘the evidence of Chinese origin established in the course of the mission [was] sufficient for Member States to take administrative duty recovery proceedings’. According to the report, it was necessary ‘that Member States institute follow up audits and investigations if appropriate of the importers concerned and initiate recovery proceedings as a matter of urgency, if this [had] not already been done’.

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

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

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

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

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

Procedure before the General Court and the order under appeal

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

21 By separate document lodged at the Registry of the General Court on 11 June 2015, the Commission raised a plea of inadmissibility in respect of that action, on the ground that the letter at issue did not

constitute a decision against which an action for annulment could be brought. The Czech Republic submitted its observations on that plea.

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

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

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

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

25 The Czech Republic claims that the Court should:

– set aside the order under appeal;

– reject the plea of inadmissibility raised by the Commission;

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

– order the Commission to pay the costs.

26 The Commission contends that the Court should:

– dismiss the appeal, and

– order the Czech Republic to pay the costs.

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

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

– grant the appeal, and

– order the Commission to pay the costs.

The appeal

Arguments of the parties

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

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

31 In that regard, the Czech Republic submits that when the Commission asks a Member State to make available to it an amount of the Union's own resources by means of a letter such as the letter at issue, that Member State is, de facto, obliged to pay the amount claimed within the prescribed period, notwithstanding any reservations expressed with regard to the Commission's position. By refusing to make that amount available to that institution, the Member State runs the risk of having to pay interest in addition to the principal amount if, following the commencement of infringement proceedings by the Commission, the Court of Justice were to find that there had been a failure to fulfil the obligation to make own resources available. The amount of interest due depends in practice on the period within which the Commission brings such an action and the duration of the infringement procedure. The amount could thus be very high and would constitute an excessive legal expense for the Member State concerned.

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

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

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

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

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

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

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

39 That would apply *a fortiori* if, despite the steps taken by the Czech Republic, the Commission persisted in refusing to initiate infringement proceedings. The Czech Republic states in that regard that it made the amount at issue available to the Commission as early as 17 March 2015, while expressing reservations as

to the validity of the Commission's arguments. In addition, by a letter of 30 August 2018, which has remained unanswered, the Czech Republic had reiterated to the Commission its reservations regarding its obligation to make that amount available and asked the Commission to refund that amount or to initiate infringement proceedings.

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

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

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

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

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

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

Findings of the Court

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

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

48 In the present case, the General Court recalled that case-law in paragraphs 31 and 35 of the order under appeal. In accordance with that case-law, it held, in paragraph 64 of that order, that the letter at issue was not capable of producing legal effects. It drew that conclusion following, first, an analysis, set out in paragraphs 36 to 56 of that order, of the context in which the letter was sent and the powers vested in the Commission in relation to the Union's own resources, having regard in particular to the combined provisions of Article 8(1) of Decision 2007/436 and Article 2(1), Article 9(1) and Article 17(1) to (4) of Regulation No 1150/2000, and, second, an examination in paragraphs 57 to 63 of that order of the content of the letter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

67 In that regard, the Court has ruled, in particular, that a Member State which fails to establish the Union's own resources and to make the corresponding amount available to the Commission, without one of the conditions laid down in Article 17(2) of Regulation No 1150/2000 being met, falls short of its obligations under EU law, notably Articles 2 and 8 of Decisions 2000/597 and 2007/436 (see, to that effect, judgments of 15 November 2005, *Commission* v *Denmark*, C-392/02, EU:C:2005:683, paragraph 68; of 18 October 2007, *Commission* v *Denmark*, C-19/05, EU:C:2007:606, paragraph 32; and of 3 April 2014, *Commission* v *United Kingdom*, C-60/13, not published, EU:C:2014:219, paragraph 50).

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

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

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

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

72 Second, as the General Court correctly noted in paragraph 84 of the order under appeal, it is apparent from the case-law of the Court that a Member State can avoid the adverse financial consequences of interest, the amount of which may be high, by making the amount claimed available to the Commission, while expressing reservations as to the validity of the Commission's arguments (see, to that effect,

judgments of 16 May 1991, *Commission* v *Netherlands*, C-96/89, EU:C:1991:213, paragraph 17, and of 12 September 2000, *Commission* v *United Kingdom*, C-359/97, EU:C:2000:426, paragraph 31).

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

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

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

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

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

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

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

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

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

82 In that regard it must be recalled that the Court has held that, according to the principles common to the laws of the Member States, a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss. While the FEU Treaty does not make express provision for a means of pursuing that type of action, if Article 268 TFEU and the second paragraph of Article 340 TFEU were to be construed as excluding that possibility, the result would be contrary to the principle of effective judicial protection. Actions for unjust enrichment of the European Union, brought under those articles, require proof of enrichment on the part of the defendant for which there is no valid legal basis and

proof of impoverishment on the part of the applicant which is linked to that enrichment (see, to that effect, judgment of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraphs 44 and 46 to 50).

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

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

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

Costs

86 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

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

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

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

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

1. **Dismisses the appeal;**

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

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

[Signatures]

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* Language of the case: Czech.

Provisional text

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 12 March 2020 (1)

Case C-575/18 P

Czech Republic
v
European Commission

(Appeal — Own resources of the European Union — Financial liability of the Member States — Determination that the Czech Republic is financially liable — Loss of certain import duties — Obligation to pay the Commission an amount corresponding to that loss — Concept of 'actionable measure' — Right to an effective remedy)

Introduction

1. By its appeal, the Czech Republic seeks to have set aside the order of the General Court of the European Union of 28 June 2018, *Czech Republic* v *Commission*, (2) by which the General Court dismissed the action for annulment which the Czech Republic had brought against the alleged decision of the European Commission contained in the letter of 20 January 2015 from the director of the Own Resources and Financial Programming Directorate of the Directorate-General for Budget bearing the reference Ares (2015)217973 ('the letter at issue'), on the ground that the action was inadmissible.

2. That appeal raises a number of fundamental questions as to the functioning of the system of the European Union's traditional own resources (TOR) and the concept of payment subject to reservations, but also, more generally, concerning the Member States' access to effective judicial protection in the event of disputes over the extent of their financial liabilities to the European Union.

Legal context

The TFEU

3. The first paragraph of Article 263 TFEU provides:

'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-

à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.'

The Charter

4. Under the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'):

'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.'

Council Decision 2007/436/EC, Euratom

5. According to recital 2 of Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources, (3) the own resources system must 'ensure adequate resources for the orderly development of the [Union's] policies, subject to the need for strict budgetary discipline'.

6. Under Article 2(1)(a) of Decision 2007/436, revenue from, inter alia, Common Customs Tariff duties and other duties established or to be established by the EU institutions in respect of trade with non-member countries is to constitute own resources entered in the general budget of the European Union.

7. Article 8(1) further states that the own resources referred to in Article 2(1)(a) are to be collected by the Member States. The latter are to make those resources available to the Commission.

Council Regulation (EC, Euratom) No 1150/2000

8. Recital 21 of Regulation (EC, Euratom) No 1150/2000 (4) states that close collaboration between Member States and the Commission will facilitate proper application of the financial rules relating to own resources.

9. Under Article 2(1) of Regulation No 1150/2000, the European Union's entitlement to the own resources referred to in Article 2(1)(a) of Decision 2007/436 is to be established as soon as the conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor.

10. Article 6(1) and (3) provides:

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

…

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

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

…'

11. Article 9(1) provides:

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

…’

12. Under Article 10(1), entry of the own resources referred to in Article 2(1)(a) of Decision 2007/436 is to be made at the latest on the first working day following the 19th day of the second month following the month during which the entitlement was established in accordance with Article 2 of Regulation No 1150/2000.

13. Article 11(1) provides that any delay in making the entry in the account referred to in Article 9(1) is to give rise to the payment of interest by the Member State concerned.

14. Finally, under Article 17(1) to (4):

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

2. Member States shall be released from the obligation to place at the disposal of the Commission the amounts corresponding to established entitlements which prove irrecoverable either:

(a) for reasons of *force majeure*; or

(b) for other reasons which cannot be attributed to them.

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

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

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

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

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

…

This report, which shall be made on a form to be produced by the Commission after consulting the committee referred to in Article 20, shall include all the facts necessary for a full examination of the reasons referred to in paragraph 2(a) and (b), which prevented the Member State concerned from making available the amounts in question, and the recovery measures the Member State took in the case or cases in question.

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

Where the Commission finds it necessary to request additional information, the six month time limit shall run from the date of receipt of the requested supplementary information.'

Background to the dispute

15. The background to the dispute may be summarised as follows.

16. On 30 May 2008, the European Anti-Fraud Office (OLAF) delivered a final report following an investigation to check imports of pocket flint lighters from Laos between 2004 and 2007. Those lighters in fact originated in China and should have been subject to an anti-dumping duty.

17. The report stated that 'the evidence of Chinese origin established in the course of the mission is sufficient for Member States to take administrative duty recovery proceedings'. According to the report, it was necessary 'that Member States institute follow up audits and investigations if appropriate of the importers concerned and initiate recovery proceedings as a matter of urgency'.

18. As far as the Czech Republic is concerned, the findings of the OLAF report identified 28 cases of imported goods which came within the competence of three different customs offices.

19. The customs offices concerned took steps to carry out tax adjustment and recovery in those 28 cases.

20. However, the Czech Republic was not in a position to effect recovery within the prescribed time limit in any of those 28 cases.

21. Between November 2013 and November 2014, the Czech Republic entered into the WOMIS system (5) 28 cases in which the recovery of own resources was impossible.

22. At the Commission's request, the Czech Republic submitted additional information to the Commission through the WOMIS system in July and December 2014.

23. In the letter at issue, the director of the Own Resources and Financial Programming Directorate of the Commission's Directorate-General for Budget informed the Czech authorities that the requirements for their being released from the obligation to make own resources available, laid down in Article 17(2) of Regulation No 1150/2000, had not been met in *any* of the abovementioned cases. He requested the Czech authorities to take the measures necessary to credit the Commission's account in the amount of 53 976 340 Czech koruny (CZK) (approximately EUR 2 112 708), at the latest on the 1st working day following the 19th day of the 2nd month following the month in which that letter was sent. The director added that any delay would give rise to the payment of interest under Article 11 of Regulation No 1150/2000.

24. On 17 March 2015, the Czech Republic paid the disputed amount into the Commission's account, although it reiterated its reservations regarding the Commission's position in the letter at issue.

Procedure before the General Court and the order under appeal

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

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

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

28. By decision of 22 December 2015, having received the observations of the main parties, the General Court stayed the proceedings before it pending delivery of the judgments in *Slovakia* v *Commission* (6) and *Romania* v *Commission*. (7) The proceedings resumed following the delivery of those judgments and the main parties were invited to express their views on the inferences to be drawn from them.

29. By the order under appeal, the General Court upheld the Commission's plea of inadmissibility on the ground, set out in paragraphs 64 and 87 of that order, that the letter at issue merely constituted a written expression of opinion intended to convey information, together with a request to make own resources available, so it could not be the subject of an action for annulment.

30. That classification followed from an analysis of, first, the context in which the letter at issue was sent and the Commission's powers concerning the European Union's own resources and, second, the letter's content.

31. In the first place, the General Court held, in essence, that, under Decision 2007/436 and Regulation No 1150/2000, the onus was directly on the Member States to establish and make available own resources (paragraphs 37 to 43 of the order under appeal), without those acts laying down any specific procedure at the end of which the Commission would be required to adopt a decision regarding the obligation to make own resources available (paragraph 47 of that order). In particular, regarding the exceptional release from that obligation provided for in Article 17(2) of Regulation No 1150/2000, the Commission could only comment, pursuant to paragraph 4 of that article, on the reasons which prevented a Member State from making available an amount declared irrecoverable by decision of the competent national administrative authority and on the measures taken by that Member State to ensure recovery. Those comments are not binding and, therefore, do not have binding legal effect (paragraphs 44 to 49 of that order).

32. Furthermore, in paragraphs 51 to 55 of the order under appeal, the General Court added, in essence, that any disputes between a Member State and the Commission concerning the establishment and making available of own resources could be settled in infringement proceedings.

33. In the second place, the General Court held, in paragraph 59 of the order under appeal, that the content of the letter at issue shows that the Commission had, in essence, forwarded comments to the Czech Republic, in accordance with Article 17(4) of Regulation No 1150/2000, regarding the latter's request to be released from the obligation to make the disputed amount available and that the Commission had asked that Member State to make that amount available. In so far as that letter referred to a time limit for making that amount available, the General Court noted, in paragraphs 62 and 63 of that order, that, in view of the overall content of the letter, the reference to such a time limit did not permit the inference that the Commission intended to adopt a measure producing binding legal effects and that, in that reference, the letter at issue echoed the wording of Articles 10 and 11 of Regulation No 1150/2000.

34. Finally, the General Court dismissed the various arguments advanced by the Czech Republic. In particular, as regards an argument based on the right to effective judicial protection, it stated as follows, in paragraphs 81 to 84 of the order under appeal:

'81. … although the requirement as to binding legal effects must be interpreted in the light of the right to effective judicial protection as guaranteed in the first paragraph of Article 47 of the [Charter], it is sufficient to note that this right is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union, as is apparent also from the Explanation relating to the abovementioned Article 47, which must, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, be taken into consideration for the interpretation of the Charter. Thus, the interpretation of the concept of "actionable measure" in the light of that Article 47 cannot have the effect of setting aside that

condition without going beyond the jurisdiction conferred by the Treaty on the EU Courts ([*Slovakia* v *Commission*], paragraph 66, and [judgment] of 25 October 2017, *Romania* v *Commission*, C-599/15 P, EU:C:2017:801, paragraph 68).

82. Moreover, it was open to the Czech Republic, on receipt of the [letter at issue], not to act on the [letter at issue] pending the possible initiation by the Commission of infringement proceedings.

83. Admittedly, it follows from the general logic of Article 258 TFEU that the Commission is not bound to bring such proceedings, since its discretion as to whether it is appropriate to bring infringement proceedings before the Court implies that no one is entitled to require it to adopt a specific position (see order of 14 September 2015, *Romania* v *Commission*, T-784/14, not published, EU:T:2015:659, paragraph 55 and the case-law cited).

84. However, it would likewise have been open to the Czech Republic to make [the amount] in question available conditionally while expressing reservations as to the validity of the Commission's arguments, the Court having referred to that possibility on several occasions (see, to that effect, judgments of 16 May 1991, *Commission* v *Netherlands*, C-96/89, EU:C:1991:213, paragraph 17; of 12 September 2000, *Commission* v *United Kingdom*, C-359/97, EU:C:2000:426, paragraph 31; and order of 4 October 2007, *Finland* v *Commission*, C-457/06 P, not published, EU:C:2007:582, paragraph 39).'

35. Consequently, the General Court dismissed the Czech Republic's action for annulment as inadmissible, without ruling on the Slovak Republic's application to intervene.

Forms of order sought by the parties to the appeal and procedure before the Court of Justice

36. In its appeal, brought on 13 September 2018, the Czech Republic claims that the Court should:

– set aside the order under appeal;

– reject the plea of inadmissibility raised by the Commission;

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

– order the Commission to pay the costs.

37. For its part, the Commission contends that the Court should:

– dismiss the appeal;

– order the Czech Republic to pay the costs.

38. The Kingdom of the Netherlands intervened in support of the form of order sought by the Czech Republic.

39. The parties to the appeal put their respective cases at the hearing on 11 November 2019.

Analysis

40. In its appeal, the appellant relies on a single ground, alleging infringement of Article 263 TFEU, read in conjunction with Article 47 of the Charter. Before examining the parties' submissions, I think it useful to recall the principles laid down in law and case-law governing TOR and, in particular, the making available of TOR.

The TOR system

41. TOR (including customs duties) are intended to finance EU policies. Since the European Union does not have a body of officials with the authority to collect those resources, the Member States are responsible for collecting and managing them, and they are subject to a number of obligations in that regard (in accordance with Regulation No 1150/2000 at the material time). (8)

42. Own resources are due as soon as they are established. It should be noted that the Member States are required to establish an entitlement to own resources 'as soon as the conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor' (see Article 2(1) of Regulation No 1150/2000). (9)

43. The Member States have *no* discretion on that point. According to the Court's settled case-law, the Member States may not dispense with determining entitlements, even where these are disputed; 'otherwise, it would have to be accepted that the financial equilibrium of the European Union may be disrupted' by the conduct of a Member State. (10) It follows that a challenge (if any) may be raised only after the fact.

44. Once an entitlement has been established, each Member State is to credit the own resources to the account opened for that purpose in the Commission's name with the Treasury or the body which that Member State has appointed. Each Member State acts, as it were, in the capacity of banker and depositary of the resources in question, with the obligation to make those resources available to the Commission *in their entirety*, irrespective of whether or not they have been recovered. (11) Thus, the Member States can avoid their obligation to make own resources available only in the situations listed in Article 17(2) of Regulation No 1150/2000 — namely where the amounts corresponding to established entitlements prove irrecoverable, either for *reasons of force majeure* or for *other reasons which cannot be attributed* to the Member States concerned.

45. That strict mechanism is justified by the need to ensure the 'efficient and rapid' availability of the European Union's own resources. (12) Among other purposes, it seeks to hold the Member States accountable.

46. It is also for that reason that breach of the obligations highlighted above leads to the imposition of high rates of interest under Article 11 of Regulation No 1150/2000. In that regard, according to the Court, there is '*an inseparable link*' between the obligation to establish own resources, the obligation to credit them to the Commission's account within the prescribed time limits and the obligation to pay interest. (13)

47. In that connection, the Commission is responsible for ensuring that the Member States fulfil their obligations. It is entitled to commence infringement proceedings under Article 258 TFEU where a Member State fails to fulfil those obligations.

48. In the event of a dispute as to the existence of TOR or the amount owed by a Member State, that State may avoid the penalty of interest 'by making available to the Commission the amount claimed while expressing reservations as to the validity of that institution's arguments'. (14)

49. However, the Court has not set out detailed rules for payments made subject to reservations. Nor has it ruled on whether such a payment may — ultimately — be regarded as having been made 'in full' from a legal perspective or whether the Member State concerned is in breach of its obligations.

50. The Court has merely noted that, although the Commission cannot refuse a Member State the right to make a payment subject to reservations, the possibility of (the Commission) negotiating the conditions and procedures of payment runs counter to the TOR system. (15)

51. That situation arises from a particular characteristic of the TOR system: the Commission has no *decision-making* power under Regulation No 1150/2000.

52. Although under Article 17(4) of Regulation No 1150/2000 the Commission is bound to make *comments* as to whether a Member State may be released from its obligation to make certain amounts available, it is not required to adopt a *decision* in that regard. Similarly, the Member States retain control over the accounts which they hold on the Commission's behalf and may even withdraw the disputed amounts, (16) at the risk of having potentially to face infringement proceedings and payment of the abovementioned interest.

53. This is not an oversight on the part of the legislature: it deliberately chose not to confer such a power on the Commission. In a proposal to amend Regulation No 1150/2000 dating from 2003, the new Article 17(4) provided for the Commission to take a '*substantiated decision*' in the event of disagreement as to whether a definitive failure to recover an amount was due to *force majeure* or other reasons not attributable to the Member State concerned. (17) The Council rejected that proposal. The Member States preferred to maintain their powers and denied the Commission any decision-making power over the amounts to be paid.

54. However, that lack of decision-making power does not call into question the Commission's role as guardian of the Treaties, nor its power to provide legal opinions on the Member States' obligations under Regulation No 1150/2000.

55. In this connection, as academic writers have pointed out, the Commission (sometimes) has to send warning letters to recalcitrant Member States. (18)

56. The Court has already held that such letters do not constitute 'actionable measures' under Article 263 TFEU. (19) Member States wishing to challenge the Commission's assessment are therefore faced with an awkward dilemma: either they refuse to make the amounts claimed available to the Commission, thereby incurring the risk of having to pay extremely high interest, or, in order to guard against that risk, they make a payment subject to reservations, without, however, being certain that the Commission will initiate infringement proceedings enabling the Court to rule on the merits of the dispute. (20)

57. The appeal before the Court in the present case is symptomatic of that almost Kafkaesque legal situation. The Czech Republic wished to challenge the Commission's position in the letter at issue. In order to do so, it made a payment subject to reservations and brought an action for annulment under Article 263 TFEU. The General Court declined to uphold that action on the ground that the letter at issue did not constitute an actionable measure. The Commission considered that there had been no failure to fulfil obligations in so far as the payment claimed had been made; it would seem that, in the Commission's view, the reservations were devoid of legal effect. (21)

58. It is against that particular legal backdrop that I shall now analyse the single ground of appeal raised by the appellant and the submissions of the other parties to the appeal.

Arguments of the parties

59. By its single plea in law, alleging infringement of Article 263 TFEU, read in conjunction with Article 47 of the Charter, the Czech Republic claims — in essence — that it lacks an effective legal remedy allowing it to bring before the Courts of the European Union its dispute with the Commission concerning the existence (or absence) of an obligation to make TOR available, contrary to what the General Court stated in paragraph 81 et seq. of the order under appeal.

60. As a preliminary point, the Czech Republic points out that, when the Commission asks a Member State to make available to it an amount of own resources by means of a document such as the letter at issue, that Member State is — de facto — obliged to pay the amount claimed within the prescribed period, notwithstanding any reservations regarding the Commission's position. If it does not do so, that Member State risks having to pay high interest for failure to fulfil its obligation to make TOR available. The amount of interest due depends in practice on the date on which the Commission initiates the infringement

procedure and on the duration of that procedure, and is therefore outwith the control of the Member State concerned.

61. First, in view of the Commission's discretion in commencing infringement proceedings (22) and the absence of any time limit for doing so, a Member State cannot be certain that the merits of the dispute will be examined by the Court. In so far as access to the Court depends, in that respect, on the Commission's goodwill, the right to effective judicial protection is not guaranteed. (23)

62. The position would be different only if, following a payment subject to reservations made by the Member State in question, the Commission was required to initiate infringement proceedings against that Member State. As matters stand, (24) however, no such obligation is apparent either from the order under appeal or from the Court's case-law on payments subject to reservations. In addition, that case-law is imprecise with regard to the conditions and effects of such a payment, which creates a state of legal uncertainty and undermines the right to effective judicial protection.

63. Second, the Czech Republic submits that the Commission's current practice shows that it does not consider itself bound to bring infringement proceedings where a payment is made subject to reservations. (25)

64. Third, the Czech Republic considers that the shortcomings in the judicial protection of a Member State (in the event of a payment subject to reservations), as outlined in the arguments set out above, constitute an element of the 'factual and legal context' in which the letter at issue was sent, which is a relevant criterion for assessing whether that letter is open to challenge. (26) In view of that context, the concepts of 'binding legal effects' and 'actionable measure' should be interpreted in a manner different from that adopted by the General Court in the order under appeal in order to guarantee the right to effective judicial protection.

65. The Czech Republic observes that it re-stated its reservations (regarding its obligation to make the disputed amount available) and requested the Commission to repay that amount *or* initiate infringement proceedings, without success.

66. The Kingdom of the Netherlands, which intervened in support of the form of order sought by the Czech Republic, asserts that the letter at issue was intended to produce legal effects, in particular in so far as it determined independently the date from which interest is payable.

67. The Commission contends that the single ground of appeal is unfounded.

68. First, it notes that the Czech Republic does not call into question the interpretation (set out, inter alia, in paragraphs 42 and 47 of the order under appeal) of Decision 2007/436 and Regulation No 1150/2000, according to which it is for the Member States to establish the European Union's own resources and those instruments do not provide for any specific procedure allowing the Commission to adopt a decision regarding the obligation to make TOR available. On that basis, the Commission considers that it has no decision-making power.

69. In the absence (undisputed by the Czech Republic) of such a power, the Commission is entitled to communicate to the Member State concerned its opinion on the classification of certain sums as TOR belonging to the European Union. However, since such an opinion has no legal effect, it cannot be the subject of an action for annulment.

70. In the Commission's view, the arguments which the Czech Republic bases on the right to effective judicial protection owing to the financial risk associated with interest should not lead to an alternative conclusion. According to the Commission, similar arguments have already been dismissed in *Slovakia* v *Commission*.

71. In that regard, the Commission adds in its observations on the statement in intervention of the Kingdom of the Netherlands that the latter has not put forward any arguments that would warrant distinguishing the present case from that giving rise to the judgment in *Slovakia* v *Commission*. Moreover, the obligation to pay interest is merely a necessary corollary of the failure of the Member State concerned to fulfil its obligation under the rules governing the TOR system to make those resources available to the Commission in good time (even where it disputes its obligation to pay the amounts in question).

72. The Commission also observes that, in view of the current state of the TOR system, there is only one means to settle a dispute between it and a Member State concerning that Member State's obligation to establish those resources and make them available: infringement proceedings. On that point, it refers to paragraphs 51 and 53 to 55 of the order under appeal, in which the General Court drew attention to the Court of Justice's exclusive jurisdiction in determining the Member States' obligations in that matter.

73. In its replies to the Court's questions, the Commission also stated that, despite the reservations to which it is subject, the payment made by the Czech Republic has, from a legal perspective, been made in full, and that those reservations do not constitute a failure to comply with the rules on TOR. (27) According to the Commission, the unilateral expression of reservations by the Member State concerned cannot alter the legal status of funds which must be made unconditionally available to it under the rules on TOR. Otherwise, the European Union's financial stability and credit rating are likely to be seriously undermined.

74. The Commission also notes that if a Member State is convinced that its position is valid and wishes to recover the funds made available, it may (unilaterally) make a correction to its accounts, without the need for judicial protection mechanisms to be provided to this end. However, by doing so, the Member State lays itself open to infringement proceedings, with the risk of ultimately having to pay the interest prescribed by the rules on TOR. That interest is, in a sense, the price paid by a Member State which acts against the Commission's opinion, 'at its own risk'. (28) If the Commission delayed in bringing infringement proceedings, thereby increasing the amount of interest due, the Courts of the European Union would be empowered to reduce the Member State's burden in that regard.

Assessment

75. In my view, a two-step assessment should be carried out.

76. *In the first step*, I shall consider whether the General Court erred in law in finding that the action for annulment brought by the appellant in respect of the letter at issue was inadmissible in the absence of an actionable measure. As I shall explain below, the position adopted by the General Court seems to me to be legally correct. Nevertheless, it is also undeniable that, as matters stand, there is a gap in the TOR system, in that it does not allow a Member State effectively to contest the position adopted by the Commission without running the risk of 'breaking the law' and having to pay extremely high interest.

77. For that reason, I shall, *in the second step*, consider alternative approaches that offer the Member States an effective judicial remedy in the event of a dispute over the obligation to make TOR available.

First step: Absence of an actionable measure in the present case

78. According to settled case-law, 'any provisions adopted by the institutions of the European Union, whatever their form, which are intended *to have binding legal effects*' are 'actionable measures' for the purposes of Article 263 TFEU. (29)

79. In order to ascertain whether or not a measure which has been challenged produces such effects, it is necessary to look to its substance. (30) Those effects must be assessed in accordance with objective criteria, such as the contents of that measure, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the measure. (31)

80. I note, on this point, that the General Court carried out a detailed, rigorous analysis of the context in which the letter at issue was sent, and of the Commission's powers in relation to TOR, in paragraphs 36 to 56 of the order under appeal. The General Court held that the Commission was not empowered to adopt a decision capable of producing binding legal effects and that the letter at issue must be regarded as intended to provide information and to make a mere request.

81. In view of the legal and case-law framework set out above (I refer to points 41 to 58 of this Opinion), the General Court's analysis is correct.

82. The parties to the appeal appear to agree with that finding. I point out, so far as is relevant, that at the hearing the Czech Republic was unable to establish the *precise* legal basis of the decision allegedly adopted by the Commission in the present case: as I have pointed out, no article of Regulation No 1150/2000 confers any decision-making power on the Commission.

83. As regards the content of the letter at issue, the appellant also fails to establish how the General Court's analysis in paragraphs 57 to 64 of the order under appeal is incorrect. (32)

84. As regards the argument of the Kingdom of the Netherlands that the letter at issue produces legal effects because it makes interest start to run on a date different from that laid down in Article 10(1) of Regulation No 1150/2000, I note that such an argument has already been dismissed by the Court as insufficient to confer such effects on a letter of that kind. (33)

85. In the light of the foregoing, only the question of access to effective judicial protection under Article 47 of the Charter remains.

86. The Czech Republic is in effect requesting the Court to redefine the concept of an actionable measure so as to extend it to documents such as the letter at issue, with the sole aim of establishing a remedy for Member States in the event of a dispute over the making available of TOR.

87. The General Court has pointed out, quite correctly, that the right to an effective remedy enshrined in Article 47 of the Charter is not 'intended to change the system of judicial review laid down by the Treaties'. (34) On that basis, the reinterpretation (proposed by the Czech Republic) of the concept of an 'actionable measure' in the light of that article cannot succeed since it would have the effect of setting aside an admissibility requirement in a manner which exceeds the powers conferred on the Courts of the European Union by the Treaties.

88. In addition, although it is hard to deny that the TOR system is imperfect, as I have already pointed out, (35) I doubt that an action for annulment is the most appropriate solution for bridging the gaps which I have identified.

89. The appellant's argument implies that the Commission has arrogated to itself the power of taking decisions which establish the Member States' obligations with regard to TOR. As I have observed several times, in view of the division of powers in respect of TOR, it is indisputable that the Commission does not have such a power and, moreover, has *never* claimed to exercise such a power.

90. If the Commission had assumed such a power and had actually adopted a measure producing legal effects (*quod non*), then that measure could be annulled for lack of a legal basis.

91. However — even if that argument were accepted — the fact remains that an action for annulment would not lead to any *alteration* of the Commission's alleged decision. The General Court would be required to annul it on the ground of lack of competence, without, however, being able to substitute its own assessment for that of the Commission and, therefore, without being in a position to settle the real problem: determining the obligations of the Member State concerned with regard to TOR.

92. In my view, this is therefore, in any event, a dead end.

93. On that basis, the single ground of appeal raised by the Czech Republic is ineffective and the appeal must be dismissed as unfounded, in so far as the General Court was right to conclude that the action for annulment was inadmissible in the absence of an actionable measure.

Second step: consideration of alternative solutions

94. What other solutions should be envisaged given that the Czech Republic cannot bring an action for annulment?

95. The Commission advocates the status quo. It submits that it is by no means abnormal for a Member State that disagrees with its analysis to have no choice but to 'break the law' and run the risk of incurring substantial interest in return for the hope (and not the certainty) that the situation will ultimately be examined by the Court through an action for failure to fulfil obligations. Similarly, according to the Commission, the reservations expressed by a Member State when it makes available a disputed amount by way of TOR are (de facto) devoid of any legal consequences. From a legal point of view, the payment has been made in full, and therefore infringement proceedings are unwarranted in those circumstances. At most it accepts that the submission of reservations may, in accordance with the principle of sincere cooperation, establish an obligation (on the Commission's part) to engage in 'constructive dialogue' with the Member State concerned with a view to reconciling their viewpoints. Following such a dialogue, having been duly enlightened by the Commission's wisdom, that Member State could decide to acknowledge that the Commission's assessment was well founded *or* to withdraw the funds previously made available to the Commission — thus laying itself open (once more) to the risk of having to pay high interest in the event of a judgment of the Court of Justice finding a failure to fulfil the obligation to make TOR available.

96. I do not concur with that analysis. It seems to me circular and incapable of providing a satisfactory response to the issue of access to effective judicial protection. (36)

97. In my view, the concept of payment subject to reservations must be clarified at the outset. To date, as I have explained above in points 48 to 50 of this Opinion, the Court has not elaborated on that concept or defined its legal parameters.

98. The Commission's interpretation strips those reservations of all tangible meaning and significance. In my opinion, it should, on the contrary, be held that a payment subject to reservations *cannot* be regarded as having been made in full from a legal perspective and therefore implies a *breach of obligations*. The Court has accepted that procedure so as to allow Member States to avoid adverse financial consequences (associated with the interest imposed by the TOR rules) while formally expressing disagreement as to the *legal status* of the funds concerned. (37) A payment subject to reservations means that the underlying debt remains in dispute. The Commission cannot consider such a payment as having been (definitively) made.

99. Although the funds concerned have actually been made available to the Commission, and although the Commission can use them, the Member State's reservations cannot be disregarded and require conclusive clarification. It seems to me that the infringement procedure, allowing a constructive exchange of views between the Commission and the Member State in question (at least during the pre-litigation stage), may be an appropriate forum for that purpose.

100. The following question arises: can the Commission be *required* to initiate infringement proceedings in such a situation?

101. The case-law presents two obstacles which would have to be overcome before that conclusion is reached.

102. First, as the Court has pointed out on numerous occasions, in view of the Commission's role as guardian of the Treaties, that institution alone is competent to decide whether it is appropriate to initiate proceedings against a Member State for failure to fulfil its obligations. Likewise, it alone is competent to

decide whether it is appropriate to continue the pre-litigation procedure by delivering a reasoned opinion, just as it has the option, but not the obligation, on completion of that procedure, to bring an action before the Court for a declaration that the Member State concerned is in breach of its obligations as alleged. (38) There are (a priori) no exceptions to that entirely discretionary power. (39) As regards TOR, the General Court has already held that the Commission's discretion as to whether it is appropriate to bring infringement proceedings before the Court of Justice implies that no one is entitled to require it to adopt a specific position. (40)

103. Second, as I noted in point 50 above, the Court has already held that 'the possibility of negotiating the conditions and procedures of payment runs counter' to the TOR system. (41) On the same occasion, the Court stated that the principles of sincere cooperation and legal certainty do not confer on the Member State concerned the right to require that *negotiations* be entered into, particularly in the context of infringement proceedings brought against it. (42)

104. To sum up, according to that case-law, the Commission therefore has discretionary power and the Member State concerned may indeed *express reservations*, but it is *not* entitled to require the Commission to initiate infringement proceedings *nor* to make its payment subject to the initiation of such proceedings. (43)

105. In order to overcome those two obstacles in the case-law, the Court will therefore have to find — on a purely exceptional basis — that the Commission is *obliged* to initiate infringement proceedings in the event of payment subject to reservations. That obligation will be strictly limited to the field of own resources. (44)

106. That obligation to act is justified for two reasons.

107. First, under Article 17(1) TEU, the Commission 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them'. The Commission oversees the application of EU law under the control of the Court of Justice. To that end, it is required to ensure that Regulation No 1150/2000 is properly applied. (45) In this connection, it must monitor and ensure that the Member States are making TOR available correctly. As I have stated above, a payment subject to reservations can hardly be regarded as having been made in full and requires some clarification which the Court will ultimately have to provide. (46)

108. Second, such an obligation is also justified in the light of the principle of sincere cooperation enshrined in Article 4(3) TEU and reflected in recital 21 of Regulation No 1150/2000, (47) read in conjunction with Article 47 of the Charter, which lays down the right to an effective remedy. Unless such an obligation is placed on the Commission, and given its current practice of regarding a payment subject to reservations as having been made 'in full', the dispute between the Commission and the Member State concerned over the validity of the obligation to make TOR available will persist (48) and never be decided by the Court. The Member State concerned will not be able to obtain a ruling on the compatibility of its conduct with the TOR rules from the body competent to give such a ruling, namely the Court. (49)

109. If the Court refuses to find that the Commission is under such an obligation, what other approach could be considered to allow the Czech Republic to submit the dispute to review by the Courts of the European Union and, if appropriate, to have the disputed amount refunded?

110. In my view, an action for *damages* could also enable that dispute to be resolved by the General Court, (50) allowing the Member State in question to recover the disputed amount in an orderly legal fashion.

111. The TOR system is based on the idea that those resources belong to the European Union *as soon as they are established*. Theoretically, the Member States are simply required to act as the collectors of those resources and are not intended to be impoverished by collecting and managing them. The position is different where such resources prove irrecoverable, but the Member State concerned is unable to plead

force majeure or other reasons which cannot be attributed to it: in such a situation, the Member State must make those resources available *from its own funds.*

112. If there is a dispute concerning the entitlement and the Member State, whilst entering reservations, has made payment, it cannot thereafter retrieve the sum in dispute without laying itself open to the financial risks previously identified.

113. In that context, two routes to compensation must be examined under Article 268 and the second paragraph of Article 340 TFEU. (51) These are an action for non-contractual liability for a wrongful act and an action for unjust enrichment (action '*de in rem verso*'), the existence of which was established by the Court in *Masdar*. (52)

114. In my view, the first route (non-contractual liability for a wrongful act) must be ruled out.

115. According to settled case-law, the non-contractual liability of the European Union and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the *unlawfulness of the conduct* of which the institutions are accused, the fact of *damage* and the existence of a *causal link* between that conduct and the damage complained of. (53)

116. As regards the unlawfulness of the act or omission at issue, the court must be able to establish the existence of a *sufficiently serious breach of a rule of law intended to confer rights on individuals* (54) resulting from a deliberate choice or negligence on the part of the institution concerned.

117. In the present case, it should be borne in mind that the Commission has no decision-making power as regards obligations to make TOR available; furthermore, a Member State cannot be regarded as an individual; and finally, the existence of a mere difference in the manner in which the Commission and that Member State interpret the legislation is not sufficient to establish a '*sufficiently serious breach*' of a rule of law constituting a *wrongful act* on the part of the Commission. (55)

118. Without such a breach, there is no need to determine whether the other two conditions referred to in point 115 (above) are met. (56)

119. That first route to compensation must therefore be abandoned.

120. I turn to examine the second route to compensation referred to above: the action for unjust enrichment.

121. In *Masdar*, the Court found that, 'according to the principles common to the laws of the Member States, a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss'. (57) In that connection, 'a claim for restitution based on unjust enrichment of the European Union requires, in order to succeed, proof of an enrichment on the part of the European Union for which there is no legal basis and of impoverishment on the part of the applicant which is linked to that enrichment'. (58)

122. Actions for unjust enrichment do not fall under the rules governing non-contractual liability in the strict sense, (59) which, to arise, requires the conditions set out in point 115 of this Opinion to be satisfied.

123. It is generally accepted in the tradition of countries governed by civil law that an applicant bringing a claim for unjust enrichment must produce evidence of: (i) an enrichment, (ii) an impoverishment, (iii) a causal link between the enrichment and the impoverishment, (iv) the subsidiary nature of that action, and (v) the absence of cause for the enrichment and impoverishment. (60)

124. The action is subsidiary in that it 'cannot serve as a roundabout means of providing what the law does not allow to be granted'. (61) The subsidiary nature of an action for unjustified enrichment means that it

cannot succeed if the applicant had another remedy which he has allowed to lapse, (62) in particular by letting the limitation period expire.

125. The enrichment must be devoid of any legal basis, meaning that the reason for the transfer of property cannot be a legal or contractual obligation or a voluntary disposition (such as, for example, a gift).

126. Here, in the case of payment subject to reservations, it seems to me that the five elements referred to in point 123 of this Opinion are present.

127. As I pointed out in point 111 (above), when a Member State resigns itself to paying, from its own funds, TOR which it was unable to recover from the debtor (who should have settled the customs debt), the Member State is impoverished and, in consequence, the European Union is correspondingly enriched. The causal link is plain. It is equally undeniable that, in such circumstances, an action *de in rem verso* would be subsidiary since there is no remedy allowing the Member State concerned to challenge the Commission's assessment and recover the disputed amount. Finally, in my view, once the General Court has found, in a declaratory judgment, that the Member State in question was not in fact required to make the disputed amount available to the Commission, the payment (whether or not subject to reservations) automatically becomes devoid of any legal basis. Since that finding is *retroactive*, the fifth condition (the absence of cause) is satisfied.

128. It will be for the General Court, ruling on that action, to determine the exact amount to be repaid to the Member State concerned. In my view, in order not to upset the financial equilibrium of the EU institutions, only the funds which that Member State actually made available to the European Union should be reimbursed. Those funds are not intended to generate interest for the Member State.

129. Finally, it will also be for the General Court to assess the action's compliance with admissibility requirements, in particular the rules on limitation. (63)

Conclusion

130. In my view, the ground of appeal relied on by the Czech Republic must be rejected as unfounded and the appeal must therefore be dismissed.

131. Nevertheless, it would be appropriate for the Court to respond to the issue raised by this appeal by finding, as I have explained in points 100 to 108 of this Opinion, that a payment made subject to reservations cannot be regarded as having been made in full from a legal standpoint and that, in such circumstances, the Commission is obliged to bring infringement proceedings in order to establish that the Member State concerned has breached its obligations to make TOR available.

132. If infringement proceedings are not brought, the only other route for submitting such a dispute for consideration by the Courts of the European Union would be an action for unjust enrichment.

133. In my view, the infringement proceedings route is the most suitable since it enables the Court to rule on the substance of the matter, namely compliance by the Member State concerned with its obligations with regard to TOR, and, where appropriate, to establish a failure to fulfil those obligations. The major disadvantage, the significance of which should not be underestimated, is that this route would require making an exception to the rule laid down in case-law that the Commission enjoys complete discretion over whether to bring infringement proceedings. That obstacle is not insurmountable provided that that exception is clearly *restricted* to TOR.

134. The route of an action for damages (based on unjust enrichment) seems to me less appropriate since it would result in the General Court being required (indirectly) to rule on a Member State's compliance with its obligations under EU law. That is not its role within the current judicial framework. However, that route is still acceptable as a default solution.

135. In the future, it is plainly desirable that the legislature should itself address this issue and improve the functioning of the TOR system by providing for an adequate judicial review mechanism. Pending that initiative, however, it is for the Court to decide the matter before it by relying on the procedural tools that exist in EU law.

Costs

136. Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

137. Since the Commission has applied for costs to be awarded against the Czech Republic and the Czech Republic has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission.

138. Article 140(1) of the Rules of Procedure, which is also applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the Member States and institutions which intervene in the proceedings are to bear their own costs.

139. Consequently, the Kingdom of the Netherlands must bear its own costs.

Findings

140. In the light of the foregoing considerations, I propose that the Court should:

– dismiss the appeal;

– order the Czech Republic to bear its own costs and to pay those incurred by the European Commission;

– order the Kingdom of the Netherlands to bear its own costs.

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1 Original language: French.

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2 T-147/15, not published, EU:T:2018:395 ('the order under appeal').

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3 OJ 2007 L 163, p. 17.

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4 Council Regulation of 22 May 2000 implementing Decision 2007/436/EC, Euratom on the system of the European Communities' own resources (OJ 2000 L 130, p. 1), as amended by Council Regulation (EC, Euratom) No 2028/2004 of 16 November 2004 (OJ 2004 L 352, p. 1) and by Council Regulation (EC, Euratom) No 105/2009 of 26 January 2009 (OJ 2009 L 36, p. 1) ('Regulation No 1150/2000'). For the sake of completeness, I note that Regulation No 1150/2000 has now been repealed. Its provisions have been largely reproduced in Council Regulation (EU, Euratom) No 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements (OJ 2014 L 168, p. 39).

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5 WOMIS is the abbreviation for 'Write-Off Management and Information System'. It is a management and information system used in writing off established entitlements which prove irrecoverable. For further details on this subject, see also: *Eighth report from the Commission on the operation of the inspection arrangements for*

traditional own resources (2013–2015) (Article 18(5) of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000), COM(2016) 639 final, point 5.1.

6 Judgment of 25 October 2017 (C-593/15 P and C-594/15 P, EU:C:2017:800; '*Slovakia* v *Commission*').

7 Judgment of 25 October 2017, C-599/15 P, EU:C:2017:801.

8 For further discussion of the system of own resources, see: Albert, J.-L., *Le droit douanier de l'Union européenne*, Bruylant, Brussels, 2019, pp. 132 to 144; Berlin, D., *Politiques de l'Union européenne*, Bruylant, Brussels, 2016, pp. 53 to 64.

9 The Court has also made clear that the Member States are required to establish the European Union's entitlement to own resources as soon as their customs authorities have the necessary particulars and, therefore, are in a position to calculate the amount of duties arising from a customs debt and determine the debtor: see, to that effect, judgment of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraphs 58 and 59 and the case-law cited).

10 Judgment of 7 April 2011, *Commission* v *Finland* (C-405/09, EU:C:2011:220, paragraph 37 and the case-law cited).

11 Article 6(3) of Regulation No 1150/2000 allows a distinction to be drawn, in accounting terms, for entitlements which have not yet been recovered or have been challenged. Amounts declared or deemed irrecoverable are to be definitively removed from the accounts pursuant to Article 17(2) of Regulation No 1150/2000.

12 See judgment of 5 October 2006, *Commission* v *Belgium* (C-378/03, EU:C:2006:639, paragraph 48 and the case-law cited).

13 Furthermore, that interest is payable regardless of the reason for the delay in making the entry in the Commission's account. See, inter alia, judgment of 15 November 2005, *Commission* v *Denmark* (C-392/02, EU:C:2005:683, paragraph 67 and the case-law cited).

14 See, by way of example, judgment of 12 September 2000, *Commission* v *United Kingdom* (C-359/97, EU:C:2000:426, paragraph 31 and the case-law cited).

15 Order of 21 June 2007, *Finland* v *Commission* (C-163/06 P, EU:C:2007:371, paragraphs 32 and 35 and the case-law cited).

16 That was, at least, the interpretation advocated by the Commission in its written pleadings and at the hearing: see points 73 and 74 of this Opinion.

17 See the explanatory memorandum and Article 1, paragraph 13.3, of the Proposal for a Council Regulation amending Regulation (EC, Euratom) No 1150/2000 implementing Decision 2000/597/EC, Euratom on the

system of the Communities' own resources, COM(2003) 366 final.

18 Potteau, A., 'Observations' (note on *Slovakia* v *Commission*, cited above), in Picod, F., *Jurisprudence de la CJUE 2017. Décisions et commentaires*, Bruylant, Brussels, 2018, p. 1023.

19 See, in particular, *Slovakia* v *Commission*, paragraph 57.

20 That problem had already been identified by one of my esteemed colleagues. I refer to the Opinion of Advocate General Kokott in *Slovakia* v *Commission* and *Romania* v *Commission* (C-593/15 P, C-594/15 P and C-599/15 P, EU:C:2017:441, points 104 to 107).

21 The Commission argues that the submission of such reservations (at most) obliges it to engage in constructive dialogue with the Member State concerned with a view to seeking to reconcile their viewpoints, in accordance with the principle of sincere cooperation (see also point 95 of this Opinion and footnotes 24 and 25).

22 The Czech Republic refers to the judgment of 11 August 1995, *Commission* v *Germany* (C-431/92, EU:C:1995:260, paragraph 22).

23 The Czech Republic refers, by analogy, to the judgment of 13 December 2017, *El Hassani* (C-403/16, EU:C:2017:960, paragraph 38 et seq.).

24 The Czech Republic adds that the same question is the subject of an action for failure to act in pending Case T-13/19. In that action, the Czech Republic alleges that the Commission has failed to initiate infringement proceedings against it, despite the fact that its payment was subject to reservations.

25 That point was duly confirmed by the Commission: see point 73 of this Opinion. In pending Case T-13/19, the Commission responds that, since the Member State has made the requisite payment, there is no infringement that may be attributed to that Member State and, therefore, no legal basis on which the Commission could initiate infringement proceedings.

26 The Czech Republic refers to the Opinion of Advocate General Kokott in *Slovakia* v *Commission* and *Romania* v *Commission* (C-593/15 P, C-594/15 P and C-599/15 P, EU:C:2017:441, point 40).

27 Thus, where a Member State submits reservations, the Commission is, at most, required to engage in constructive dialogue with that State with a view to reconciling their viewpoints: see points 57 and 95 of this Opinion.

28 The Commission refers in particular to the Opinion of Advocate General Darmon in *Commission* v *Netherlands* (C-96/89, EU:C:1990:374, point 32).

29 See *Slovakia* v *Commission*, paragraph 46 and the case-law cited. Emphasis added.

30 Judgment of 22 June 2000, *Netherlands* v *Commission* (C-147/96, EU:C:2000:335, paragraph 27 and the case-law cited).

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31 Judgment of 13 February 2014, *Hungary* v *Commission* (C-31/13 P, EU:C:2014:70, paragraph 55 and the case-law cited).

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32 I would add that although certain phrases in the letter at issue suggest that the Commission had 'refused' to release the Czech authorities from the obligation to make available TOR, as they had requested, the General Court nevertheless held that, in view of its context and the Commission's powers, that letter did not contain a *decision* on a request to be so released but merely an opinion (paragraphs 57 to 59 and 66 to 70 of the order under appeal). This view concurs with what academic writers have found with regard to TOR: see point 55 of this Opinion.

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33 See *Slovakia* v *Commission*, paragraph 61. I note that, on this point, the Court declined to adopt the analysis advanced by my esteemed colleague, Advocate General Kokott: see Opinion of Advocate General Kokott in *Slovakia* v *Commission* and *Romania* v *Commission* (C-593/15 P, C-594/15 P and C-599/15 P, EU:C:2017:441, points 50 to 59). See also in this regard: Potteau, A., op. cit., pp. 1022 and 1023.

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34 See paragraph 81 of the order under appeal, and *Slovakia* v *Commission*, paragraph 66.

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35 See points 56 and 57 of this Opinion.

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36 Similarly, I would reject the argument, put forward at the hearing by the Commission, that the Member State alone holds the key to the matter since it can, on its own initiative, recover the disputed amount from the account opened in the Commission's name. In doing so, the Member State concerned is once again required to break the rules in an attempt to trigger judicial proceedings. The Commission's reasoning is clearly circular and does not provide a satisfactory solution to the lack of an effective judicial remedy with which we are confronted in the present case. In that regard, the fact that the Court may *reduce* the amount of interest (if the Commission delays in bringing an action, for example) does not compensate for the financial risk incurred by the Member State in question.

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37 See point 48 of this Opinion and the case-law cited.

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38 See judgment of 16 July 2015, *Commission* v *Bulgaria* (C-145/14, EU:C:2015:502, paragraph 24 and the case-law cited).

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39 For further discussion, see: Von Bardeleben, E., Donnat, F., and Siritzky, D., *La Cour de Justice de l'Union européenne et le droit du contentieux européen*, La Documentation française, Paris, 2012, p. 189.

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40 See order of 9 January 2006, *Finland* v *Commission* (T-177/05, not published, EU:T:2006:1, paragraph 39).

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41 Order of 21 June 2007, *Finland* v *Commission* (C-163/06 P, EU:C:2007:371, paragraph 35).

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42 Order of 21 June 2007, *Finland* v *Commission* (C-163/06 P, EU:C:2007:371, paragraph 36). Emphasis added.

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43 I note in that regard that the expression ‘conditional payment’, used in particular in the orders of 9 January 2006, *Finland* v *Commission* (T-177/05, not published, EU:T:2006:1), and of 21 June 2007, *Finland* v *Commission* (C-163/06 P, EU:C:2007:371), is inappropriate: under the TOR rules, the Member States are *not* entitled to make those resources available subject to any conditions. They are only entitled to *express reservations* while making the legally required payment *unconditionally.*

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44 In so far as is relevant, I also note that the Commission has itself in the past envisaged such an obligation as a possibility: see, to that effect, the Opinion of Advocate General Kokott in *Slovakia* v *Commission* and *Romania* v *Commission* (C-593/15 P, C-594/15 P and C-599/15 P, EU:C:2017:441, point 106).

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45 The general logic of Regulation No 1150/2000 is based on the Commission’s monitoring and control function (see, in particular, recitals 8, 9 and 11 thereof). It is also useful to note that current legislation and, more specifically, Council Regulation (EU, Euratom) No 608/2014 of 26 May 2014 laying down implementing measures for the system of the own resources of the European Union (OJ 2014 L 168, p. 29) have defined the powers and responsibilities of the Commission and its officials in respect of TOR far more precisely.

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46 In the interests of the sound administration of the budget, although the Commission is empowered to use the funds made available, it would nevertheless be advisable for it to take account of the uncertainty in their regard owing to the reservations, pending the Court’s ruling.

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47 It will be recalled that, according to that recital, close collaboration between Member States and the Commission will facilitate proper application of the financial rules relating to own resources.

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48 In the present case, this is demonstrated by the unsuccessful efforts of the appellant, which has several times requested the Commission to bring infringement proceedings against it — those efforts culminating in the initiation of an action for failure to act in Case T-13/19, in which the appellant requested the General Court to declare that the Commission had failed to fulfil its obligations under Article 4(3) TEU, read in conjunction with Article 47 of the Charter, in that, following the conditional provision of TOR, the Commission did not bring infringement proceedings against the Czech Republic but nor did it reimburse the disputed sum. See, in that regard, footnotes 24 and 25 above.

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49 According to settled case-law, ‘the Commission is not empowered to determine conclusively … the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with [EU] law’. See, to that effect, judgment of 20 March 2003, *Commission* v *Germany* (C-135/01, EU:C:2003:171, paragraph 24).

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50 As there would be no infringement proceedings, the General Court’s decision in an action for damages would not conflict with the exclusive jurisdiction of the Court of Justice to declare a failure to fulfil obligations. See Opinion of Advocate General Kokott in *Slovakia* v *Commission* and *Romania* v *Commission* (C-593/15 P, C-594/15 P and C-599/15 P, EU:C:2017:441, point 109).

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51 It will be recalled that, under Article 268 TFEU, the Court of Justice of the European Union has jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of

Article 340 TFEU. The second paragraph of Article 340 TFEU states as follows: ‘in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties’.

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52 I refer to the judgment of 16 December 2008, *Masdar (UK)* v *Commission* (C-47/07 P, EU:C:2008:726, ‘*Masdar*’). Thus, the possibility of bringing an action for unjust enrichment of the European Union cannot be denied to a person solely on the ground that the TFEU does not make express provision for a means of pursuing that type of action. As the Court has already held, if Articles 268 and 340 TFEU were to be construed as excluding that possibility, ‘the result would be contrary to the principle of effective judicial protection, laid down in the case-law of the Court and confirmed in Article 47 of [the Charter]’: see also, to that effect, judgment of 18 September 2018, *Barroso Truta and Others* v *Court of Justice of the European Union* (T-702/16 P, EU:T:2018:557, paragraph 105).

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53 Judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 106 and the case-law cited). Emphasis added.

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54 See, by way of example, judgment of 19 April 2007, *Holcim (Deutschland)* v *Commission* (C-282/05 P, EU:C:2007:226, paragraphs 47 to 49). Emphasis added.

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55 So far as it is relevant, I should point out that the Court has expressly refused to recognise the existence of a system of strict liability (without fault): I refer here to the judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 175). In the present case, it seems clear to me that, when acting in its capacity as guardian of the Treaties, and even if its interpretation in respect of a complex matter of law may ultimately prove to be incorrect, the Commission cannot ipso facto be accused of a *sufficiently serious* breach of EU law (or, more generally, of a wrongful act) in that context.

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56 Where the Court finds that there is no act or omission by an institution of an unlawful nature, so that the first condition for non-contractual liability of the European Union is not satisfied, it may dismiss the application in its entirety without it being necessary for it to examine the other preconditions for such liability (judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 166 and the case-law cited)).

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57 *Masdar*, paragraph 44.

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58 See judgment of 28 July 2011, *Agrana Zucker* (C-309/10, EU:C:2011:531, paragraph 53, in which the Court also refers to *Masdar*).

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59 *Masdar*, paragraph 49.

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60 See, for example, in Belgian law: Van Ommeslaghe, P., *Traité élémentaire de droit civil*, t. II, *Les obligations*, vol. 2 (*Source des obligations — deuxième partie*), Brussels, Bruylant, 2013, p. 1138, No 782. This mechanism has been laid down, in Belgian law, by case-law. In French law, it has been codified in legislation: see Articles 1303 to 1303-4 of the Code civil (Civil Code), relating to ‘unjust enrichment’. A similar regime exists in the common law system. As is often the case at common law, ‘unjust enrichment’ in English law is a complex edifice, based on case-law rather than legislation. Its precise structure, scope and nature are still uncertain: see, for a general account, Burrows, A., *A Restatement of the English Law of Unjust Enrichment*,

Oxford University Press, 2012, and Virgo, G., *The Principles of the Law of Restitution* (3rd éd.), Oxford University Press, 2015. In its judgment in *Bank of Cyprus UK Ltd* v *Menelaou* [(2015) UKSC 66], the Supreme Court of the United Kingdom held that before upholding an action based on unjust enrichment, the court must ask itself four questions and consider (i) whether the defendant has been enriched; (ii) whether that enrichment was at the claimant's expense; (iii) whether the enrichment was unjust; and (iv) whether there are any defences available to the defendant. There is ample case-law to substantiate and illuminate each of those criteria.

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61 Cour de cassation (Court of Cassation, Belgium), judgment of 22 August 1940, *Pasicrisie*, 1940, p. 205. In other words, such an action cannot be used as an abuse of process. Similarly, the General Court has already held that a claim for damages must be held to be inadmissible when it is in fact aimed at securing the withdrawal of an individual decision which has become definitive and would, if upheld, have the effect of nullifying the legal effects of that decision: see judgment of 15 March 1995, *Cobrecaf and Others* v *Commission* (T-514/93, EU:T:1995:49, paragraphs 59 and 60 and the case-law cited). That decision must also be actionable, which is not (by definition) the case here.

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62 Cour de cassation (Court of Cassation, Belgium), judgment of 25 March 1994, *Pasicrisie*, 1994, p. 305.

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63 It will be recalled that Article 46 of the Statute of the Court of Justice of the European Union provides that proceedings against the European Union in matters arising from non-contractual liability are to be barred after a period of five years from the occurrence of the event giving rise thereto. It will therefore be for the General Court to determine the exact date on which the enrichment (and the associated impoverishment) occurred.

JUDGMENT OF THE COURT (Sixth Chamber)

28 February 2019 (*)

(Appeal — Arbitration clause — Article 272 TFEU — Concept of a ‘declaratory action’ — Article 263 TFEU — Concept of an ‘administrative decision’ — Grant agreement concluded under the Competitiveness and Innovation Framework Programme (CIP) (2007-2013) — Audit reports finding certain declared costs to be ineligible)

In Case C-14/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 5 January 2018,

Alfamicro — Sistemas de computadores, Sociedade Unipessoal, Lda, established in Cascais (Portugal), represented by G. Gentil Anastácio and D. Pirra Xarepe, advogados,

appellant,

the other party to the proceedings being:

European Commission, represented by J. Estrada de Solà and M.M. Farrajota, acting as Agents,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of C. Toader (Rapporteur), President of the Chamber, L. Bay Larsen and M. Safjan, Judges,

Advocate General: J. Kokott,

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 appeal, Alfamicro — Sistemas de computadores, Sociedade Unipessoal, Lda (‘Alfamicro’) requests that the Court of Justice set aside the judgment of the General Court of the European Union of 14 November 2017, *Alfamicro* v *Commission* (T-831/14, not published, EU:T:2017:804) (‘the judgment under appeal’), by which the General Court dismissed Alfamicro’s action under Article 272 TFEU seeking, in essence, a declaration that the appellant does not owe a debt to the European Commission under Grant Agreement No 238882 on the EU financing of the ‘Save Energy’ project, concluded under the Competitiveness and Innovation Framework Programme (2007-2013) established by Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 (OJ 2006 L 310, p. 15) (‘the grant agreement at issue’).

Legal context

2 In accordance with Article 1(2) of Decision No 1639/2006, read in the light of recital 2 thereof, that decision was adopted in order to contribute to the competitiveness and innovative capacity of the European Community as an advanced knowledge society, with sustainable development based on robust economic growth and a highly competitive social market economy with a high level of protection and improvement of the quality of the environment. That decision was repealed from 31 December 2013 by Regulation (EU) No 1287/2013 of the European Parliament and of the Council of 11 December 2013 establishing a Programme for the Competitiveness of Enterprises and small and medium-sized enterprises (COSME) (2014 — 2020) and repealing Decision No 1639/2006 (OJ 2013 L 347, p. 33).

3 According to recital 19 of Decision No 1639/2006, the purpose of that decision was to take appropriate measures to prevent irregularities and fraud, as well as the necessary steps to recover funds lost, wrongly paid or incorrectly used, in accordance with Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities (OJ 1996 L 292, p. 2) and Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

4 The decision's objectives, as set out in Article 2 thereof, include, in Article 2(2)(b), the Information and Communications Technologies (ICT) Policy Support Programme.

5 Article 9 of that decision, headed 'Protection of the Communities' financial interests', provides, in paragraph 3 thereof:

'All implementing measures resulting from this Decision shall provide, in particular, for supervision and financial control by the Commission or any representative authorised by it, and by audits by the European Court of Auditors, if necessary on-the-spot audits.'

Background to the dispute

6 Alfamicro is a single-shareholder company governed by Portuguese law providing computer and information technology services. On 9 June 2009, it signed the grant agreement at issue with the Commission.

7 The aim of the 'Save Energy' project, which was financed by that agreement, was to raise awareness among citizens and policy-makers of the issues surrounding energy efficiency. It ran from 1 March 2009 to 31 October 2011.

8 That project involved a consortium of 17 partners from 5 Member States, including Alfamicro, which acted as a coordinator. It coordinated the implementation of pilot technological and social innovation projects. Further, it participated in other European projects in which it took the role of technical consultant or project coordinator.

9 Article 5(1) of the grant agreement at issue set the maximum Community financial contribution at EUR 2 230 000 and specified that that financial contribution was to be limited to 50% of the eligible costs.

10 Article 10 of that agreement, headed 'Applicable law and competent court', provided, in the first paragraph thereof, that the agreement was to be governed by its terms, the relevant Community acts related to the Competitiveness and Innovation Framework Programme, the Financial Regulation applicable to the general budget of the European Communities and its implementing rules, other relevant Community law and, on a subsidiary basis, the law of Belgium.

11 According to the second paragraph of Article 10 of that agreement, ‘the beneficiary is aware and agrees that the Commission may take decisions to impose pecuniary obligations, which shall be enforceable in accordance with Article 256 of the Treaty establishing the European Community’.

12 The third paragraph of Article 10 of that agreement states that, notwithstanding the Commission’s right directly to adopt the decisions referred to in the second paragraph of Article 10, the General Court or, on appeal, the Court of Justice of the European Communities was to have sole jurisdiction to hear any dispute between the Community and any beneficiary concerning the interpretation, application or validity of the grant agreement at issue and the legality of the decisions as referred to above.

13 Annex II to the grant agreement at issue — the terms of which were incorporated into that agreement — set out the general conditions to which that agreement was subject (‘the General Conditions’). Article II.28 of the General Conditions, headed ‘Financial audit’, provided, in the first subparagraph of paragraph 1 thereof, that the Commission was entitled to initiate an audit in respect of the beneficiary at any time during the implementation of the project concerned and up to five years after the date of the final payment. Under the second subparagraph of that paragraph, that procedure was to be carried out by external auditors or by the Commission services themselves, including the European Anti-Fraud Office (OLAF). According to the wording of paragraph 6 of Article II.28 of the General Conditions, the European Court of Auditors was to have the same rights as the Commission, notably the right of access, for the purpose of checks and audits.

14 The duration of the ‘Save Energy’ project, initially envisaged to be 30 months, was subsequently extended to 32 months, meaning that it ended on 3 October 2011. After the project, the Commission made a payment of EUR 680 300, which represented 50% of the costs declared by Alfamicro.

15 By letter of 25 October 2012, the Court of Auditors informed Alfamicro that, pursuant to Article 287 TFEU and as provided for under paragraph 6 of Article II.28 of the General Conditions, it would be the subject of an audit to be carried out in its offices in Cascais (Portugal) from 17 to 19 December 2012. The Court of Auditors completed its audit on 11 April 2013.

16 The preliminary audit report, sent to Alfamicro by letter of 29 April 2013, was subsequently revised by the Court of Auditors, taking into account the provisional observations submitted by the appellant. By letter of 25 August 2014, the Commission sent Alfamicro the final audit report and informed it that the audit was now closed. As a result of the audit, the Court of Auditors rejected the costs declared by Alfamicro in respect of personnel and services provided by two of its subcontractors, as well as ‘other direct costs’, principally relating to travel costs and costs for the purchase of consumables, totalling EUR 934 262, on the basis that they fell outside of the scope of the contract and were not covered by the relevant regulations.

17 By letter of 8 September 2014 (‘the pre-information letter’), the Commission informed Alfamicro that, on the basis of the audit conclusions, it intended to recover a sum of EUR 467 131 and that a debit note for that amount would be drawn up if Alfamicro failed to submit observations within 30 days from the date of receipt of the pre-information letter. The Commission also noted in the pre-information letter that, if that amount was not paid during the period set out in the debit note, default interest would be calculated at the rate set out therein. Lastly, the Commission noted that it was entitled to recover that amount either by offsetting it or by taking measures to enforce payment. By letter of 8 October 2014, Alfamicro contested the content of the pre-information letter.

18 By letter of 28 October 2014, the Commission confirmed its position as set out in the pre-information letter and attached to its letter a debit note with the number 3241413112 for an amount of EUR 467 131 with a payment deadline of 12 December 2014.

19 Subsequently, by letters of 15 and 24 April 2015, sent to Alfamicro during the written part of the procedure before the General Court, the Commission informed Alfamicro that it would offset that debt against other amounts payable to the appellant as a beneficiary of three other projects subsidised by the

European Union. As a result of that set-off, the amount claimed by the Commission from Alfamicro is currently EUR 270 436.

The procedure before the General Court and the judgment under appeal

20 By application lodged at the Registry of the General Court on 29 December 2015, Alfamicro brought an action under Article 272 TFEU, in accordance with which the Court of Justice is to have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

21 Alfamicro asked the General Court to make a declaration that the Commission's decision allegedly contained in its letter of 28 October 2014 was invalid, nullifying all of its legal effects and, in particular, annulling the debit note for EUR 467 131 attached to that letter and issuing a credit note for the same amount in its favour.

22 Before the General Court, Alfamicro put forward pleas in law alleging infringement of the grant agreement at issue, insofar as the declared costs were found to be ineligible, and breaches of the principles of proportionality, legitimate expectations, legal certainty, sound administration and the obligation to state reasons.

23 In its reply, lodged after the set-off measures referred to in paragraph 19 above were taken by the Commission, Alfamicro extended the subject matter of its action by asking the General Court to declare those set-off measures invalid and order the Commission to annul them and repay to Alfamicro the corresponding sums, plus default interest.

24 In turn, the Commission lodged a counterclaim seeking, in essence, an order requiring Alfamicro to repay the sum wrongly paid under the grant agreement at issue.

25 The General Court classified the application lodged by Alfamicro under Article 272 TFEU as a 'declaratory action', requesting a declaration that it does not owe a debt to the Commission under the grant agreement at issue.

26 With regard to the first plea in law, alleging an infringement of the grant agreement at issue, the General Court carried out an in-depth analysis of the Court of Auditors' conclusions relating to the costs for services provided by internal consultants and subcontractors (in this instance, the companies identified as O. and D.). It upheld the assessment of the Court of Auditors and the Commission in that regard, according to which a sum corresponding to 93% of the grant paid by the Commission could not be verified and was not reliable and, consequently, could not be considered to represent costs actually incurred by Alfamicro. Consequently, the General Court held that the costs were not eligible under the grant agreement at issue and dismissed the first plea in law.

27 By its second plea in law, Alfamicro claimed that the principle of proportionality had been breached. Since the 'Save Energy' project has ended and the Commission benefited from it in full, Alfamicro claimed that it would be disproportionate to reduce the grant to only 7% of its original amount. The General Court held that, in agreements of that type, the grant is not remuneration for work carried out by the beneficiary, but a grant in respect of projects, the payment of which is subject to specific conditions. For that reason, the Commission was entitled to reimburse only eligible costs pursuant to the agreement signed with that beneficiary. Thus, the General Court found that the principle of proportionality had not been breached and rejected that plea in law.

28 By its third plea in law, Alfamicro claimed that the principles of legitimate expectations, legal certainly and sound administration had been breached. The General Court rejected that plea in law as being ineffective, as it considered that those principles did not apply in a contractual context. In any event, it found that there had been no breach of those principles in the present case.

29 Alfamicro's fourth and final plea in law was based on a breach by the Commission of the obligation to state reasons. It claimed that the reasons for the decision allegedly contained in the letter of 28 October 2014 were 'extremely brief', and that, consequently, the decision was vitiated by an error in law. The General Court rejected that plea in law and held that, as the letter was not an administrative measure, the obligation to state reasons did not apply in the present case. Further, it found that, even if that plea were to be interpreted as being based on the obligation to perform a contract in good faith, that plea could not succeed, as that letter formed part of a framework which was known to Alfamicro, that party having been sufficiently informed by the pre-information letter.

30 Accordingly, the General Court dismissed the declaratory action in its entirety.

31 With regard to the claim by Alfamicro in its reply, in which it requested that the General Court declare that the set-off measures, taken by the Commission after the application commencing proceedings had been lodged, were invalid and order the Commission to repay Alfamicro an amount equal to that set-off, plus default interest, the General Court rejected them as inadmissible on the ground that those set-off measures were administrative measures and any order that they be annulled should be requested pursuant to Article 263 TFEU. The Rules of Procedure of the General Court do not allow the nature of an ongoing action to be amended.

32 With regard to the Commission's counterclaim, the General Court found that the Court of Auditors' assessment that certain costs were ineligible was well founded and, consequently, confirmed that Alfamicro owed an amount equal to those costs to the Commission. On that basis, it ordered that Alfamicro pay to the Commission the amount still due after the set-off measures have been taken, namely EUR 277 849.93, plus EUR 26.88 in default interest per day from 20 June 2015 until the entirety of the debt arising from the grant agreement at issue has been repaid.

Forms of order sought

33 By its appeal, Alfamicro claims that the Court should:

– set aside the judgment under appeal;

– refer the case back to the General Court so that it can be heard again in the context of Article 263 TFEU; and

– order the Commission to pay all of the costs.

34 The Commission contends that the Court should:

– principally, find that the appeal brought by the appellant is inadmissible;

– in the alternative, dismiss the appeal as unfounded and, consequently, uphold the judgment under appeal; and

– order the appellant to bear all the costs.

The appeal

35 In support of its appeal, Alfamicro relies on four grounds of appeal, the first alleging that the General Court misrepresented the heads of claim in the initial application as seeking a finding of fact that Alfamicro did not owe a debt to the Commission under the grant agreement at issue, the second alleging infringement of the grant agreement at issue, the third alleging a breach of the principle of proportionality and the fourth alleging a breach of the principle of legal certainty.

The first ground of appeal, alleging infringement of Article 263 TFEU

Admissibility of the first ground of appeal

– *Arguments of the parties*

36 The Commission objects to the admissibility of the first plea in law. It relies on the fact that Alfamicro had lodged its appeal before the General Court on the basis of Article 272 TFEU and the arbitration clause in the grant agreement at issue. By bringing an appeal requesting that the Court of Justice set aside the judgment under appeal and refer the case back to the General Court so that it can give judgment on the basis of Article 263 TFEU on the validity of an alleged administrative decision adopted by the Commission in its letter of 28 October 2014, the appellant is changing the subject matter of the proceedings, contrary to Article 170 of the Rules of Procedure of the Court of Justice. The ground of appeal should therefore be rejected as inadmissible.

37 Alfamicro argues that its application initiating proceedings made it clear that it claimed that the General Court should, first, declare that the Commission's decision, which it understood to be contained in the letter of 28 October 2014, was invalid and, second, annul the debit note attached thereto. Further, it claims that the General Court acknowledged, in paragraphs 35 and 36 of the judgment under appeal, that Alfamicro was seeking an annulment of the Commission's decision by arguing that the decision contained in that letter was an administrative measure. Accordingly, the Commission's plea of inadmissibility should be rejected.

– *Findings of the Court*

38 According to the case-law of the Court of Justice, to allow a party to put forward for the first time before the Court of Justice a plea in law which it did not raise before the General Court would in effect allow that party to bring before the Court of Justice a wider case than that heard by the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the assessment by the General Court of the pleas argued before it. However, an argument which was not raised at first instance does not constitute a new plea that is inadmissible at the appeal stage if it is simply an amplification of an argument already developed in the context of a plea set out in the application before the General Court (judgment of 16 November 2017, *Ludwig-Bölkow-Systemtechnik* v *Commission*, C-250/16 P, EU:C:2017:871, paragraph 29 and the case-law cited).

39 Alfamicro did indeed request that the General Court give judgment on the basis of Article 272 TFEU and the arbitration clause in the grant agreement at issue, rather than on the basis of Article 263 TFEU.

40 However, it is apparent from paragraph 36 of the judgment under appeal that, from the outset, the appellant requested a declaration that the Commission's decision allegedly contained in the letter of 28 October 2014 was invalid. It follows that Alfamicro was indeed intending to bring an action for annulment. Additionally, the General Court noted that contradiction and found, in paragraph 41 of the judgment under appeal, that any action for annulment would be inadmissible on the ground that neither that letter nor the debit note was an administrative measure that could be challenged in the context of such an action.

41 It is clear therefrom that Alfamicro had claimed, in its action before the General Court, that the Commission's letter of 28 October 2014 had to be considered to be an administrative measure issued by that institution, even if the legal basis for its action was incorrect. As the General Court incorrectly assessed the argument in the first ground of appeal, in so far as it misconstrued the legal nature of the Commission's letter of 28 October 2014, such a ground of appeal is merely a continuation of an argument already developed in a plea in law in the application before the General Court.

42 That ground of appeal must therefore be declared admissible.

Substance

– *Arguments of the parties*

43 By its first ground of appeal, Alfamicro claims that the General Court incorrectly held, first, that the measure that it asked to be annulled did not have the characteristics of a challengeable act, as referred to in Article 263 TFEU, and, second, in paragraph 50 of the judgment under appeal, that, by its application, Alfamicro was in fact asking the General Court to declare that Alfamicro did not owe a debt under the grant agreement at issue, as was claimed by the Commission.

44 Alfamicro argues that a number of factors show that the Commission's letter of 28 October 2014 is an administrative measure. That letter unilaterally establishes the debt and its deadline and grants the Commission the power to take enforcement measures. Thus, the nature of the audit carried out by the Court of Auditors and the fact that the results of that audit had consequences on other agreements between Alfamicro and the Commission shows that that audit sits outside of the contractual framework.

45 Further, Alfamicro claims that the set-off measures taken by the Commission following that letter are also administrative measures. It is contradictory to argue, first, that the Commission's debt is based on a contractual obligation and that consequently the beneficiary must bring its action under Article 272 TFEU and, second, to acknowledge that the Commission can act unilaterally to enforce that debt by means of set-off, which is to say by means of an administrative measure that can only be challenged on the basis of Article 263 TFEU.

46 The Commission contests the arguments raised by Alfamicro in support of the first ground of appeal.

– *Findings of the Court*

47 As a preliminary point, it should be noted, as the General Court did in paragraph 42 of the judgment under appeal, that, according to the settled case-law of the Court, an action for annulment for the purposes of Article 263 TFEU 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 capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (judgments of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 16 and the case-law cited, and of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 31 and the case-law cited).

48 On a number of occasions, the Court has found that, in the context of an action for annulment, the power of interpretation and application of the provisions of the FEU Treaty by the EU judicature does not apply where the applicant's legal position falls within the contractual relationships whose legal status is governed by the national law agreed to by the contracting parties (see, to that effect, judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 18, and order of 21 April 2016, *Borde and Carbonium* v *Commission*, C-279/15 P, not published, EU:C:2016:297, paragraph 39).

49 Were the EU judicature to hold that it had jurisdiction to adjudicate on the annulment of acts falling within purely contractual relationships, not only would it risk rendering Article 272 TFEU — which grants the Courts of the European Union jurisdiction pursuant to an arbitration clause — meaningless, but would also risk, where the contract does not contain such a clause, extending its jurisdiction beyond the limits laid down by Article 274 TFEU, which specifically gives national courts or tribunals ordinary jurisdiction over disputes to which the European Union is a party (judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 19).

50 It follows from that case-law that, where there is a contract between the applicant and one of the European Union institutions, an action may be brought before the European Union judicature on the basis of Article 263 TFEU only where the contested measure aims to produce binding legal effects falling outside

of the contractual relationship between the parties and which involve the exercise of the prerogatives of a public authority conferred on the contracting institution acting in its capacity as an administrative authority (judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 20).

51 In the present case, the measure contested by Alfamicro is the Commission's letter of 28 October 2014 by which the Commission sent a debit note to Alfamicro and notified it to repay sums wrongly paid under the grant agreement at issue, the amount of which is set out in the debit note.

52 Consequently, that debit note falls within the scope of the grant agreement at issue, since the note's purpose is the recovery of a debt which is grounded on the provisions of that agreement. Such a debit note and the formal demand for payment accompanying it set out only the maturity date and also the payment terms of the debt that they establish and cannot be equated to an enforcement order as such, even though it refers to enforcement pursuant to Article 299 TFEU as a possible option among others open to the Commission where a party fails to perform an obligation by the delivery date laid down (see, by analogy, judgment of 9 September 2015, *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraph 23).

53 In any event, in the present case, the Commission did not resort to enforcement measures, but decided to lodge a counterclaim before the General Court seeking an order requiring Alfamicro to settle that debt.

54 Further, no document relied on by Alfamicro supports the conclusion that the Commission acted in its capacity as an administrative authority or that its letter of 28 October 2014 produced legal effects outside of the contractual framework that were capable of changing Alfamicro's legal situation.

55 Provision was made for the audit carried out by the Court of Auditors in the grant agreement at issue, as is usual for that type of agreement. Audits pursue the objective of ensuring that the beneficiary of a grant receives a payment only in respect of costs that are eligible under the agreement allocating them, so as to ensure responsible management and use of European funding.

56 It is true that, after sending its letter of 28 October 2014, the Commission extrapolated, in respect of some other agreements with Alfamicro, on the basis of the results of the audit relating to the grant agreement at issue, and the Commission's decisions taken on that basis could, in some cases, constitute administrative measures taken by that institution if they fall outside of the contractual framework of those agreements. However, first, rather than being established on that basis, the debt established by the Commission in its letter of 28 October 2014 is based directly on the results of the audit carried out by the Court of Auditors with regard to expenses declared by Alfamicro under the grant agreement at issue and, second, the General Court was not adjudicating on an application relating to the other agreements.

57 Further, the set-off measures taken subsequently by the Commission are separate measures, and whether or not they are administrative in nature has no effect on the contractual nature of the declaration of debt in the debit note attached to the Commission's letter of 28 October 2014. Indeed, while Alfamicro criticises generally the approach in accordance with which contractual measures are differentiated from the administrative set-off measures, as set out in the case-law of the General Court, it does not contest, in the context of the present appeal, the General Court's decision, in paragraph 196 of the judgment under appeal, to find the heads of claim seeking annulment of the Commission's set-off measures to be inadmissible, but merely argues that the General Court should have found that the letter of 28 October 2014 and the debit note attached to that letter were challengeable acts, as referred to in Article 263 TFEU.

58 Consequently, the General Court did not err in law when it held that, even if the action at first instance, despite being explicitly based on Article 272 TFEU, had to be classified as an 'action for annulment' with its legal basis in Article 263 TFEU, such an action would be inadmissible, because neither the letter of 28 October 2014 nor the debit note attached to that letter are challengeable acts as referred to in Article 263 TFEU, which means that it was appropriate to find that Alfamicro's action was based on Article 272 TFEU, in the light of the arbitration clause in the grant agreement at issue.

59 It follows from the foregoing that the first ground of appeal must be rejected as unfounded.

The second and third grounds of appeal, alleging infringement of the grant agreement at issue and breach of the principle of proportionality

Arguments of the parties

60 By its second and third grounds of appeal, which it is appropriate to examine together, Alfamicro criticises the General Court for having decided, in paragraph 142 of the judgment under appeal, that the Commission was obliged to request repayment of funding paid in respect of costs considered to be ineligible, and that it did not breach the proportionality principle or its obligation to perform its contractual obligations in good faith.

61 Alfamicro claims that, as Article II.28 of the General Conditions provides that the Commission is to take 'all appropriate measures which it considers necessary', that institution should have taken the proportionality principle into account when implementing the result of the Court of Auditors' audit. The grant agreement at issue is a contract involving reciprocal obligations and Alfamicro fulfilled the obligations to which it was subject under that agreement. By reducing the grant by 93%, despite the fact that the 'Save Energy' project had been completed, the Commission infringed that agreement and breached the proportionality principle.

62 The Commission contests the arguments put forward in support of the second and third grounds of appeal.

Findings of the Court

63 As a preliminary point, it should be noted that the General Court found, in paragraphs 90 and 128 of the judgment under appeal, that the Court of Auditors had correctly assessed that the costs declared by Alfamicro were ineligible. That finding, which follows in any event from a finding of fact falling within the sovereign power of the General Court, is not contested in the present appeal.

64 Consequently, the point in issue is only whether the General Court was fully entitled to find that, when it deducted the entirety of the costs deemed ineligible from the amount of the grant and requested, consequently, that a large part of the grant be repaid, the Commission did not breach the proportionality principle.

65 In that context, it should be noted that, under Article 317 TFEU, the Commission is obliged to observe the principle of sound financial management. It also ensures the protection of the financial interests of the European Union in the implementation of its budget. This is also a contractual matter, as the grants made by the Commission come from the EU budget. In accordance with a fundamental principle governing EU aid, the European Union can subsidise only expenditure actually incurred (judgment of 28 February 2013, *Portugal* v *Commission*, C-246/11 P, not published, EU:C:2013:118, paragraph 102 and the case-law cited).

66 Consequently, the Commission cannot approve expenditure from the EU budget without legal basis; otherwise it will breach the principles established by the FEU Treaty. In the context of a grant, it is the grant agreement that governs the conditions for the allocation and use of that grant and, more particularly, the clauses relating to the determination of the amount of that grant on the basis of the costs declared by the party contracting with the Commission.

67 Consequently, if the costs declared by the beneficiary are not eligible under the relevant grant agreement because they have been judged to be unverifiable and/or unreliable, the Commission has no choice but to recover an amount of the grant equal to the unsubstantiated amounts, since, pursuant to the legal basis provided by that grant agreement, the Commission can pay out of the EU budget only duly substantiated sums. Accordingly, in the present case, requesting repayment of the part of the grant corresponding to the ineligible costs, as established in the Court of Auditor's audit report, is an appropriate measure.

68 With regard to the arguments relating to the fact that that agreement involves reciprocal obligations, it is sufficient to note that the grant is not consideration for the realisation of the project forming the subject of the grant agreement. The sums paid by the Commission under that agreement are paid solely in order to allow the beneficiary to meet costs generated by such realisation. As part of those costs were found to be ineligible, as the beneficiary failed to comply with the contractual obligation to substantiate the use of the sums allocated to him, an amount equal to that part of the costs must be recovered by the Commission, and the fact that the beneficiary has in the meantime completed the project that is the subject of the grant agreement does not affect that obligation.

69 With regard to Alfamicro's argument of unjust enrichment, it is sufficient to find that that argument was raised for the first time before the Court of Justice and is, therefore, inadmissible.

70 Consequently, the General Court did not err in law when it found that, when the Commission requested repayment of funding paid in respect of costs considered to be ineligible, it took an appropriate measure with regard to the appellant, that measure being the only one that it was entitled to adopt in accordance with its obligations flowing from both the grant agreement at issue and EU law, and that, in that context, it did not act contrary to the proportionality principle or its obligation to perform its contractual obligations in good faith.

71 In the light of the findings above, the second and third grounds of appeal must be rejected as unfounded.

The fourth ground of appeal, alleging breach of the principle of legal certainty

Arguments of the parties

72 By that ground of appeal, Alfamicro argues that the General Court erred in law when it failed to find that the Commission had breached the principle of legal certainty. The appellant claims that paragraph 5 of Article II.28 of the General Conditions provided that the Commission was entitled to take 'appropriate measures'. The appellant submits that, even if it had been able to anticipate that the fact that it was unable to substantiate its costs declared as having been incurred in accordance with the grant agreement at issue could have consequences on the amount of that grant, it would never have been able to predict that that grant would be reduced by 93%, despite the project having been completed. By doing so, the Commission adopted inappropriate measures, contrary to what is set out in the grant agreement at issue and, on the same basis, breached the principle of legal certainty.

73 The Commission contests those arguments.

Findings of the Court

74 It should be noted that, rather than hearing the case as a court having jurisdiction to adjudicate on the lawfulness of a measure that may be the subject of an action for annulment under Article 263 TFEU, the General Court heard the case as the court having jurisdiction over the contract, and was therefore entrusted to adjudicate on the contractual dispute.

75 The principle of legal certainty — which is one of the general principles of European Union law — requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by European Union law (judgment of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, EU:C:2011:811, paragraph 100 and the case-law cited).

76 In that context, it follows that the General Court was fully entitled to find, in paragraphs 156 and 157 of the judgment under appeal, that the principle of legal certainty did not apply in a contractual dispute in which the General Court is not called upon to check the legality of an administrative measure. Therefore, any breach of that principle would have no consequences on the Commission's obligations under the grant agreement at issue.

77 The fourth ground of appeal must therefore be dismissed as ineffective.

78 It follows from all the foregoing that none of the grounds put forward by Alfamicro in support of its appeal can succeed.

79 The appeal must therefore be dismissed in its entirety.

Costs

80 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court shall make a decision as to the costs. Under Article 138(1) of those rules, applicable to appeal proceedings pursuant to Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Alfamicro has been unsuccessful and the Commission has applied for costs to be awarded against it, Alfamicro must be ordered to pay the costs.

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

1. **Dismisses the appeal;**

2. **Orders Alfamicro — Sistemas de computadores, Sociedade Unipessoal, Lda to pay the costs.**

[Signatures]

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* Language of the case: Portuguese.

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

16 May 2019 (*) (1)

(Medicinal products for human use — Article 3(1)(b) of Regulation (EC) No 141/2000 — Definition of ‘significant benefit’ — Availability of orphan medicinal products — Article 5(12)(b) of Regulation No 141/2000 — Commission decision to remove a medicinal product from the Register of Orphan Medicinal Products — Error of assessment — Error of law — Legitimate expectations)

In Case T-733/17,

GMP-Orphan (GMPO), established in Paris (France), represented by M. Demetriou QC, E. Mackenzie, Barrister, L. Tsang and J. Mulryne, Solicitors,

applicant,

v

European Commission, represented by K. Petersen and A. Sipos, acting as Agents,

defendant,

ACTION pursuant to Article 263 TFEU seeking the partial annulment of Commission Implementing Decision C(2017) 6102 final of 5 September 2017 granting marketing authorisation under Regulation (EC) No 726/2004 of the European Parliament and of the Council for ‘Cuprior-trientine’, a medicinal product for human use, in so far as the Commission decided, in Article 5 of that decision, that that medicinal product no longer satisfied the criteria laid down in Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products (OJ 2000 L 18, p. 1) to be registered as an orphan medicinal product and that the European Union Register of Orphan Medicinal Products should be updated accordingly,

THE GENERAL COURT (Seventh Chamber),

composed of V. Tomljenović, President, E. Bieliūnas and A. Kornezov (Rapporteur), Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 13 December 2018,

gives the following

Judgment

Background to the dispute

1 On 19 March 2015, the European Commission adopted a decision by which trientine tetrahydrochloride, sponsored by the applicant, GMP-Orphan (GMPO), was designated as an orphan medicinal product for the treatment of Wilson’s disease and entered into the European Union Register of Orphan Medicinal Products in accordance with Regulation (EC) No 141/2000 of the European

Parliament and of the Council of 16 December 1999 on orphan medicinal products (OJ 2000 L 18, p. 1) (‘the 2015 designation decision’).

2 On 7 December 2015, the applicant submitted an application for marketing authorisation in respect of that medicinal product under the name Cuprior — trientine (‘Cuprior’).

3 On 20 September 2016, the applicant also submitted a report to the European Medicines Agency (EMA) and, more specifically, to the Committee for Orphan Medicinal Products provided for in Article 4 of Regulation No 141/2000 (‘the COMP’), on the maintenance of the designation as an orphan medicinal product of Cuprior at the time of granting the marketing authorisation.

4 On 23 May 2017, following an exchange of correspondence between the applicant and the COMP, the latter adopted an opinion in which it concluded that the criteria for designation of the medicinal product Cuprior as an orphan medicinal product, set out in Article 3(1)(b) of Regulation No 141/2000, had not been satisfied on the ground that that product did not provide a significant benefit, in particular in comparison with dihydrochloride trientine (‘the reference product’) which had been granted marketing authorisation in the United Kingdom since 1985.

5 On 30 June 2017, the applicant requested that the COMP’s opinion of 23 May 2017 be revised in accordance with Article 5(7) of Regulation No 141/2000.

6 On 20 July 2017, the COMP adopted a final opinion in which it upheld the conclusions reached in its opinion of 23 May 2017 (‘the final opinion’). In particular, the COMP stated that satisfactory methods of treatment of the condition in question had already been authorised in one Member State of the EU and that the sponsor had not provided sufficient evidence to demonstrate the lack of availability of the reference product in the EU.

7 On 5 September 2017, the Commission adopted Decision C(2017) 6102 final granting marketing authorisation under Regulation (EC) No 726/2004 of the European Parliament and of the Council for Cuprior — trientine, a medicinal product for human use (‘the contested decision’). Article 1 of that decision states that the marketing authorisation provided for in Article 3 of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1) is granted for the medicinal product Cuprior, the characteristics of which are summarised in Annex I to that decision, and that that medicinal product is to be registered in the European Union register of medicinal products under reference EU/1/17/1199.

8 However, on the basis of the COMP’s final opinion, the Commission decided that the criteria for designation as set out in Article 3 of Regulation No 141/2000 were no longer met in respect of Cuprior and that, therefore, it could not be classified as an orphan medicinal product (recital 4). Consequently, Article 5 of the contested decision states that the ‘medicinal product [Cuprior] shall not be classified as [an] orphan medicinal product’ and that ‘the [European Union] Register of Orphan Medicinal Products should be updated accordingly’.

9 On 12 September 2017, Cuprior was removed from the Register of Orphan Medicinal Products.

Procedure and forms of order sought

10 By application lodged at the Court Registry on 2 November 2017, the applicant brought the present action.

11 On the same day, the applicant made an application for interim measures, which was rejected by order of 23 November 2018, *GMPO* v *Commission* (T-733/17 R, not published, EU:T:2018:839).

12 On 19 January 2018, the Commission lodged its defence.

13 The parties lodged the reply and the rejoinder on 12 March and 27 April 2018 respectively.

14 The applicant claims that the Court should:

– annul Article 5 of the contested decision;

– order the Commission to classify Cuprior as an orphan medicinal product and update the European Union Register of Orphan Medicinal Products accordingly;

– order the Commission to pay the costs.

15 The Commission contends that the Court should:

– dismiss the action as inadmissible in part and, in any event, as unfounded;

– order the applicant to pay the costs.

Law

The second head of claim

16 The Commission argues that the applicant's second head of claim by which it requests that the Court orders the Commission to classify Cuprior as an orphan medicinal product and to update the European Union Register of Orphan Medicinal Products accordingly is inadmissible. In the Commission's view, that head of claim fails to comply with Article 266 TFEU and the relevant case-law.

17 The applicant submits that the second head of claim is admissible, since, if the Court were to hold that Cuprior satisfies the designation criteria as an orphan medicinal product, it could then decide that the only decision that the Commission could consequently adopt is to classify Cuprior as an orphan medicinal product and to update the European Union Register of Orphan Medicinal Products.

18 According to the case-law, in the context of a review of legality on the basis of Article 263 TFEU, the Court has no jurisdiction to issue directions to the institutions, bodies, offices and agencies of the European Union, even where they concern the manner in which its judgments are to be complied with. It is for the institution concerned, under Article 266 TFEU, to adopt the measures required to give effect to a judgment delivered in an action for annulment (see judgment of 30 May 2013, *Omnis Group* v *Commission*, T-74/11, not published, EU:T:2013:283, paragraph 26 and the case-law cited).

19 It must be stated that, by its second head of claim, the applicant requests that the Court, in essence, orders the Commission to classify Cuprior as an orphan medicinal product and to update the European Union Register of Orphan Medicinal Products accordingly. Since the Court does not have such jurisdiction, that head of claim must be rejected.

Substance

20 In support of its action, the applicant relies on four pleas in law, alleging, first, an error of law in the interpretation of the term 'significant benefit' within the meaning of Article 3(1)(b) of Regulation

No 141/2000, second, an error of law and a manifest error of assessment in the application of Article 3(1)(b) of Regulation No 141/2000, third, an error of law and a breach of the principles of protection of legitimate expectations and procedural fairness and, fourth, a manifest error of assessment of the evidence adduced by the applicant.

21 It is appropriate to examine, first of all and together, the first and the fourth plea, since the arguments raised in those pleas overlap and complement each other.

The first and fourth pleas, alleging an error of law in the interpretation of the term 'significant benefit' within the meaning of Article 3(1)(b) of Regulation No 141/2000 and a manifest error of assessment of the evidence adduced by the applicant

22 By its first plea, the applicant claims that the COMP and the Commission erred in law by refusing to recognise that possible marketing authorisation for Cuprior as an orphan medicinal product in all Member States could constitute a significant benefit within the meaning of Article 3(1)(b) of Regulation No 141/2000 and Article 3(2) of Commission Regulation (EC) No 847/2000 of 27 April 2000 laying down the provisions for implementation of the criteria for designation of a medicinal product as an orphan medicinal product and definitions of the concepts 'similar medicinal product' and 'clinical superiority' (OJ 2000 L 103, p. 5) to patients with Wilson's disease in comparison with the reference product, which is authorised only in the United Kingdom.

23 The applicant maintains that the Communication from the Commission on Regulation (EC) No 141/2000 of the European Parliament and of the Council on orphan medicinal products (OJ 2003 C 178, p. 2; 'the 2003 Communication') makes clear that authorisation in all Member States, as opposed only to a limited number of Member States, provides a significant benefit, and that an imminent expectation of an EU-wide marketing authorisation may be sufficient to maintain an assumption of significant benefit. In that regard, the applicant claims that the significant benefit may, in accordance with Article 3(1)(b) of Regulation No 141/2000 and Article 3(2) of Regulation No 847/2000, be either clinical or a major contribution to patient care. The second limb of that definition thus encompasses any development that adds to the ability of physicians to care for patients, provided that it is a sufficiently important development. Accordingly, a substantial increase in the availability of a trientine-based therapy, the only treatment option for some patients with Wilson's disease, would provide them with a significant benefit in the form of a major contribution to the care they receive. Even if the reference product constitutes appropriate medication for those patients, their needs would not be met, if, as a matter of fact, they do not have access to it. That finding is also apparent from the Guideline on the format and content of applications for designation as orphan medicinal products and on the transfer of designations from one sponsor to another, updated on 27 March 2014 (ENTR/6283/00 Rev 4; 'the 2014 Guideline').

24 The fact that, in most Member States, patients may, in principle, have access to the reference product in the context of national schemes adopted pursuant to Article 5(1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67) ('national importation schemes') does not suffice, according to the applicant, to preclude the existence of a significant benefit, since, in the framework of those schemes, the use of that product would amount to 'unlicensed use'. Thus, and by analogy, the 2003 Communication specifies that the off-label use of an authorised medicinal product cannot be considered to be a satisfactory method. Similarly, the COMP's approach creates unequal access to trientine because the availability of the national importation schemes and the conditions governing their application depend entirely upon the non-harmonised national systems of the Member States. Moreover, taking into account such schemes is inconsistent with the objective of the EU legislature to provide for strict and harmonised marketing authorisation procedures.

25 Consequently, according to the applicant, by failing to have regard to the 2003 Communication and the 2014 Guideline, the COMP concluded arbitrarily that there was no 'inherent assumption' of significant benefit where a medicinal product was authorised in a larger number of Member States than the reference product.

26 Lastly, the applicant claims that the COMP disregarded the fact that, even if the reference product could be imported under national importation schemes, there are, in practice, barriers to obtaining that product such as, for example, 'administrative' hurdles arising from the lack of a valid marketing authorisation across the EU. The COMP was therefore required to take into account the practical benefits that Cuprior would provide if it was authorised across the EU.

27 By its fourth plea, the applicant claims that the COMP committed a manifest error of assessment in evaluating the evidence put forward by the applicant in the course of the administrative procedure in order to establish that Cuprior provides a significant benefit to patients. This concerns the following evidence:

– long-term studies carried out in Germany on the treatment of patients with Wilson's disease according to which the proportion of patients requiring treatment with trientine, who experience serious side effects with other treatments available (namely D-penicillamine), is 20 to 30%; a document entitled '[European Association for the Study of the Liver] Clinical Practice Guidelines: Wilson's disease', published in the *Journal of Hepatology* in 2012, according to which there was a clear impact on the health of those patients because Wilson's disease can be fatal if not properly treated; and the fact, acknowledged by the COMP in its final opinion, that for some patients, trientine-based medicinal products are the only treatment;

– the results of a survey carried out on the basis of the replies given by national medicinal product regulatory agencies in 26 Member States, 18 doctors from 15 Member States and patient associations from 11 Member States which show that, despite the existence of routes of access to the reference product in nearly all Member States, this does not result in appropriate supply or availability of the medicinal product in question, and the fact, mentioned by doctors and patient associations, that low prescription rates for treatment with the reference product in certain Member States were due to the lack of authorisation for that product, to the fact that it was not reimbursed by national health systems, and to the practical (logistical) difficulties relating to the importation of that product, which show that patients' needs are unmet, even if, in theory, they may have access to the reference product as a result of national importation schemes.

28 However, according to the applicant, the COMP wrongly rejected that evidence on the sole basis of the information that it had gathered informally from national regulatory agencies.

29 The Commission disputes the applicant's arguments.

30 First, it should be noted that the procedure relating to orphan medicinal products divides into two separate phases. The first phase covers the designation of the product as an orphan medicinal product; the second covers marketing authorisation for the product that has been designated as an orphan medicinal product and the market exclusivity attaching to it (judgment of 9 September 2010, *Now Pharm* v *Commission*, T-74/08, EU:T:2010:376, paragraph 33).

31 With regard to the procedure for designation as an orphan medicinal product, Article 3 of Regulation No 141/2000 sets out the criteria which a potential product must meet in order to be recognised as an orphan medicinal product. The first assumption of Article 3(1)(b) of Regulation No 141/2000 provides that the sponsor of the orphan medicinal product must in particular establish that there exists no satisfactory method of diagnosis, prevention or treatment of the condition in question by the product for

which an application for designation as an orphan medicinal product has been made that has been authorised in the European Union. If such a method exists, the legislature has made provision, in the second assumption of Article 3(1)(b) of Regulation No 141/2000, for the designation as an orphan medicinal product of any potential medicinal product for the treatment of the same condition provided its sponsor can establish that the medicinal product will be of significant benefit to patients affected by that condition (judgment of 9 September 2010, *Now Pharm* v *Commission*, T-74/08, EU:T:2010:376, paragraph 34).

32 The term 'significant benefit' is defined in Article 3(2) of Regulation No 847/2000 as 'a clinically relevant advantage or a major contribution to patient care'. In the context of the second assumption of Article 3(1)(b) of Regulation No 141/2000, applicable in the present case, establishing significant benefit takes place in the context of a comparison with an existing authorised medicinal product or method. The 'clinically relevant advantage' and the 'major contribution to patient care', which enable the potential orphan medicinal product to be described as being of significant benefit, can be established only by comparison with treatments that have already been authorised (see, to that effect, judgment of 22 January 2015, *Teva Pharma and Teva Pharmaceuticals Europe* v *EMA*, T-140/12, EU:T:2015:41, paragraph 64 and the case-law cited).

33 As for the second phase of the procedure, namely that of marketing authorisation for an orphan medicinal product, it starts, where relevant, after the product concerned has been designated as an orphan medicinal product. It is apparent from Article 5(12)(b) of Regulation No 141/2000 that, when reviewing an application for marketing authorisation, it is necessary to ascertain whether the criteria laid down in Article 3 of that regulation are still satisfied. As provided in Article 5(12)(b) of Regulation No 141/2000, a designated orphan medicinal product is to be removed from the Register of Orphan Medicinal Products if it is established before the marketing authorisation is granted that those criteria are no longer met in respect of the medicinal product concerned.

34 Thus, where a sponsor submits an application for marketing authorisation in respect of a designated orphan medicinal product, he triggers at the same time a procedure for re-evaluating the designation criteria. The responsibility for assessing whether the designation criteria have been met lies with the COMP, which must issue an opinion in that regard. In this case, the Commission did not depart from the COMP's opinion and therefore endorsed the findings of that opinion. Accordingly, the judicial review which falls to the Court must be carried out in respect of all the considerations set out in that opinion, which forms an integral part of the contested decision (see, to that effect, judgment of 5 December 2018, *Bristol-Myers Squibb Pharma* v *Commission and EMA*, T-329/16, not published, EU:T:2018:878, paragraph 98).

35 In the light of the above, it should be pointed out that, in these proceedings, the applicant relies on the second assumption set out in Article 3(1)(b) of Regulation No 141/2000. It therefore recognises that in this case there are satisfactory methods of treatment which have already been authorised in the European Union for patients with Wilson's disease, including in particular the reference product. It is common ground in that regard, as the applicant confirmed at the hearing, that the reference product is at least as clinically effective as Cuprior and that the application for marketing authorisation for Cuprior was based on pre-clinical tests and clinical trials of the reference product.

36 The applicant essentially submits, in its first plea, that imminent marketing authorisation for Cuprior, valid for the whole of the European Union, constitutes an 'inherent assumption' of significant benefit within the meaning of the second assumption of Article 3(1)(b) of Regulation No 141/2000, of Article 3(2) of Regulation No 847/2000, of the 2003 Communication and of the 2014 Guideline, since the reference product is authorised in only one Member State.

37 First, it should be noted in that regard that no provision either in Regulation No 141/2000 or Regulation No 847/2000 provides that marketing authorisation at EU level for an orphan medicinal product constitutes *per se* a significant benefit in comparison with treatment based on an existing medicinal product, which is as effective and already authorised, albeit in only one Member State.

38 Second, as provided in Article 3(2) of Regulation No 847/2000, the term 'significant benefit' is defined as 'a clinically relevant advantage or a major contribution to patient care'. In this case, as Cuprior does not provide any clinical advantage in comparison with the reference product, it is the assumption of a 'major contribution to patient care' on which the applicant relies.

39 It is apparent from that definition that the comparative analysis between the new medicinal product and the reference product must establish not only that the new product provides a benefit to patients and that it contributes to their care, but also that that benefit is 'significant' and that that contribution is 'major'. The expected advantage of that new medicinal product must therefore exceed a certain quantitative or qualitative threshold in order that it may be considered to be 'significant' or 'major'.

40 A sponsor must therefore demonstrate, on the basis of concrete and substantiated evidence and information, that its medicinal product provides a significant benefit, that is to say that it ensures a major contribution to patient care in comparison with the reference product, and is not able to rely in that regard on presumptions or assertions of a general nature.

41 The mere fact that the reference product is authorised in only one Member State does not mean that patients in other Member States do not have legal access to that product and that their needs are unmet. Similarly, the fact that a medicinal product is authorised at EU level does not in itself mean that the medicinal product has, in fact, been made available in all Member States. Indeed, there may also be availability problems with respect to medicinal products authorised at EU level.

42 Third, that conclusion is borne out by the 2003 Communication. It is apparent from Section A.4 thereof that assumptions of significant benefit of a medicinal product as a 'major contribution to patient care' are necessarily based on an analysis of concrete evidence in each individual case. More specifically, the assumptions of significant benefit on which the sponsor relies must be 'supported by available data [or] evidence supplied by the [sponsor]' (second and third paragraphs) and the sponsor must 'explain why [the supply or availability problem] results in the unmet needs of patients' whilst substantiating those claims by 'qualitative and quantitative references' (fourth paragraph).

43 Although the fifth paragraph of Section A.4 of the 2003 Communication states that, 'with respect to potential availability of the product to the [EU] population, a medicinal product that is authorised and available in all Member States may constitute a significant benefit compared with a similar product that is authorised in a limited number of Member States only', it must be stated that that passage relates to medicinal products which are not only 'authorised' but also 'available' in all Member States. Moreover, that passage merely states that such a medicinal product 'may' constitute a significant benefit. Consequently, although that passage of the 2003 Communication acknowledges that a potential EU marketing authorisation may constitute a significant benefit, this remains only a possibility which must be substantiated, on a case-by-case basis, by concrete evidence, as is apparent also from the aforementioned passages of the 2003 Communication (see paragraph 42 above), and not a mandatory stipulation or a legal presumption.

44 At the hearing, the applicant acknowledged that it cannot rely on the assumption described in the ninth paragraph of Section A.4 of the 2003 Communication either, since that assumption is not applicable to the circumstances of the present case. In this case, the reference product has been authorised on the United Kingdom market since 1985 and thus well before the 2015 designation decision, so that it cannot reasonably be argued that the sponsor of the reference product sought, by the national

authorisation in question, to block imminent marketing authorisation for Cuprior. The assumption described in the ninth paragraph of Section A.4 of the 2003 Communication is not therefore applicable to the present case.

45 The applicant nonetheless relies on the 10th paragraph of Section A.4 of the 2003 Communication, according to which 'the imminent expectation of a [marketing authorisation at EU level] as compared with the existence of a national authorisation [for the same medicinal product] in one or a limited number of Member States may be sufficient to maintain an assumption of significant benefit'. However, even if that paragraph is intended to apply in circumstances other than those described in the ninth paragraph of Section A.4 of the 2003 Communication, circumstances which are not relevant to this case, it is sufficient to note that that paragraph also merely indicates a possibility rather than a mandatory stipulation or a legal presumption.

46 Fourth, the 2014 Guideline also supports that conclusion. Thus, Section D.3 of that document essentially reiterates what is stated in the 2003 Communication. That section acknowledges, on the one hand, that a medicinal product that is authorised in all Member States 'may' constitute a significant benefit as compared to a product that is authorised in a limited number of Member States only, but that, on the other hand, justifications provided by the sponsor aimed at establishing the potential increase in supply or availability must be examined in the light of whether these justifications could lead to a clinically relevant significant benefit for patients in all Member States.

47 Fifth, the fact that a medicinal product is not authorised at EU level but only in one Member State does not prevent the Member States in which that product is not authorised from providing for legal mechanisms in order to enable that product to be imported into their territories. In accordance with recital 30 of Directive 2001/83, it must be possible for a person established in one Member State to receive from another Member State a reasonable quantity of medicinal products intended for his personal use. In that vein, Article 5(1) of Directive 2001/83 provides that a Member State may, in accordance with legislation in force and to fulfil special needs, exclude from the provisions of that directive and thus from the prohibition set out in Article 6(1) thereof medicinal products supplied in response to a *bona fide* unsolicited order, formulated in accordance with the specifications of an authorised healthcare professional and for use by an individual patient under his responsibility.

48 The Court of Justice has had occasion to point out that it is apparent from all the conditions set out in Article 5(1) of Directive 2001/83, read in the light of the fundamental objectives of the directive, and in particular the objective of seeking to safeguard public health, that the exception provided for in that provision can only concern situations in which the doctor considers that the state of health of his individual patients requires that a medicinal product be administered for which there is no authorised equivalent on the national market or which is unavailable on that market (see judgment of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 57 and the case-law cited).

49 In this case, it is not disputed that there are national importation schemes which enable the reference product to be imported lawfully even if it is not authorised in the Member State of importation. These schemes therefore permit medicines without a granted marketing authorisation in the relevant Member State to be prescribed for use in the treatment of the patients concerned.

50 Contrary to what the applicant claims, in the present case, the use in question, in the framework of those schemes, is not 'off-label' use of the reference product, but solely its use in a Member State other than that in which it has been authorised, and precisely in accordance with the actual therapeutic indications for which the reference product has been authorised. The analogy that the applicant seeks to draw between 'off-label' use and use in accordance with the therapeutic indications in a Member State other than that in which the reference product has been authorised must therefore fail.

51 The applicant's argument that the taking into account of such national importation schemes for the purposes of examining whether there is a significant benefit creates unequal access to the reference product because that access is governed by rules, which sometimes differ, applied by each Member State and is therefore inconsistent with the objective of the EU legislature to set up, at EU level, strict and harmonised marketing authorisation procedures must also fail. The relevance of those schemes cannot be denied solely because they have been set up on the basis of an exception, namely that laid down in Article 5(1) of Directive 2001/83, or because the rules governing their application are not harmonised at EU level. Whether those schemes in fact guarantee sufficient and effective access to the reference product is another question entirely and depends on the examination of the particulars of each case, this point being the subject indeed of the fourth plea. Similarly, taking into account such schemes in no way calls into question the centralised procedure at EU level for marketing, but is intended to establish whether, in fact, patients with the condition at issue are able to have access to the reference product.

52 Accordingly, the COMP did not err in law, in its final opinion, on which the Commission based the contested decision, by taking into account the existence of national importation schemes enabling the lawful importation of the reference product.

53 It follows, in the light of all the foregoing considerations, that the fact that a medicinal product may be authorised at EU level does not permit the conclusion or even the presumption that it will be of significant benefit within the meaning of the second assumption of Article 3(1)(b) of Regulation No 141/2000, of Article 3(2) of Regulation No 847/2000, of the 2003 Communication and of the 2014 Guideline, in comparison with the reference product, on the sole ground that the latter is authorised in only one Member State.

54 The first plea must therefore be rejected as unfounded.

55 With respect to the fourth plea, it must be examined whether the contested decision is vitiated by an error of assessment in that the COMP concluded that the evidence adduced by the applicant was insufficient to establish the assumption of a significant benefit. In that regard, the COMP found that the applicant had not sufficiently established the lack of availability of the reference product in the European Union and that, consequently, the assertion that Cuprior would significantly increase the availability of the treatment could not be accepted.

56 In that context, it has been held that, where the Commission must undertake complex technical or scientific assessments, it enjoys broad discretion. In such a situation, judicial review is confined to determining whether the relevant procedural rules have been complied with, whether the facts established by the Commission are correct and whether there has been a manifest error of appraisal of those facts or a misuse of powers (see judgment of 9 September 2010, *Now Pharm* v *Commission*, T-74/08, EU:T:2010:376, paragraph 111 and the case-law cited).

57 However, in the present case, the Court finds that the COMP's opinion, on which the contested decision is based, does not undertake complex technical or scientific assessments, but is essentially based on findings of fact regarding the availability within the European Union of the reference product. The judicial review by the Court must therefore be full in the present case.

58 In this instance, first, it should be noted that the COMP conducted its own inquiry relating to the availability of the reference product in the EU Member States. The results of that inquiry revealed that regulatory mechanisms for importing the reference product exist in at least 26 Member States and that that medicinal product could therefore be imported or was in fact imported, in accordance with Article 5(1) of Directive 2001/83.

59 The applicant does not appear to dispute the accuracy of the information thus collected by the COMP in the context of that inquiry. By contrast, it takes issue with the fact that the COMP relied on 'informal communications' between members of the COMP and national regulatory authorities. The applicant therefore appears, at least implicitly, to call into question the probative value of that inquiry.

60 It should be pointed out in that regard that, according to settled case-law, the principle which prevails in EU law is that of the unfettered evaluation of evidence and it is only the reliability of the evidence before the Court which is decisive when it comes to the assessment of its value. In addition, in order to assess the probative value of a document, regard should be had to the credibility of the account it contains and, in particular, to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (see, to that effect, judgment of 31 May 2018, *Kaddour* v *Council*, T-461/16, EU:T:2018:316, paragraph 107 and the case-law cited).

61 In the present case, it must be stated that the information gathered in the context of the COMP's inquiry was from official and reliable sources, namely national regulatory authorities, which have the experience to enable them to assess whether or not there are any supply problems and to know the procedures established for the purposes of importing the reference product. The results of that inquiry were presented in a summary table of 15 June 2016, entitled 'Availability of trientine in Member States according to COMP members review, EMA/317599/2017' appended as Annex A.7 to the application, which contains specific and verifiable information, by Member State.

62 Moreover, the COMP is a collective body composed of one member designated by each Member State, three members designated by the Commission to represent patient organisations, three members nominated by the Commission acting on a proposal by the EMA and a Chairman, and one member nominated by the States of the European Economic Area (EEA) (recital 6 of Regulation No 141/2000). The COMP is therefore formed by a college representing all Member States together with patient organisations, thus enabling it to form an opinion on the basis of national experiences acquired by both national regulatory authorities and patient organisations.

63 Consequently, and in the absence of any substantiated argument to the contrary by the applicant, the Court considers that the COMP's inquiry is of high probative value.

64 Second, as regards the evidence adduced by the applicant before the COMP, the applicant has sought to show that, despite the existence of regulatory pathways for importing the reference product in most Member States, there were 'logistical and administrative' obstacles preventing effective access to that product. In that regard, the applicant relied on the results of a survey that it undertook itself on the basis of the replies given by the national medicinal product regulatory agencies of 26 Member States, 18 doctors from 15 Member States and patient associations from 11 Member States. It documented the replies in a summary table, appended as Annex 10 to the application, which places the Member States into three groups, namely those in which availability of the reference product is 'limited[/absent]' (7 Member States), those in which availability is 'moderate' (4 Member States) and those in which availability is 'good' (9 Member States). According to the results of that survey, the availability problems identified in the 11 Member States with 'limited[/no]' or 'moderate' availability are due to the lack of reimbursement of the reference product and to supply problems.

65 After examining the results of that survey, the COMP reached the conclusion that the survey did not sufficiently show that there were availability problems in respect of the reference product. More specifically, the COMP stated that it could not take account, in the assessment of whether or not there was a significant benefit, of considerations related to lack of reimbursement of the reference product in the Member State of importation. Moreover, according to the COMP, the applicant had not provided any additional evidence capable of proving the existence of objective shortages of supply beyond, on

the one hand, the lack of reimbursement in some Member States and, on the other hand, the administrative burden entailed by having to arrange importation.

66 As regards the first type of obstacle, namely obstacles arising from lack of reimbursement of the reference product in the Member State of importation, it should be borne in mind that the reimbursement of a medicinal product by the health systems of the Member States falls within the exclusive competence of the Member States. Thus, the fact that the reference product is authorised only in one Member State does not necessarily mean that it is therefore excluded from any reimbursement by the national health system of the Member State of importation. By way of example, it is apparent from the COMP's inquiry, mentioned in paragraph 58 above, that the reference product is reimbursed in Germany.

67 Moreover, as the applicant conceded at the hearing, nor does obtaining a marketing authorisation at EU level mean that Cuprior would be reimbursed under national health schemes. Furthermore, the applicant does not provide any material capable of showing that Cuprior would probably be reimbursed by national health systems, or to what extent, once a marketing authorisation at EU level has been obtained for it.

68 As regards the second type of obstacle, on which the applicant relies, namely obstacles of an 'administrative or logistical' nature, it must be stated that the applicant's arguments in that respect are not sufficiently substantiated. The applicant merely cites some examples, that are set out in its survey, which is referred to in paragraph 64 above, according to which there is a requirement in certain Member States to obtain prior authorisation which must be renewed periodically or according to which there are unspecified delays in the supply of the reference product, without however showing that the manner in which the national importation schemes function imposes an unreasonable administrative burden on the patient in terms of waiting times, costs or steps to be taken, which might jeopardise the effectiveness of those programmes and, hence, the timely supply of the reference product. As was noted in paragraphs 39 and 40 above, the sponsor must establish not only that its medicinal product provides a benefit or contributes to patient care, but also that that benefit is 'significant' and that that contribution is 'major'.

69 Moreover, the information gathered by the applicant in its survey must, in any event, be compared with the information which emerges from the COMP's inquiry, which, as this Court has stated, is of high probative value (see paragraph 63 above). That inquiry does not refer to any significant obstacle to access to the reference product in the Member States concerned.

70 Third, with respect to the applicant's arguments that, for 20 to 30% of all patients with Wilson's disease, the only possible treatment is a trientine-based medicinal product and, for those patients, the lack of such treatment may be fatal, as the evidence referred to in the first indent of paragraph 27 above allegedly shows, it is sufficient to observe that it is not disputed that for certain patients the only possible treatment is a trientine-based treatment and that the lack of such treatment could be fatal. However, the COMP correctly observed that those data do not show that there is a lack of availability in the European Union of the reference product, which is as effective in treating those patients, or that those patients are incorrectly treated.

71 Accordingly, the Court considers that the COMP did not make an error of assessment in finding that the sponsor had not provided sufficient supporting information to establish that there was an availability problem and that patients with Wilson's disease in the European Union were not correctly treated by means of products which have already been authorised, including by regulatory routes of access in accordance with Article 5(1) of Directive 2001/83. Consequently, the contested decision, which endorses the COMP's final opinion, is not vitiated by an error of assessment either.

72 The fourth plea must therefore also be rejected as unfounded.

The second plea, alleging an error of law or a manifest error of assessment in the application of Article 3(1)(b) of Regulation No 141/2000

73 By its second plea, the applicant claims that the COMP erred in law or committed a manifest error of assessment by finding that Cuprior did not satisfy the requirements laid down in Article 3(1)(b) of Regulation No 141/2000 because the applicant had not established that the insufficient availability of the reference product within the European Union would cause harm to patients. Once the insufficient availability was established in the present case, there was no need to also show that it led to a failure to meet patient needs or caused patient harm.

74 The Commission disputes the applicant's arguments.

75 It must be stated in that regard that the applicant's arguments in support of its second plea are based on the premiss that it has demonstrated the insufficient availability of the reference product in the EU and that it cannot be required to show, in addition, that that insufficiency causes patient harm. However, that premiss has not been proved in the present case, as is apparent from the Court's analysis of the first and fourth pleas. The second plea of the action is therefore ineffective.

76 In any event, as is apparent from paragraph 32 above, in accordance with Article 3(2) of Regulation No 847/2000, the term 'significant benefit' means inter alia a 'major contribution to patient care'. It follows that the expected contribution of the medicinal product in question must always be assessed by reference to the care needed by patients. Thus, if an alleged increase in the availability of a medicinal product does not result in patients' real needs being met or, conversely, if the current state of supply causes no harm to patients, the assumption of a significant benefit is not established.

77 The second plea must therefore be rejected.

The third plea, alleging an error of law and a breach of the principles of protection of legitimate expectations and procedural fairness

78 The applicant claims that, by relying on the Commission notice of 18 November 2016 on the application of Articles 3, 5 and 7 of Regulation No 141/2000 on orphan medicinal products (OJ 2016 C 424, p. 3, 'the 2016 Notice'), instead of the 2003 Communication, whereas the 2016 Notice was not applicable *ratione temporis* either to the application for marketing authorisation filed on 7 December 2015, or to the report on the maintenance of the designation as an orphan medicinal product in respect of Cuprior submitted on 20 September 2016, the COMP erred in law and infringed the principles of protection of legitimate expectations and procedural fairness.

79 According to the applicant, first of all, unlike the 2016 Notice, the 2003 Communication expressly recognises that a significant benefit could be based on an increase in supply or availability and that a product that is authorised in all Member States may constitute a significant benefit in comparison with a product that is authorised in only one Member State. Next, by requiring the applicant to establish the existence of 'patient harm', the COMP actually applied the 2016 Notice which alone refers to such a requirement. Lastly, the COMP adopted an overly restrictive approach to the evidence that the applicant should adduce to establish 'objective supply shortages' or a 'systematic shortage', thus disregarding the letter and spirit of the 2003 Communication. By contrast, the COMP should have required only that the applicant establish that the assumptions which resulted in the initial designation of trientine tetrahydrochloride as an orphan medicinal product remain valid and had not changed at the time of the application for marketing authorisation.

80 The Commission disputes the applicant's arguments.

81 In the first place, as regards the argument alleging the error of law that the COMP allegedly committed by actually applying the 2016 Notice instead of the 2003 Communication, it should be pointed out at the outset that it was the 2003 Communication which was in force on the date of the application triggering the marketing authorisation procedure for Cuprior, filed on 7 December 2015, and at the time of submission of the report on the maintenance of the designation as an orphan medicinal product of that medicinal product, submitted on 20 September 2016. Since the 2016 Notice, which replaces the 2003 Communication, was published in the *Official Journal of the European Union* on 18 November 2016, the COMP was entitled to take it into consideration only after that date. The 2003 Communication is therefore applicable *ratione temporis* to the present case.

82 However, the Court notes that the COMP made no reference whatsoever to the 2016 Notice in its final opinion. Moreover, there is nothing to suggest that the COMP applied the 2016 Notice implicitly.

83 According to Section B.5 of the 2016 Notice, significant benefit should not be based on 'possible increased supply [or] availability due to shortages of existing authorised products or to existing products being authorised in only one or a limited number of Member States. (Exceptions may be made if the sponsor has evidence of patient harm)'.

84 In that regard, first of all, it must be stated that, in its final opinion, the COMP concluded not that significant benefit could not be based on the fact that the reference product was authorised only in one Member State, unless patient harm was proved — which might suggest that the COMP had actually applied the 2016 Notice — but that the applicant had not demonstrated the existence of an availability problem in respect of the reference product.

85 Next, the mere fact that, in its final opinion, the COMP states that the applicant failed to prove the existence of patient harm, a factor referred to in the 2016 Notice, does not mean that the COMP applied that notice, since, as is stated in paragraph 76 above, the term significant benefit is to be assessed, in any event, by reference to the care which patients actually need.

86 Lastly, the applicant's argument based on the fact that, in a provisional position of 11 April 2017 (document EMA/COMP/453124/2016, appended as Annex A.8 to the application), the COMP mentioned that, 'in the light of the upcoming changes in the acceptability of the arguments of limited availability in the new "Notice to Applicants" from the European Commission, the committee should discuss if this aspect of major contribution to patient care in this maintenance procedure shall still be accepted' cannot succeed. In that passage, the COMP does not refer to the 2016 Notice. Moreover, that passage appears in a document which contains only a provisional opinion which merely states that the COMP should further discuss the abovementioned issue and that, therefore, no final position had been adopted in that regard.

87 In any event, by that argument, the applicant is in actual fact suggesting that if the COMP had adhered to the 2003 Communication, the conclusion that it would have reached would have been different. However, as is apparent from the analysis in paragraphs 35 to 71 above, the contested decision is not vitiated by any error of law and of assessment as regards the interpretation and application in the present case of the term 'significant benefit' within the meaning in particular of the 2003 Communication. Accordingly, the applicant's argument that the COMP wrongly applied the 2016 Notice instead of the 2003 Communication must be considered ineffective.

88 In the second place, it should be borne in mind that Article 5(12)(b) of Regulation No 141/2000 provides for the possibility of removing a designated orphan medicinal product from the EU Register of Orphan Medicinal Products if it is established before the marketing authorisation is granted that the

designation criteria are no longer met. According to Section B.2.1 of the 2003 Communication, 'the sponsor is requested to inform the [EMA] and to submit a report on the criteria that led to the designation of the product as an orphan medicinal product and updated information on the current fulfilment of these criteria'. Section D.3 of the 2014 Guideline also states that the level of evidence or data required by the COMP at that stage of the procedure will be 'higher … than at the time of designation'.

89 It follows that the COMP was entitled and was even obliged, to re-examine the designation criteria at the stage of the application for marketing authorisation. At the end of that review, the COMP may reach a conclusion different from that which led it to accept the designation of the medicinal product as an orphan medicinal product. Otherwise, the marketing authorisation procedure would be meaningless.

90 Accordingly, the applicant cannot reasonably complain that the COMP reached a conclusion different from that which it had adopted when it accepted the designation of the product as an orphan medicinal product, particularly since, as is stated in paragraph 88 above, at the stage of the application for marketing authorisation, the level of evidence and data required is higher than at the time of the initial designation.

91 In the third place, as regards the alleged infringement of the principle of protection of legitimate expectations, it should be recalled that the protection of legitimate expectations extends to any person with regard to whom an institution of the European Union has given rise to justified hopes and that a person may not plead a breach of that principle unless the administration has given him precise assurances (see order of 4 July 2013, *Menidzherski biznes reshenia*, C-572/11, not published, EU:C:2013:456, paragraph 30 and the case-law cited).

92 In whatever form it is given, information which is precise, unconditional and consistent and comes from authorised and reliable sources constitutes assurances capable of giving rise to such hopes (see judgment of 14 March 2013, *Agrargenossenschaft Neuzelle*, C-545/11, EU:C:2013:169, paragraph 25 and the case-law cited).

93 Also according to the case-law, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretionary power will be maintained (judgment of 29 November 2016, *T & L Sugars and Sidul Açúcares* v *Commission*, T-103/12, not published, EU:T:2016:682, paragraph 150).

94 Neither the COMP nor the Commission had at any time provided the applicant with precise assurances that Cuprior would obtain marketing authorisation or that it would be maintained on the list of orphan medicinal products. In particular, the 2015 designation decision was not capable of giving rise to a legitimate expectation on the part of the applicant that that designation would necessarily be followed by the maintenance of such a designation for the medicinal product at issue and by the award of marketing authorisation.

95 Lastly, since the applicant puts forward no independent argument in support of the complaint alleging breach of the principle of 'procedural fairness', it is not necessary to respond separately to that complaint. In any event, it should be pointed out that the applicant was afforded the opportunity to submit its observations on all the matters that the COMP had indicated to be relevant prior to the adoption of the final opinion.

96 Consequently, the third plea must be rejected as unfounded.

97 In the light of all the foregoing, the action must be dismissed in its entirety.

Costs

98 Under Article 134(1) of the Rules of Procedure of the General Court, 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 applicant has been unsuccessful, it must be ordered to pay the costs, including those incurred in the proceedings for interim measures, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Orders GMP-Orphan (GMPO) to pay the costs, including those incurred in the proceedings for interim measures.

Tomljenović Bieliūnas Kornezov

Delivered in open court in Luxembourg on 16 May 2019.

E. Coulon V. Tomljenović

Registrar President

* Language of the case: English.

1 This judgment is published in extract form.

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

18 October 2018 (*)

(Financial aid — Projects of common interest in the field of trans-European energy networks — Determination of the final amount of the financial aid — Audit report identifying irregularities — Ineligible costs — Obligation to state reasons — Legitimate expectations — Proportionality)

In Case T-387/16,

Terna — Rete elettrica nazionale SpA, established in Rome (Italy), represented by A. Police, L. Di Via, F. Degni, F. Covone and D. Carria, lawyers,

applicant,

v

European Commission, represented by O. Beynet, L. Di Paolo, A. Tokár and G. Gattinara, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU seeking annulment of the letters of 6 July 2015, 23 May and 14 June 2016 of the Commission relating to certain costs incurred in the context of two projects in the field of trans-European energy networks (Projects 209-E255/09-ENER/09/TEN-E-S 12.564583 and 2007-E221/07/2007-TREN/07TEN-E-S 07.91403) following the grant of financial aid by the Commission to the applicant,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias, President, I. Labucka and I. Ulloa Rubio (Rapporteur), Judges,

Registrar: E. Coulon,

gives the following

Judgment

Background to the dispute

1 The applicant, Terna — Rete Elettrica Nazionale SpA, is a company established in Italy active in the high-voltage electricity transmission and distribution sector.

2 The applicant has a 42.68% shareholding in CESI SpA, a company operating in the sector of electromechanical appliance testing and certification and electrical systems consultancy.

3 In accordance with Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC (OJ 2006 L 262, p. 1), on 15 June 2007 the Commission of

the European Communities published a call for proposals for the award of financial aid within the framework of annual work programme C(2007) 3945 of 14 August 2007 for grants in the field of trans-European energy networks.

4 In accordance with Article 9 of Regulation (EC) No 680/2007 of the European Parliament and of the Council of 20 June 2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks (OJ 2007 L 162, p. 1), following every call for proposals based on the multiannual or annual work programmes referred to in Article 8(1) of the same regulation, the Commission is to decide on the amount of financial aid to be granted to the projects or parts of projects selected and to specify the conditions and methods for their implementation.

5 By Decision C(2008) 7941 of 2 December 2008 (‘the Decision of 2 December 2008’), the Commission selected, from amongst the programmes eligible for financial aid, the project of common interest ‘Direct current energy transmission between Italy and France by means of highway infrastructures’ (‘Project E 221’). By that decision, the applicant was granted a maximum of EUR 1 542 600 in financial aid.

6 By Decision C(2010) 3360 of 21 May 2010 (‘the Decision of 21 May 2010’), the Commission selected, from amongst the programmes eligible for financial aid, the project of common interest ‘Feasibility study for a new electricity interconnection, through the southern cross-border between Italy and France by means of highway infrastructures’ (‘Project E 255’). By that decision, the applicant was granted a maximum of EUR 500 000 in financial aid.

7 Implementation of Projects E 221 and E 255 brought to light the need to acquire services related to activities which the applicant was unable to perform using its own resources. The applicant therefore entrusted the performance of those services to CESI. More specifically, in the context of Projects E 221 and E 255, the applicant awarded to CESI directly, on the basis of a negotiated procedure, the performance of seven tasks concerned with the supply of research, development and specialist support services and coming under framework agreements No 3000029140, No 3000034279 and No 6000001506 concluded with CESI by means of a derogation from the public procurement rules, on the basis of the existence of technical reasons, respectively on 17 April 2009, 27 May 2010 and 8 April 2011 (‘the tasks at issue’).

8 Following completion of Projects E 221 and E 255, the Commission, by letter of 5 November 2010, informed the applicant that an external auditing firm (‘the auditing firm’) was going to conduct a financial audit of the costs declared by the applicant under those projects. The Commission made clear that the findings of the financial audit would be assessed by the competent departments with a view to adjusting the costs claimed by the applicant, and that, if those adjustments were to prove to be in the Commission’s favour, they could have an impact on future payments or result in the issuing of orders for the recovery of the overpaid amount.

9 By letter of 13 June 2013, the auditing firm sent the draft audit report to the applicant. The draft audit report informed the applicant that some of the costs incurred in carrying out Projects E 221 and E 255 could not be regarded as eligible. Specifically, with regard to the external costs coming under the tasks at issue, the draft audit found that those costs could not be regarded as eligible since, according to the information provided by the Commission, the award of contracts to companies belonging to the same group would be allowed only if any profits made by the contractor are deducted from the costs borne. In addition, CESI had provided the services to the applicant on market terms, thereby securing a profit margin. The applicant was asked to express its agreement or to submit any observations.

10 The applicant submitted its observations by letter of 5 July 2013. In this regard, the applicant claimed

that it does not exercise any form of control over CESI and that the award of the tasks at issue to that company was entirely consistent with the principles laid down in European and national legislation. More specifically, the applicant submitted that those tasks had been awarded to CESI by a procedure without prior call for competition by virtue of the derogations laid down in Article 40(3)(c), (e) and (i) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), namely the existence of technical reasons pursuant to which the contract could be executed only by a particular economic operator, the technical difficulties arising from any acquisition of new supplies resulting in an excessive and disproportionate increase in costs, and the existence of a framework agreement with CESI.

11 By letter of 18 June 2014, the Commission sent the applicant the final audit report (‘the audit report’) produced by the auditing firm. The audit report reproduced virtually all the initial findings contained in the draft audit report, approved certain costs claimed by the applicant and made comments in the light of the applicant’s observations. The applicant was invited to submit any observations within a period of two weeks from receipt of the letter, failing which the Commission would issue two debit notes with a view to recovering a sum of EUR 414 101.72 in relation to Project E 221 and of EUR 80 769.67 in relation to Project E 255.

12 By letter of 15 July 2014, the applicant responded to the Commission’s letter and provided certain new explanations. Whilst noting that a significant proportion of its earlier observations had been upheld, the applicant contested the findings reached by the audit report regarding the direct external costs coming under the tasks at issue. The applicant stressed that it did not exercise any type of control over CESI, which was merely a company with which it was associated but over which it did not exercise any power of management or coordination, in accordance with Article 2947 of the Italian Civil Code. In addition, the applicant explained the reasons which had led it to use a procedure without prior call for competition to award the tasks at issue to CESI, on the basis of the derogations provided for in Article 40(3)(c), (e) and (i) of Directive 2004/17.

13 Further to the response provided by the applicant by the letter of 15 July 2014, the Commission ordered a further investigation. By email of 13 February 2015, it asked the applicant to provide it with additional explanations about the procedures which resulted in the award to CESI, by a procedure without prior call for competition, of framework agreements Nos 3000034279 and 6000001506. Specifically, the Commission requested an explanation for the reference to Article 40(3)(c) of Directive 2004/17 to justify CESI’s unique status as a particular economic operator, given the technical reasons associated with the contract. In addition, the Commission stated that the exception provided for in Article 40(3)(e) of Directive 2004/17 did not apply in the present case since the contract at issue was a service contract and not a supply contract.

14 By email of 23 March 2015, the applicant responded to the Commission’s requests. The applicant stressed that it did not exercise any power of control, management or coordination over CESI and submitted that, by letter of 5 July 2013, it had already informed the Commission of the legal framework which had allowed it to award the tasks at issue to CESI directly, by a procedure without prior call for competition, namely Article 40 of Directive 2004/17, which in certain circumstances permits the use of a procedure without prior call for competition. The applicant stated that, on account of the use of specific tools and software developed jointly with it, CESI was the only economic operator capable of providing the services coming under the tasks at issue, since calling on other economic operators would have resulted in additional costs, longer time frames and a risk that information might be lost in the performance of those services.

15 By letter of 6 July 2015, whilst noting the information gathered in the course of the further investigation and finding that CESI was not a company controlled by the applicant but rather a

company associated with it and over which the applicant did not exercise any form of management or coordination, the Commission revised its position and informed the applicant that the costs relating to the tasks at issue, tasks awarded to CESI directly, could not be regarded as eligible not on account of the failure to comply with the Commission's guidance on the award of contracts to companies belonging to the same group, but because of non-compliance with the applicable rules on public procurement. In this regard, the Commission found that the applicant could have awarded the tasks at issue to CESI directly, without first conducting a call for tender procedure, pursuant to Article 40(3)(i) of Directive 2004/17, only if the framework agreements under which those tasks fell had been awarded in accordance with that directive. The Commission also found that the applicant had failed to satisfy the burden of proof laid down in Article 40(3)(c) of Directive 2004/17, since it had not shown that, as a result of the technical capacities specific to the services falling within the scope of the framework agreements awarded to CESI, CESI was the only company to which the applicant could award those framework agreements. Finally, the Commission stated that the exception laid down in Article 40(3)(e) of Directive 2004/17 did not apply in the present case since it exclusively concerned supply contracts. The Commission announced that, within a period of one month, it would issue two debit notes: one in the amount of EUR 414 101.72 relating to Project E 221 and the other in the amount of EUR 80 769.67 relating to Project E 255.

16 On 21 September 2015, the applicant brought an action before the Court for the annulment of the letter of 6 July 2015. That action was registered at the Court under reference T-544/15.

17 By letter of 23 May 2016, the 'Energy' Directorate-General (DG) of the Commission, proceeding with the procedure to recovery the amounts owed to it, informed the applicant that its arguments had been re-examined in conjunction with competent members of staff of other directorates-general. By that letter, the Commission confirmed the findings set out in the letter of 6 July 2015 and announced that, within a period of one month, it would issue two debit notes with a view to recovering an amount of EUR 414 101.72 in relation to Project E 221 and an amount of EUR 80 769.67 in relation to Project E 255.

18 By letter of 14 June 2016, the Commission sent the applicant two debit notes: one in the amount of EUR 414 101.72 in relation to Project E 221, the other in the amount of EUR 80 769.67 in relation to Project E 255.

19 By order of 13 September 2016, *Terna* v *Commission* (T-544/15, not published, EU:T:2016:513), the Court dismissed the action brought in the case in question as manifestly inadmissible.

Procedure and forms of order sought

20 By application lodged at the Court Registry on 20 July 2016, the applicant brought the present action.

21 By separate document lodged at the Court Registry on 4 October 2016, the Commission raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court.

22 The applicant lodged its observations on that plea on 16 November 2016.

23 By order of 17 February 2017 of the President of the Fifth Chamber of the General Court, the plea of inadmissibility was joined to the main proceedings.

24 Pursuant to Article 106(3) of the Rules of Procedure, if a request to arrange a hearing is not submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, the Court may decide to rule on the action without an oral part of the procedure. In the

present case, since it considers that it has sufficient information available to it from the material in the file, the Court has decided, in the absence of such a request, to rule without an oral part of the procedure.

25 The applicant claims that the Court should:

– annul the letters of 6 July 2015, 23 May and 14 June 2016 (‘the contested measures’);

– join the present proceedings to Case T-544/15, in accordance with Article 68(1) of the Rules of Procedure;

– order the Commission to pay the costs.

26 The Commission contends that the Court should:

– dismiss the action as inadmissible and, in the alternative, as unfounded;

– order the applicant to pay the costs.

27 The application to join the present case to Case T-544/15 has become redundant and there is therefore no longer any need to rule on the applicant’s second head of claim since, by order of 13 September 2016, *Terna* v *Commission* (T-544/15, not published, EU:T:2016:513), the Court dismissed the action brought in the case in question as manifestly inadmissible.

Law

The plea of inadmissibility

28 The Commission claims that the action is inadmissible on the ground that the contested measures are not acts capable of forming the subject matter of an action for annulment for the purposes of Article 263 TFEU. The Commission argues in this regard that the contested measures are not acts which definitively determine its position or final acts but rather acts preparatory to a possible recovery procedure. The Commission submits that only a possible decision following the issuing of the debit note could form the subject matter of an action for annulment.

29 The applicant contests the Commission’s arguments and argues that the contested measures are final acts which produce binding legal effects, such as the refund of amounts, capable of affecting its interests by bringing about a significant change in its legal position. In this regard, the applicant submits, first of all, that the Commission fails to take account of the payment made by it, subject to reservations, on 12 August 2016, of the amounts requested by the Commission in order to avoid incurring default interest, and that, therefore, in such circumstances, the Commission will not adopt a subsequent decision, which in its view is the only act open to challenge. Next, the applicant submits that, if the contested measures are not open to appeal pursuant to Article 263 TFEU, the only act open to challenge would be that which the Commission would adopt on expiry of the deadline set for the payment of the debit note, that is to say when the default interest penalty applies, and that this would be contrary to the most fundamental legal principles. Lastly, the applicant submits that, if the action is dismissed on the ground of inadmissibility, the Court would deprive it of its right to effective judicial protection.

30 In that regard, it should be recalled that, in accordance with settled case-law, only measures which produce binding legal effects capable of affecting an applicant’s interests by bringing about a significant change in his legal position are acts or decisions against which an action for annulment may

be brought under Article 263 TFEU (judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 9; of 5 October 1999, *Netherlands* v *Commission*, C-308/95, EU:C:1999:477, paragraph 26; and of 29 January 2002, *Van Parys and Pacific Fruit Company* v *Commission*, T-160/98, EU:T:2002:18, paragraph 60).

31 More specifically, in the case of acts adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from that same case-law that, in principle, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision (judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 10, and of 14 December 2006, *Germany* v *Commission*, T-314/04 and T-414/04, not published, EU:T:2006:399, paragraph 38).

32 In the present case, it should be noted that, as is stated in paragraph 4 above, under Article 9 of Regulation No 680/2007, following every call for proposals for the award of financial aid, the Commission is to decide on the amount of the financial aid to be granted to the projects or parts of projects selected and to specify the conditions and methods for their implementation.

33 Thus, the contested measures come within the framework of the Decisions of 2 December 2008 and of 21 May 2010, which are binding on the Commission and the applicant. Those Commission decisions entail an acceptance of the proposals submitted, namely agreement between the parties submitting the proposals, on the one hand, and the Commission, on the other, without however Regulation No 680/2007 providing that such agreement is to take the form of a contract.

34 In such a context, the Commission's letters of 23 May and 14 June 2016, in which the Commission makes definitive claims against the aid beneficiary, on the basis of the decision to grant financial aid, can be classified as acts open to review only if they specify the amounts which the Commission considers must be recovered from the aid beneficiary and which that beneficiary repays, subject to the bringing of an action, thus conforming to the will of the Commission.

35 Furthermore, since repayment has been made, the Commission will not adopt any decision following the issuing of the debit note. Accordingly, preventing the applicant from being able to contest the sums repaid would risk undermining its right to an effective remedy. It would therefore be contrary to the right to sound administration to encourage the applicant not to pay the amounts payable as set out in the debit note so that any decision adopted after the debit note is issued may be challenged on the basis of Article 263 TFEU.

36 It follows from the foregoing that the plea of inadmissibility raised by the Commission must be dismissed in relation to the letter of 14 June 2016, which serves as the covering letter for the debit notes mentioned in paragraph 18 above, and the letter of 23 May 2016, pursuant to which the 'Energy' DG of the Commission determined the definitive position of that institution vis-à-vis the merits of the case, after examining one last time the arguments advanced by the applicant and also consulting the competent staff of other directorates-general. However, the action must be dismissed as inadmissible in so far as it is directed against the letter of 6 July 2015, which has already been the subject matter of an action dismissed by the order of 13 September 2016, *Terna* v *Commission* (T-544/15, not published, EU:T:2016:513) (see paragraphs 16 and 19 above), since that order has become final.

Substance

37 The applicant puts forward four pleas in support of its action: the first alleges, in essence, a failure to conduct inquiries and to state reasons for the contested measures, a misapplication of Articles 14 and 37 of Directive 2004/17, and a misapplication of Article III.3.7, paragraphs 1, 4 and 6, of Annex III to the

Decisions of 2 December 2008 and of 21 May 2010; the second alleges a misapplication of Article 40(3)(c) of Directive 2004/17; the third alleges infringement of the principle of the protection of legitimate expectations; and the fourth, raised in the alternative, alleges infringement of the principle of proportionality.

38 As a preliminary point, it should be observed that, on several occasions in the application, the applicant has claimed that the tasks at issue should have been examined independently from the framework agreements, concluded with CESI between 2009 and 2011, within the scope of which those tasks fall. The applicant considers that that substantive error conditioned the Commission's subsequent analysis, since economic considerations, which are admittedly relevant as regards the conclusion of the framework agreements, are not relevant in relation to the tasks at issue, which led to the costs associated with those tasks being regarded as ineligible.

39 In the present case, firstly, it should be observed that the applicant contradicts itself, in this regard, in the application. Although on several occasions it disputes the link between the tasks at issue and the framework agreements, on other occasions it claims that those tasks are linked to and come under the framework agreements. In the application, the applicant itself defines that relationship, by submitting that the tasks at issue must be assessed in the broader context of the relations existing between it and CESI, which are governed by the framework agreements which they concluded between 2009 and 2011. In addition, in the context of its third plea, the applicant claims that the legality of the direct award of the tasks at issue followed specifically from the Commission's failure to contest the award, by a procedure without call for competition, of framework agreement No 3000034279, under which those tasks fall. However, the applicant also states in the application that the framework agreements are irrelevant as far as Projects E 221 and E 255 are concerned and that, therefore, the Commission should have restricted its examination solely to the direct awards to CESI of the tasks at issue beyond the framework agreements. Accordingly, it follows from the foregoing that the applicant cannot criticise the Commission, on the one hand, for having focused solely on the legality of the framework agreements and, on the other, of inferring the legality of each direct award of the tasks at issue specifically from the prior legality of the framework agreements.

40 Secondly, it must be observed that the definition of a framework agreement contained in Article 1(4) of Directive 2004/17 establishes that a framework agreement is an agreement by which the contracting entity defines, with one or more economic operators, the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged. It is apparent from that definition that the contracts based on the framework agreements are awarded subject to the conditions laid down in the framework agreement and that all the contracts awarded during the entire term of the framework agreement are intrinsically linked to the framework agreement, which will determine the prices, quantities and conditions.

41 Thirdly it must be recalled that, under Article 17(2) of Directive 2004/17, contracting entities may not circumvent that directive by splitting works projects or proposed purchases of a certain quantity.

42 Accordingly, in the light of Directive 2004/17 and in view of the close relationship between the framework agreements and the tasks at issue, awarded to CESI directly on the basis of those framework agreements, an assessment of the legality of the award of the tasks at issue, independent from the award of the framework agreements to which they are inevitably and intrinsically linked, would be clearly contrary to that directive.

43 The Commission therefore correctly assessed the legality of the direct award of the tasks at issue to CESI in close conjunction with the award of the framework agreements under which those tasks fell.

44 It is in the light of these preliminary considerations that the pleas in law put forward in support of the

action must be examined.

The first plea in law, alleging, in essence, a failure to conduct inquiries and to state reasons for the contested measures, a misapplication of Articles 14 and 37 of Directive 2004/17, and a misapplication of Article III.3.7, paragraphs 1, 4 and 6, of Annex III to the Decisions of 2 December 2008 and of 21 May 2010

45 This plea is divided, in essence, into three parts, alleging, first, a failure to conduct inquiries and to state reasons for the contested measures; second, a misapplication of Articles 14 and 37 of Directive 2004/17; and, third, a misapplication of Article III.3.7, paragraphs 1, 4 and 6, of Annex III to the Decisions of 2 December 2008 and of 21 May 2010, on account of an excessively formal application of Directive 2004/17.

– The first part of the first plea, alleging a failure to conduct inquiries and to state reasons for the contested measures

46 The applicant takes the view, in essence, that the contested measures are vitiated by a failure to conduct inquiries and by an insufficient statement of reasons because the Commission relied on an incorrect reading of the applicable provisions and an incorrect framing of the relationship between the tasks at issue and the framework agreements.

47 In this regard, the applicant submits that it has always relied in the alternative, and not cumulatively, on the derogation laid down in Article 40(3)(c) of Directive 2004/17, which concerns the tasks at issue only, and that laid down in Article 40(3)(i) of that directive, which concerns the framework agreements. In the applicant's view, the Commission should have assessed whether there were technical reasons, within the meaning of Article 40(3)(c) of Directive 2004/17, justifying the award by a procedure without prior call for competition, having regard to those tasks and not to the framework agreements.

48 In addition, the applicant claims that the brief statement of reasons provided by the Commission is manifestly flawed, since the Commission has never provided a response to the observations made by the applicant concerning the existence of technical reasons justifying the award of the tasks at issue to CESI by a procedure without prior call for competition.

49 Finally, the applicant submits that the Commission wrongly excluded from the reimbursement sought by the applicant the costs relating to the tasks at issue awarded directly to CESI, on the basis of the assumption that the framework agreements to which those tasks refer were concluded by a procedure without prior call for competition, in breach of the EU rules on public procurement.

50 The Commission contests the applicant's arguments.

51 It should be recalled that, in accordance with settled case-law, the purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the rights of the defence, is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and, second, to enable that judicature to review the legality of that act (see judgment of 15 November 2012, *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraph 49 and the case-law cited).

52 The statement of reasons required by Article 296 TFEU must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the person concerned to ascertain the reasons for the measures and to enable the court having jurisdiction to exercise its power of review (see judgment of 15 November 2012, *Council* v *Bamba*,

C-417/11 P, EU:C:2012:718, paragraph 50 and the case-law cited).

53 The statement of reasons must, however, be appropriate to the act at issue and the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him (see judgment of 15 November 2012, *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraphs 53 and 54 and the case-law cited).

54 Firstly, it should be observed, as set out in paragraphs 39 to 43 above, that the Commission correctly assessed the legality of the direct award of the tasks at issue to CESI in close conjunction with the award of the framework agreements under which those tasks fell. It follows that the applicant's complaints concerning the incorrect framing of the relationship between the tasks at issue and the framework agreements have no basis.

55 Second, it is apparent from the contested measures that the Commission set out the reasons why, in its view, the costs associated with the tasks at issue directly awarded to CESI in the context of Projects E 221 and E 255 were regarded as ineligible, and that the reasons provided by the applicant to derogate from the rules on public procurement were neither technically nor legally acceptable. Thus, by letter of 6 July 2015, the Commission stated that those tasks had not formed the subject of a call for competition procedure when they were awarded and that, therefore, the ability of the applicant to award them directly to CESI turned on the compatibility of the procedure adopted to conclude the framework agreements, under which the tasks at issue fell, with Directive 2004/17, in accordance with Article 14(2) and (3) of that directive. The Commission submitted in that regard that the explanations provided by the applicant, based on the technical nature of the expected provision of services, were incapable of justifying the direct award of the framework agreements. In addition, by letter of 23 May 2016, the Commission informed the applicant that the explanations advanced could not alter the assessments contained in the letter of 6 July 2015, which had to be regarded as final, and stated that, within a period of one month, it would issue two debit notes with a view to the recovery of an amount of EUR 414 101.72 in relation to Project E 221 and of an amount of EUR 80 769.67 in relation to Project E 255. Finally, the Commission sent the two debit notes to the applicant on 14 June 2016.

56 It follows from the foregoing that the contested measures mark the conclusion of an exchange of letters, in the course of which the Commission set out, to the requisite legal standard, the points of fact and of law upon which it based its decisions and responded to all the comments made by the applicant. Accordingly, the contested measures were adopted in a context which enabled the applicant to understand the scope of the measures concerning it and, thereafter, sufficient reasons for them are stated.

57 Finally, the question of whether the conclusion of a framework agreement in breach of the EU rules on public procurement is incapable of excluding the costs relating to the tasks coming under that framework agreement falls within the scope of the examination of the merits of the case and not of the form of the contested measures. Accordingly, such considerations, even assuming that they are sufficiently precise, are irrelevant in the context of the complaint alleging a failure to state reasons and can only be rejected.

58 It follows from the foregoing that the first part of the first plea must be dismissed.

– The second part of the first plea, alleging a misapplication of Articles 14 and 37 of Directive 2004/17

59 The applicant submits that the Commission was wrong to find that the use of subcontracting provides evidence capable of ruling out the existence of technical reasons which would justify the award of contracts by a procedure without call for competition, in accordance with Article 40(3)(c) of Directive 2004/17. In that regard, the applicant takes the view that the provision on subcontracting, namely Article 37 of Directive 2004/17, does not exclude from its scope contracts awarded by a procedure without prior call for competition, and that, similarly, Article 40 of Directive 2004/17 does not provide that, in a case of direct award by a procedure without call for competition, the particular economic operator is required to perform all the services forming the subject matter of the contract personally.

60 The applicant adds that, in any event, subcontracting was used in relation to just one of the tasks at issue and provided for in favour of a restricted number of operators and in relation to purely secondary and ancillary activities which have a minor impact and are of no particular importance in the performance of that task. Moreover, the applicant claims that the services provided by the subcontractor were different from those to which technical reasons were connected.

61 The Commission contests the applicant’s arguments.

62 It should be observed that, although Article 37 of Directive 2004/17 allows contracting entities to subcontract to third parties a share of the contract at issue, Article 40(2) of that directive provides that contracting entities may choose between an open, restricted or negotiated procedure for the award of their contracts, provided that a call for competition has been made. In addition, Article 40(3)(c) of that directive provides that contracting authorities may use a procedure without prior call for competition when, for technical reasons, the contract may be executed only by a particular economic operator.

63 In the present case, it should be observed that the use of other economic operators with a view to the provision of a service precludes, in itself, that service provision from coming under the derogation laid down in Article 40(3)(c) of Directive 2004/17. As is apparent from case-law, the application of Article 40(3)(c) of Directive 2004/17 is subject to two cumulative conditions, namely, first, that there are technical reasons connected to the services which are the subject matter of the contract and, second, that those technical reasons make it absolutely necessary to award that contract to a particular operator (see, by analogy, judgment of 2 June 2005, *Commission* v *Greece*, C-394/02, EU:C:2005:336, paragraph 34).

64 In addition, the framework agreements concluded with CESI, under which the tasks at issue fell, authorise the use of subcontracting, and the activities together with the corresponding contractors are listed in the framework agreements. Accordingly, the applicant must be deemed to have considered that other operators were, in principle, capable of carrying out those activities (see, to that effect and by analogy, judgment of 2 June 2005, *Commission* v *Greece*, C-394/02, EU:C:2005:336, paragraph 37). It must therefore be held that it was not absolutely necessary to award those framework agreements to CESI, since the latter was not the only operator with the expertise to provide the services at issue.

65 It cannot therefore be argued that the use of other operators — even in marginal circumstances, where the number of operators is restricted or where the activities are secondary — does not preclude the service provided from coming under the derogation provided for in Article 40(3)(c) of Directive 2004/17.

66 In those circumstances, the second part of the first plea must be dismissed.

– The third part of the first plea, alleging a misapplication of Article III.3.7, paragraphs 1, 4 and 6, of Annex III to the Decisions of 2 December 2008 and of 21 May 2010

67 The applicant claims that Article III.3.7, paragraphs 1, 4 and 6, of Annex III to the Decisions of 2 December 2008 and of 21 May 2010 has been misapplied on account of an excessively formal application of Directive 2004/17.

68 In that regard, the applicant submits that Article III.3.7, paragraph 1, of Annex III to the Decisions of 2 December 2008 and of 21 May 2010 does not provide for the obligation to use prior open or restricted procedures for the award of contracts, but merely lays down a more general duty to incur costs which are 'reasonable and justified and which comply with the requirements of sound financial management, in particular in terms of economy and efficiency'. The applicant submits that, although it did lawfully opt not to launch a call for competition procedure in the literal sense for the award of contracts to CESI, it did conduct in-depth negotiations with CESI, obtaining substantial discounts from that operator. The applicant therefore criticises the Commission for having applied Directive 2004/17 in an excessively formal manner, since the Commission simply stated that the costs arising from the contracts directly awarded to CESI were not eligible merely because they had been awarded by a procedure without prior call for competition, without conducting a substantive review as to whether or not those contracts were advantageous from an economic perspective and whether the costs were reasonable and justified.

69 The Commission contests the applicant's arguments.

70 It must be recalled that the principle of competitive tendering forms the basis of all public contracts financed in whole or in part by the budget of the European Union, alongside the principles of transparency, proportionality, equal treatment and non-discrimination, as provided for in Article 102 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1).

71 It must be observed that the contracts at issue, since they are financed in part by the European Union, must comply with the applicable rules on public procurement. Those rules include Article III.2.5 of Annex III to the Decisions of 2 December 2008 and of 21 May 2010, which establishes the principle that, when financed activities are awarded to third parties, the beneficiary is required to comply with the applicable rules on public procurement, as laid down in EU law. In addition, in accordance with Article 40(2) of Directive 2004/17, when awarding contracts, contracting entities may apply open, restricted or negotiated procedures, provided that, subject to the exceptions laid down in paragraph 3 of that article, a call for competition has been made.

72 In the present case, the cost effectiveness of awarding activities to external operators does not provide an exemption from the obligation to comply with the provisions of Article III.2.5 of Annex III to the Decisions of 2 December 2008 and of 21 May 2010. The applicant relies on Article III.3.7(f) of Annex III to the Decisions of 2 December 2008 and of 21 May 2010, claiming that, in order to be eligible, the costs of the action must be reasonable and justified and comply with the principles of sound financial management. It submits that those principles were under no circumstances breached when the framework agreements were awarded to CESI by a procedure without prior call for competition, since CESI gave it substantial discounts. However, although that factor may be significant when awarding contracts, it cannot in any event justify derogation from the procurement rules and does not guarantee that the action has been undertaken in accordance with the policies of the European Union, in particular with the rules on public contracts.

73 In that context, the Commission observed, in its letters of 6 July 2015 and of 23 May 2016, that the direct award of the framework agreements, under which the tasks at issue fall, was not justified by

arguments based on technical reasons connected with the contract, pursuant to which the contract may be executed only by a particular economic operator. Accordingly, in view of the failure to comply with the rules laid down in EU legislation applicable in the field of public contracts when the abovementioned framework agreements were awarded by a procedure without prior call for competition, the costs relating to the tasks at issue cannot be regarded as eligible, even if they are reasonable and justified.

74 It follows from the foregoing that the third part of the first plea must be dismissed and, therefore, so must the first plea in its entirety.

The second plea, alleging the misapplication of Article 40(3)(c) of Directive 2004/17

75 The applicant submits that by entrusting to CESI, by a procedure without prior call for competition, services which it could not perform using its own resources was, in reality, a necessary decision, since CESI was the only operator capable of performing those services. The applicant thus states that the choice of CESI was covered by the exception laid down in Article 40(3)(c) of Directive 2004/17.

76 The applicant considers that it provided precise information and justifications concerning the scope of the technical specifications of the services awarded directly to CESI, thus making clear the reasons why the award to CESI was necessary and, in any event, more economically advantageous. In this regard, the applicant submits that CESI is the only operator capable of providing the necessary support on account of its competence in the management and use of the software Spira, Promed, Sicre and Wcreso and the tool Grare, used in the context of framework agreement No 3000034279, in relation to Project E 255, and of framework agreement No 3000029140, in relation to Project E 221. More specifically, the applicant submits that a contract concluded with any other economic operator would have been on less advantageous terms, that the implementation time frames would have been longer, and that certain errors could have been made or information lost.

77 Furthermore, the applicant takes the view that, in accordance with case-law, the continuity of complex projects constitutes a valid technical reason for the direct award to a particular operator. In this regard, it submits that it has shown that there were no reasonable alternatives to the direct award of the tasks at issue to CESI and, in view of the link existing between the tasks at issue and the activities previously performed under the framework agreements, it awarded those tasks to CESI by a procedure without prior call for competition.

78 The Commission contests the applicant’s arguments.

79 It follows from Article 40(3)(c) of Directive 2004/17 that contracting entities may use a procedure without prior call for competition inter alia when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular economic operator.

80 Moreover, it must be recalled that it follows from case-law that the application of Article 40(3)(c) of Directive 2004/17 is subject to two cumulative conditions, namely, first, that there are technical reasons connected to the works which are the subject matter of the contract and, second, that those technical reasons make it absolutely necessary to award that contract to a particular contractor (see, by analogy, judgment of 2 June 2005, *Commission* v *Greece*, C-394/02, EU:C:2005:336, paragraph 34).

81 It should also be noted that, as derogations from the rules relating to procedures for the award of public procurement contracts, the provisions of Article 20(2)(c) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which contained similar rules to those laid down in

Article 40(3)(c) of Directive 2004/17, had to be interpreted strictly. In addition, the burden of proof lies on the party seeking to rely on those provisions (judgment of 2 June 2005, *Commission* v *Greece*, C-394/02, EU:C:2005:336, paragraph 33).

82 In the present case, the applicant claims that the supplies of services involving services which it was unable to perform itself, using its own resources, are covered by the exception laid down in Article 40(3)(c) of Directive 2004/17, since CESI was the only operator capable of performing those services.

83 It must be stated that the applicant, on whom the burden of proof lies, does not state any technical reasons or point to any ground establishing that such technical reasons, even assuming that they exist, made it absolutely necessary to entrust the performance of those services to CESI. In this regard, the applicant simply relies on the fact that the activities forming the subject matter of those supplies of services involved the use of software or of a programme already used jointly by it and CESI. It must be observed that, as the Commission points out, the fact that CESI uses software owned by the applicant is indeed an assessment criterion in the context of a comparison with other competing operators, but it cannot justify, in the light of the case-law cited in paragraph 80 above, the a priori exclusion of any other operator on the ground that CESI is, allegedly, the sole competent operator. Nothing would prevent the applicant, should it receive a more advantageous tender than CESI's tender, from granting a licence for the use of the software or of the programme at issue to the new operator. In particular, it should be observed that the licence to use the programmes or software is not an exclusive right which would make it impossible for other operators to be used to perform the activities in question. This is necessarily the case because if it were possible to rely on previous professional relationships with the contracting entity in order to preclude any procedure involving a call for competition when new contracts are awarded, the objective of opening up contracts pursued by Directive 2004/17 would inevitably be compromised and this would have the paradoxical result of impeding competition to the benefit of the contractor.

84 In addition, with regard to the explanations offered by the applicant to justify the direct award of the contested services to CESI on the ground that a contract concluded with any other company would have been on less advantageous terms, that the implementation time frames would have been longer or that certain errors might have been made or information lost, it should be observed that the alleged problems involved in moving from one provider to another and the additional costs to which that change might give rise, factors relied on the applicant, logically presuppose that a change in operator from CESI to another tenderer was technically possible. At no point does the applicant ever refer to a ground of technical incompatibility which would objectively prevent another operator from providing the same services, such that, as set out in paragraph 80 above, it would be absolutely necessary to select one operator only. In any event, it should also be noted that the applicant has at no time provided figures or evidence to show that a contract concluded with any other company would have been more costly or involved longer implementation time frames.

85 Finally, with regard to the continuity of works, it must be observed that it is true that the aim of ensuring the continuity of works under complex projects is a technical reason which must be recognised as being important. However, merely to state that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor (see, by analogy, judgment of 14 September 2004, *Commission* v *Italy*, C-385/02, EU:C:2004:522, paragraph 21). In the present case, the applicant simply stated in general terms that the use of any other operator would increase the costs and time frames without providing explanations which could show the need to use one operator only. The lack of other reasonable solutions is not the reference criterion for determining the legality of the direct award to a particular operator, which presupposes, on the contrary, the absolute necessity of such an award, as is established in case-law. Accordingly, the link between the previous activities provided

by CESI for the applicant under the framework agreements and the tasks at issue cannot constitute such a reason.

86 Since the applicant has failed to prove that, for technical reasons, within the meaning of Article 40(3)(c) of Directive 2004/17, the framework agreements under which the tasks at issue fall could only be awarded to CESI, the second plea in law must be dismissed.

The third plea, alleging infringement of the principle of the protection of legitimate expectations

87 Firstly, the applicant claims that the contested measures are contrary to the principle of the protection of legitimate expectations because the Commission found to be ineligible the costs arising from the tasks falling under framework agreement No 3000034279, which it has never contested despite the publication of the award notice for that framework agreement in the *Official Journal of the European Union* on 7 July 2010. In this regard, the applicant submits that the publication in the *Official Journal of the European Union* of a contract notice providing information about the award of a contract to a particular economic operator following a negotiated procedure without prior call for competition, without the Commission or another economic operator contesting that award or submitting observations within the time limits laid down in Article 2f of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), is a factor capable of giving rise to a legitimate expectation on the part of the applicant as to the lawfulness of the procedure adopted.

88 Secondly, the applicant contests the applicability of the provisions of Directive 2004/17 in the present case on the basis of the value of a significant proportion of the number of tasks at issue, which is lower than the relevance threshold laid down in Article 16(a) of that directive.

89 The Commission contests the applicant’s arguments.

90 First, it must be observed that, in accordance with settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any individual in regard to whom an institution of the European Union has given rise to justified hopes (see judgment of 11 March 1987, *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v EEC, 265/85, EU:C:1987:121, paragraph 44 and the case-law cited).

91 However, three cumulative conditions must be satisfied in order to rely on that principle. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the EU authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (see judgment of 30 June 2005, *Branco* v *Commission*, T-347/03, EU:T:2005:265, paragraph 102 and the case-law cited; judgments of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 77, and of 30 June 2009, *CPEM* v *Commission*, T-444/07, EU:T:2009:227, paragraph 126).

92 With regard to the first condition, it is settled case-law that such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources. However, a person may not plead breach of the principle of legitimate expectations unless he has been given precise assurances by the administration (see judgment of 19 March 2003, *Innova Privat-Akademie* v *Commission*, T-273/01, EU:T:2003:78, paragraph 26 and the case-law cited).

93 In the present case, it is not apparent from the information in the file that the Commission gave the applicant the precise assurance that it would approve the method used by the applicant to award the

contracts under Projects E 221 and E 255. Verification of the eligibility of expenditure is carried out only after the final financial statements have been produced, whereas the previous stages are concerned solely with the technical monitoring of the progress of the projects. Accordingly, it is only when payment of the balance is requested, a request which is submitted together with the technical implementation report and the financial statement of the eligible costs actually borne, that such verification takes place, as is clear inter alia from Article III.3.5 of Annex III to the Decisions of 2 December 2008 and of 21 May 2010.

94 Accordingly, the fact that the Commission did not contest the award of framework agreement No 3000034279 to CESI, despite the lawful publication in the *Official Journal of the European Union* of the award notice, does not constitute an assurance such as to give rise to a legitimate expectation on the part of the applicant as regards the eligibility of the expenditure. In this regard, the silence observed by the Commission regarding the direct award of the framework agreement cannot be regarded as a precise assurance provided by the administration capable of giving rise to a legitimate expectation (see, to that effect, judgment of 18 January 2006, *Regione Marche* v *Commission*, T-107/03, not published, EU:T:2006:20, paragraph 134).

95 Secondly, with regard to the applicant's argument that Directive 2004/17 is not applicable in the present case, it should be observed that, as regards specifically the calculation of the estimated value of a public contract, Article 17(2) and (3) of Directive 2004/17 provides, first, that, with regard to framework agreements, the estimated value to be taken into consideration is to be the maximum value net of value added tax (VAT) of all the contracts envisaged for the total term of the framework agreement and, second, that contracting entities may not circumvent the Directive by splitting works projects or proposed purchases of a certain quantity of supplies or services or by using special methods for calculating the estimated value of contracts. However, as has been set out in paragraphs 39 to 43 above, the tasks at issue directly awarded to CESI could not seriously be regarded as being separate from the framework agreements, since those tasks were carried out specifically in performance of those agreements.

96 It is therefore necessary to determine the applicability of Directive 2004/17, for the purposes of Article 17(3) thereof, as regards the value of the framework agreements. In this regard, it must be observed that the value of the framework agreements significantly exceeds the relevance threshold, since framework agreement No 3000029140 was concluded for an amount of EUR 16 039 700, framework agreement No 3000034279 for an amount of EUR 19 200 000, and framework agreement No 6000001506 for an amount of EUR 24 925 000; in accordance with Article 16(a) of Directive 2004/17, the relevance threshold for supply and service contracts is EUR 499 000.

97 In those circumstances, the third plea must be dismissed.

The fourth plea, alleging infringement of the principle of proportionality

98 The applicant submits, in the alternative, that the contested measures are unlawful since the Commission found all the costs relating to the tasks at issue to be ineligible. The applicant submits that the Commission declared those costs to be ineligible since, when awarding contracts to companies belonging to the same group, the principle of economic efficiency had not been observed because CESI had provided the services to it on market terms and had thus made a profit. The applicant takes the view, in this regard, that the Commission's actions are contrary to the principle of proportionality, since Article III.3.8, paragraphs 4 and 6, of Annex III to the Decisions of 2 December 2008 and of 21 May 2010 does not allow the Commission to exclude all the costs borne where a profit is made, but requires, as the case may be, simply a reduction in the amount of the financial aid in respect of the share deemed to be ineligible.

99 The applicant therefore submits that the correct application of that article should have led the Commission, first of all, to identify the profit margin component of the costs relating to the tasks at issue and then to declare those costs ineligible solely in respect of the share of the profit deemed ineligible. The applicant therefore takes the view that the Commission exercised an excessive power to impose penalties given its remit, which confers on it only powers of monitoring and control.

100 In addition, the applicant submits that the Commission declared the expenses at issue ineligible, whilst noting that CESI was not a company controlled by the applicant but merely a company associated with it. However, in the applicant's view, a consistent application of that finding should have meant that the Commission understood that it was impossible for the applicant to obtain from CESI a detailed breakdown of the costs relating to the services provided by that company.

101 The Commission contests the applicant's arguments.

102 It should be observed that this plea is ineffective since, as has been established in paragraph 15 above, following the further investigation ordered by the Commission, the Commission revised its position and found the costs to be ineligible on account of the failure to comply with the rules on public procurement and not because of the failure to comply with the principle of economic efficiency when awarding contracts to companies belonging to the same group. By its letter of 6 July 2015, the Commission informed the applicant that the costs relating to the tasks at issue, which were awarded directly to CESI, were ineligible because the framework agreements had been awarded by a procedure without call for competition and that the applicant had not satisfied the burden of proof laid down in Article 40(3) of Directive 2004/17.

103 In the present case, the Commission has not exercised any power to impose penalties, but has simply found there to have been a breach of Article III.2.5.3 of Annex III to the Decisions of 2 December 2008 and of 21 May 2010, which requires the applicant to comply with EU legislation on the award of public contracts when awarding its contracts. Once that breach was established by the Commission, it could not come to any other conclusion, since only the costs of the action relating to contracts awarded in accordance with EU legislation on public contracts could be regarded as costs eligible for co-financing, as provided for in Articles III.2.5.3 and III.3.7 of Annex III to the Decisions of 2 December 2008 and of 21 May 2010. Therefore, faced with non-compliance with EU legislation on the award of public contracts in relation to certain contracts, the Commission was obliged to declare the related expenditure to be ineligible, to calculate the amount of the aid accordingly and to launch a procedure for the recovery of the difference between the amounts of the eligible costs and the amounts already paid. Thus, the amounts corresponding to the ineligible costs, in so far as they relate to contracts unlawfully entrusted to CESI, have become undue and, as such, subject to the repayment obligation pursuant to Article III.3.9, paragraph 1, of Annex III to the Decisions of 2 December 2008 and of 21 May 2010.

104 Furthermore, the Commission cannot be criticised for having imposed a penalty, since the measures adopted to recover a proportion of the amounts paid has a less onerous impact on the beneficiary than the cancellation of the aid altogether. In accordance with Article 116(3) of Regulation No 966/2012, where, after the signature of the contract, the procedure or the performance of the contract proves to have been subject to substantial errors, irregularities or fraud, the contracting authority may suspend the performance of the contract or, where appropriate, terminate it. Furthermore, where substantial errors or irregularities are committed by the contractor, the contracting authority may, in addition, refuse to make payments or recover amounts unduly paid, to an extent proportionate to the seriousness of the substantial errors, irregularities or fraud.

105 In those circumstances the fourth plea must be dismissed and the present action must be dismissed in its entirety.

Costs

106 Under Article 134(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 applicant has been unsuccessful, it must be ordered to bear its own costs in addition to those of the Commission, in accordance with the latter's pleadings.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Terna — Rete elettrica nazionale SpA to bear its own costs and those incurred by the European Commission.**

Gratsias Labucka Ulloa Rubio

Delivered in open court in Luxembourg on 18 October 2018.

[Signatures]

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* Language of the case: Italian.

JUDGMENT OF THE COURT (Fourth Chamber)

25 October 2017 (*)

(Appeal — Own resources of the European Union — Decision 2007/436/EC — Financial liability of the Member States — Loss of certain import duties — Obligation to pay the European Commission the amount corresponding to the loss — Actions for annulment — Admissibility — Letter from the European Commission — Concept of 'actionable measure')

In Joined Cases C-593/15 P and C-594/15 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 November 2015,

Slovak Republic, represented by B. Ricziová, acting as Agent,

appellant,

supported by:

Czech Republic, represented by M. Smolek, J. Vláčil and T. Müller, acting as Agents,

Federal Republic of Germany, represented by T. Henze and K. Stranz, acting as Agents,

Romania, represented by R.-H. Radu, M. Chicu and A. Wellman, acting as Agents,

interveners in the appeal,

the other party to the proceedings being:

European Commission, represented by A. Caeiros, A. Tokár, G.-D. Balan and Z. Malůšková, acting as Agents,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 23 March 2017,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2017,

gives the following

Judgment

1 By its appeals, the Slovak Republic seeks to have set aside the orders of the General Court of the European Union of 14 September 2015, *Slovakia* v *Commission* (T-678/14, not published, 'the first order under appeal', EU:T:2015:661), and *Slovakia* v *Commission* (T-779/14, not published, 'the second order under appeal', EU:T:2015:655) (together, 'the orders under appeal'), by which it dismissed as inadmissible its actions for annulment of the decisions of the European Commission Directorate-General for Budget allegedly contained in the letter BUDG/B/03MV D (2014) 2351197 of 15 July 2014 ('the first letter at issue'), and in the letter BUDG/B/03MV D (2014) 3139078, of 24 September 2014 ('the second letter at issue') (together, 'the letters at issue').

Legal context

2 Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources (OJ 2007L 163, p. 17) repeals, with effect from 1 January 2007, Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources (OJ 2000 L 253, p. 42).

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

4 Under Article 2(1) of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000, implementing Decision 2007/436 (OJ 2000 L 130, p. 1), as amended by Council Regulation (EC, Euratom) No 105/2009 of 26 January 2009 (OJ 2009 L 36, p. 1, 'Regulation No 1150/2000'), the Union's entitlement to own resources is to be established as soon as the conditions provided for by the customs regulations have been met concerning the entry of the entitlement in the accounts and the notification of the debtor.

5 The first subparagraph of Article 9(1) of Regulation No 1150/2000 provides:

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

6 In accordance with Article 10(1) of that regulation, entry of own resources is to be made at the latest on the first working day following the nineteenth day of the second month following the month during which the entitlement was established in accordance with Article 2 of that regulation.

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

Background to the dispute

8 In 2006 and 2007, some companies made customs declarations, as customs debtors, in Germany in order to place goods destined for Slovakia under the external Community transit procedure in accordance with Article 91 et seq. of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

9 For those transit operations, the Slovak customs authorities informed the German authorities, within the required time limits and by means of the New Computerised Transit System (NCTS), of the presentation of the goods at the customs office of destination and the result of the check carried out. Accordingly, the transactions concerned were cleared and the financial guarantee provided by the main debtors was released.

10 However, a survey carried out in Slovakia found that, at the Slovakian destination customs office, there had been an irregular termination of transit operations following an unlawful introduction into the NCTS.

11 The director of the Directorate for Financial Resources and Financial Programming of the Directorate-General for Budget of the European Commission ('the director') pointed out in the letters at issue that, by Decision C(2011) 9750 final, of 5 January 2012 (file REM 03/2010), the Commission had, following a request from the German authorities, found that a remission of import duties was justified under Article 239 of Regulation No 2913/92, as regards a German company which had, as the main debtor, filed several declarations on behalf of its customers for the transport to Slovakia, during the years 2006 and 2007, of goods subject to the external transit procedure. In that regard, the Commission pointed out that the irregular closure of transit operations constituted fraudulent manoeuvres that could only be reasonably explained by the active complicity of a customs official of the Slovak destination office or by a failure of organisation on the part of that office which allowed a third party to access the NCTS.

12 The director also stated, in essence, that the German authorities had, for the same reasons, granted a remission of customs duties in other cases. Thus, in the first letter at issue, the case of another company was mentioned and, in the second letter at issue, six other cases.

13 In the letters at issue, the director explained that, in the view of the Commission services, the Slovak Republic was considered to be financially liable insofar as the confirmation of the clearance of the transit documents returned to the German office of departure had prevented the German authorities from collecting or recovering customs duties, which are traditional own resources. He pointed out that, although the Slovak Republic was not responsible for levying customs duties incurred for imports into the Union, a Member State remained financially liable for losses of own resources if its authorities or their representatives made mistakes or acted fraudulently.

14 The director then pointed out that the Slovak authorities had been unable to guarantee that the customs provisions of the Union had been correctly applied. That incorrect application of EU law resulted, it is claimed, in a loss of traditional own resources in so far as the German authorities had not been able to collect customs duties and make them available to the Commission. The director concluded from this that the Slovak Republic had to compensate the Union budget for the loss thus caused. In that regard, he referred, by analogy, to paragraph 44 of the judgment of 8 July 2010, *Commission* v *Italy* (C-334/08, EU:C:2010:414).

15 The director explained, in essence, that any refusal by the Slovak Republic to make available such traditional own resources would be contrary to the principle of loyal cooperation between Member States and within the Union and would hamper the proper functioning of the system of own resources.

16 Consequently, he requested the Slovak authorities to make available to the Commission two gross amounts of own resources of EUR 1 602 457.33 and EUR 1 453 723.12 respectively, from which it is necessary to deduct 25% by way of collection costs, by the first working day following the nineteenth day of the second month following the dispatch of the letters at issue. He added that any delay would give rise to the payment of interest under Article 11 of Regulation No 1150/2000.

The proceedings before the General Court and the orders under appeal

17 By applications lodged at the Registry of the General Court on 22 September and 26 November 2014 respectively, the Slovak Republic brought actions for annulment of the decisions allegedly contained in the letters at issue.

18 By separate documents lodged at the Registry of the General Court on 5 December 2014 and 12 February 2015 respectively, the Commission raised pleas of inadmissibility under Article 114(1) of

the Rules of Procedure of the General Court of 2 May 1991. In both cases those pleas were based on the absence of a measure against which an action for annulment may be brought and, in Case T-678/14, on the purely confirmatory nature of the first letter at issue.

19 The Slovak Republic submitted its observations on these pleas of inadmissibility.

20 By documents lodged at the Registry of the General Court on 8 and 23 January 2015 respectively, the Federal Republic of Germany and Romania applied to intervene in support of the form of order sought by the Slovak Republic in Case T-678/14. By documents lodged at the Registry of the General Court on 10 April and 4 May 2015 respectively, those Member States applied to intervene in support of the form of order sought by the Slovak Republic in Case T-779/14.

21 By the orders under appeal, the General Court ruled on the Commission's pleas of inadmissibility pursuant to Article 130 of its Rules of Procedure.

22 In order to assess whether the letters at issue are actionable, the General Court examined, in paragraphs 27 to 37 and 39 of the first order under appeal and in paragraphs 26 to 36 and 38 of the second order under appeal, the division of powers between the Commission and the Member States regarding the determination of own resources under the provisions of Decision 2007/436 and Regulation No 1150/2000. It concluded, in paragraph 41 of the first order under appeal and in paragraph 40 of the second order under appeal, that, since the Commission had no power to adopt a measure requiring a Member State to make own resources available, the letters at issue were for information purposes only and could constitute no more than a simple request addressed to the Slovak Republic.

23 In that regard, the General Court pointed out, in paragraphs 42 to 44 of the first order under appeal and in paragraphs 41 to 43 of the second order under appeal, that an opinion issued by the Commission, such as that contained in those letters, does not bind the national authorities and, in paragraphs 45 to 47 of the first order under appeal and in paragraphs 44 to 46 of the second order under appeal, that it cannot, any more than a reasoned opinion in the pre-litigation stage of an infringement procedure, constitute an actionable measure.

24 Finally, the General Court dismissed the arguments raised by the Slovak Republic. In particular, in paragraphs 54 and 55 of the first order under appeal and in paragraphs 53 and 54 of the second order under appeal, the General Court rejected as ineffective the arguments alleging that the Commission had misinterpreted the relevant rules, that the letters at issue had no legal basis or that the amounts referred to therein could not be regarded as 'own resources', on the ground that those arguments concerned the merits of the content of those letters. In paragraphs 56 to 59 of the first order under appeal and in paragraphs 55 to 58 of the second order under appeal, the General Court also responded to arguments based on the complete system of legal remedies, effective judicial protection and the urgency of the situation in the present case, which, it is claimed, result in particular from the risk of having to pay considerable default interest.

25 In the light of the above, the General Court accepted those pleas of inadmissibility raised by the Commission and dismissed the actions of the Slovak Republic as inadmissible, in so far as they were directed against measures which could not be the subject of an action, without ruling on the applications for leave to intervene by the Federal Republic of Germany and Romania.

Forms of order sought and proceedings before the Court

26 By its appeals, the Slovak Republic claims that the Court should:

– set aside in their entirety the orders under appeal;

– rule itself on the admissibility of the Slovak Republic's appeals and refer the cases back to the General Court for that court to rule on the substance of the appeals, or, alternatively, refer the cases back to the General Court for that court to rule both on the admissibility and the substance of the appeals, and

– order the Commission to pay the costs.

27 In its response, the Commission asks the Court to:

– dismiss the appeals and

– order the Slovak Republic to pay the costs.

28 In their statements in intervention, the Federal Republic of Germany and Romania request, in essence, the Court to allow the appeals.

29 By order of the President of the Court of 12 January 2016, Cases C-593/15 P and C-594/15 P were joined for the purposes of the written and oral procedure and the judgment.

Concerning the appeals

30 In support of its appeals, the Slovak Republic raises two grounds of appeal alleging, first, errors of law and, secondly, in the alternative, infringement of the General Court's obligation to state reasons.

The first ground of appeal

Arguments of the parties

31 By its first ground of appeal, the Slovak Republic alleges that the General Court committed several errors of law in its assessment of the nature and effects of the letters at issue. This ground is divided into three sets of arguments.

32 In the first place, the Slovak Republic alleges, in essence, that the General Court misconstrued the nature of the amounts claimed in the letters at issue by qualifying them, at least implicitly, as 'own resources' within the meaning of Article 2(1) of Decision 2007/436. The General Court thus erroneously applied the regulatory provisions and case-law relating to own resources in order to rule on the Commission's decision-making powers. In so far as the correct legal classification of those amounts was relevant to the assessment of the admissibility of the applications, the General Court could not, moreover, without erring in law, simply consider, in paragraphs 54 and 55 of the first order under appeal and in paragraphs 53 and 54 of the second order under appeal, that the arguments put forward by the Commission in that regard concerned the substantive assessment.

33 In any event, the case-law cited by the General Court in paragraphs 28 to 34 of the first order under appeal and in paragraphs 27 to 33 of the second order under appeal is irrelevant in the present case since it sets out the obligations of the Member States in respect of own resources in bilateral relations between the Commission and the Member State responsible for making such resources available. The present cases, it is claimed, involve a tripartite relationship between the Commission, the Federal Republic of Germany as Member State responsible for making own resources available, and the Slovak Republic, which was not responsible for making available such resources.

34 The Slovak Republic, in its observations on the statements in intervention, further emphasises the legal uncertainty and the risk of serious financial consequences arising from the uncertainty concerning the legal basis of the alleged obligation to make available the amounts claimed. It disputes the very existence of such an obligation under EU law. Since, by the letters at issue, the Commission has

established an obligation and consequences not provided for by that law, those letters, it is claimed, clearly produce legal effects capable of affecting its interests. In any event, it would be useful for the Court to clarify the issues relating to that legal basis in the present cases.

35 In the second place, the Slovak Republic submits that the General Court erred in law by raising, in essence, in paragraph 41 of the first order under appeal and in paragraph 40 of the second order under appeal, the criterion of the powers of the institution which adopted the contested measure as a *sine qua non* condition for the existence of an actionable measure. It is true that the Court held, in paragraph 55 of the judgment of 13 February 2014, *Hungary* v *Commission* (C-31/13 P, EU:C:2014:70), that the effects of a measure must be assessed in accordance with the powers of the institution which adopted the measure. However, that case-law cannot be interpreted as meaning that the inevitable consequence of a lack of power is that an act of an institution of the European Union could in no circumstances constitute a measure producing binding legal effects amenable to an action for annulment under Article 263 TFEU. Such an approach would render irrelevant the plea of illegality alleging lack of competence of the authority which adopted the measure.

36 In the third place, the Slovak Republic claims that, contrary to what the General Court held in paragraph 59 of the first order under appeal and in paragraph 58 of the second order under appeal, the possibility for it to make a conditional payment is not such as to overcome the inadequacy of judicial protection and of access to justice nor to remedy the urgency of the situation in a case such as that considered in the present cases. If the actions brought before the General Court were inadmissible, this would have unacceptable adverse effects on the situation of the Slovak Republic, since it could only challenge the Commission's claims in the event of an action for failure to fulfil obligations and it therefore had to run the risk of paying high default interest. However, the option of making conditional payment, which, it is claimed, is not provided for by any legal act of the Union and whose recovery is not guaranteed by the case-law, would in no way guarantee to it access to justice.

37 The Commission disputes the merits of all those arguments and considers that the first ground of appeal must be rejected as unfounded.

38 In the first place, that institution contends that the arguments relating to the nature of the amounts claimed, their payment by the Slovak Republic and the existence of an obligation on that Member State to make them available concern the assessment of the merits of the appeals and not their admissibility. As regards the assessment of admissibility, the Commission is of the view that the General Court examined the content of the letters at issue in accordance with the case-law and correctly held that, having regard to that content, those letters contain only an invitation to make own resources available, which neither the Slovak Republic nor the intervening Member States have challenged. The General Court was therefore right to assess the applications in the light of the provisions and case-law relating to own resources.

39 In that regard, on the one hand, it is not disputed that the amounts at issue constitute customs duties and, therefore, traditional own resources. On the other hand, when analysing those provisions at the admissibility stage, the General Court did not rule on any obligation on the part of the Slovak Republic to make available the amounts at issue. It would appear from all of those provisions, as interpreted by the case-law, and from the rules governing infringement proceedings, that no power has been conferred on the Commission to make a binding determination of the amount of own resources, to fix the time limit for their payment and to determine default interest.

40 In any event, the Commission considers that, even if the letters at issue were to be regarded as not relating to the payment of own resources, those letters cannot be capable of producing binding legal effects. No legal basis for the adoption of such a binding legal measure, it is contended, has been determined.

41 In the second place, the Commission contends, in essence, that the examination of the scope of its powers, in the present cases, falls within a complex examination to determine whether the letters at

issue are actionable in the light of their nature, the context of their adoption and the powers of the institution which adopted them. In its view, it is necessary to distinguish, on the one hand, measures which produce legal effects and which have been adopted by an institution lacking competence and, on the other, measures which do not produce such effects and which could not, therefore, be the subject of an action for annulment.

42 In the third place, the Commission considers that the inevitable consequence of the characteristics of the own resources system is that the Commission does not have the power to adopt binding decisions in that regard. The lack of such competence cannot therefore be regarded as a denial of the right of the Slovak Republic to effective judicial protection. The same would apply to the obligation on that Member State to pay default interest, which, it is contended, follows directly from Article 11 of Regulation No 1150/2000. Moreover, conditional payment is intended not to guarantee the right to effective judicial protection, but to mitigate the possible financial charge which a Member State may incur as a result of the obligation to pay default interest. Furthermore, the risk of incurring default interest is, it is contended, associated with the failure to make the own resources available to the Commission and not with the letters at issue containing an invitation to that effect.

43 The lack of competence to adopt binding decisions regarding own resources is also confirmed, it is contended, by the Council's rejection of a proposal to amend Article 17 of Regulation No 1150/2000, which would have conferred on the Commission the power to examine the case and to adopt a duly reasoned decision if the amount of duty determined was greater than EUR 50 000.

44 The Commission also observes that an action for annulment may be brought only if the dispute concerns the validity of an act producing legal effects. On the other hand, if the subject matter of the dispute is the existence of an obligation of a Member State arising under EU law, the only remedy available is an action for failure to fulfil obligations. The Treaties do not provide for any procedure open to a Member State to determine whether it has complied with its obligations under EU law.

45 The Czech Republic, the Federal Republic of Germany and Romania are of the opinion that the first ground of appeal should be upheld.

Findings of the Court

46 According to consistent case-law, any provisions adopted by the institutions of the European Union, whatever their form, which are intended to have binding legal effects, are regarded as 'actionable measures', within the meaning of Article 263 TFEU (judgment of 13 February 2014, *Hungary* v *Commission*, C-31/13 P, EU:C:2014:70, paragraph 54 and the case-law cited).

47 To ascertain whether or not a contested measure produces such effects, it is necessary to look to its substance (judgment of 22 June 2000, *Netherlands* v *Commission*, C-147/96, EU:C:2000:335, paragraph 27 and the case-law cited). Those effects must be assessed in accordance with objective criteria, such as the contents of that measure, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the measure (judgment of 13 February 2014, *Hungary* v *Commission*, C-31/13 P, EU:C:2014:70, paragraph 55 and the case-law cited).

48 In the orders under appeal, the General Court ruled on the Commission's pleas of inadmissibility without going to the substance of the case. As explained in paragraphs 22 and 23 of the present judgment, following an examination of the division of powers between the Commission and the Member States regarding the determination of own resources under the provisions of Decision 2007/436 and Regulation No 1150/2000, the General Court concluded, in paragraph 41 of the first order under appeal and in paragraph 40 of the second order under appeal, that, in the absence of a provision empowering the Commission to adopt a measure requiring a Member State to make own resources available, the letters at issue should be regarded as being for information purposes only and as a simple invitation addressed to the Slovak Republic.

49 In that regard, the General Court pointed out that an opinion issued by the Commission, such as that contained in those letters, does not bind the national authorities and that it cannot, any more than a reasoned opinion in the pre-litigation stage of an infringement procedure, constitute an actionable measure.

50 On the one hand, it is indeed the case that the General Court essentially based its assessment of the actionable nature of the letters at issue on an examination of the powers of the Commission on the basis of the provisions of Decision 2007/436 and of Regulation No 1150/2000. In so doing, contrary to the allegations of the Slovak Republic, it did not, however, assess the nature of the funds claimed or treat those funds as 'own resources'.

51 The General Court limited itself, in the orders under appeal, to an abstract explanation of the obligations and powers of the Member States and the Commission respectively in the area of the Union's own resources. Since, as is apparent from paragraphs 4 to 10 of the first order under appeal and from paragraphs 4 to 10 of the second order under appeal, the Commission had sent the letters at issue in that area, the General Court could, without committing errors of law, assess those obligations and powers in the light of the regulations concerning own resources, for the sole purpose of examining the actionable nature of those letters and without prejudice to the substantive question of its applicability to the circumstances of the case and the classification of the amounts in question.

52 Furthermore, it must be held that, in those circumstances, the General Court was right, at paragraph 55 of the first order under appeal and in paragraph 54 of the second order under appeal, to reject as ineffective the arguments raised by the Slovak Republic and based on the merits of the content of the letters at issue.

53 On the other hand, however, it should be pointed out that, as the Slovak Republic rightly points out, the General Court merely examined the powers of the institution which adopted the measure, without carrying out an analysis of the content of the letters at issue, contrary to the requirements of the case-law referred to in paragraph 47 of the present judgment.

54 Consequently, the General Court erred in law.

55 However, if the grounds of a decision of the General Court disclose an infringement of EU law, but its operative part is shown to be well founded on other legal grounds, such an infringement is not capable of bringing about the annulment of that decision, and a substitution of grounds must be made (see, to that effect, judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 150, and of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 102 and the case-law cited).

56 That is the situation in the present case.

57 Having regard to the case-law referred to in paragraphs 46 and 47 of the present judgment, it is apparent from an analysis of the content of the letters at issue, taking into account the context of their issue and the powers of the Commission, that those letters cannot be regarded as 'actionable measures'.

58 First, as regards the content of those letters, it should be pointed out that, after recalling the facts at issue, the director expressed the Directorate's view that the Slovak Republic was considered to be liable for the loss of own resources incurred in Germany. It took the view that the Slovak Republic had to compensate for these losses and that, in the event of refusal to make available the amounts in question, the latter would infringe the principle of sincere cooperation and jeopardise the proper functioning of the own resources system. In the light of those factors, the Commission requested the Slovak Republic to make available to it the amounts corresponding to the losses in question and specified that failure to pay within the period laid down in those letters would give rise to the payment of default interest pursuant to Article 11 of Regulation No 1150/2000.

59 It is apparent from that reminder that, by the letters at issue, the Commission, in essence, explained to the Slovak Republic its opinion as to the legal consequences of the losses of own resources incurred in Germany and the obligations which, according to the Commission, would result for the Slovak Republic. In the light of that opinion, it requested that Member State to make the amounts in question available.

60 It must be held that neither the statement of a simple legal opinion, nor a simple request to make available the amounts in question can be capable of producing legal effects.

61 It cannot be inferred from the mere fact that the letters at issue lay down a time limit for making those amounts available, whilst indicating that a delay may give rise to default interest, in view of the overall content of those letters, that the Commission intended, rather than expressing its opinion, to adopt measures which have binding legal effects or, therefore, to confer on those letters the nature of actionable measures.

62 Secondly, as regards the context, it should be pointed out that, at the hearing, the Commission, without being contradicted on this point either by the Slovak Republic or by the intervening Member States, observed that the dispatch of letters such as the letters at issue was a common practice of that institution intended to initiate informal discussions on a Member State's compliance with EU law, which could be followed by the initiation of the pre-litigation phase of an infringement procedure. That context is reflected in the letters at issue, which clearly set out the reasons why the Commission considers that the Slovak Republic could have infringed provisions of EU law. Furthermore, it is clear from the applications lodged by the Slovak Republic before the General Court that that context was known to it and that the intention of the Commission to enter into informal contacts was well understood.

63 It is clear from the case-law that, in view of the Commission's discretion to initiate infringement proceedings, a reasoned opinion is not capable of producing binding legal effects (see, to that effect, judgment of 29 September 1998, *Commission* v *Germany*, C-191/95, EU:C:1998:441, paragraph 46 and the case-law cited). The same applies a fortiori to letters which, like the letters at issue, can be regarded as simple informal contacts prior to the opening of the pre-litigation phase of an action for failure to fulfil obligations.

64 Thirdly, as regards the powers of the Commission, it is common ground between the parties that, in any event, that institution has no power to adopt binding measures requiring a Member State to make available amounts such as those at issue in the present cases. On the one hand, even assuming that, as the Slovak Republic points out, those amounts cannot be treated as 'own resources', the Commission stated before the Court that no legal basis for adopting a binding measure could be determined. On the other hand, even supposing that those amounts must be regarded as 'own resources', contrary to the arguments of the Slovak Republic, it must be observed that the Commission's argument, that no decision-making power has been conferred on it either by Decision 2007/436 or by Regulation No 1150/2000, was not contradicted by that Member State.

65 In the light of all the foregoing considerations, it must be concluded that the letters at issue do not constitute 'actionable measures' within the meaning of Article 263 TFEU, without it being necessary to rule on the substantive question concerning the applicability of Decision 2007/436 and Regulation No 1150/2000 and the legal classification of the amounts claimed.

66 That conclusion is not called into question by the arguments of the Slovak Republic based on the right to effective judicial protection, the unnecessary prolongation of the dispute between it and the Commission and the risk of default interest. Although the requirement as to mandatory legal effects must be interpreted in the light of the right to effective judicial protection as guaranteed in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, it is sufficient to note that this right is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of

the European Union, as is apparent also from the Explanation relating to the abovementioned Article 47, which must, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, be taken into consideration for the interpretation of the Charter (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 97 and the case-law cited). Thus, the interpretation of the concept of 'actionable measure' in the light of that Article 47 cannot have the effect of setting aside that condition without going beyond the jurisdiction conferred by the Treaty on the EU courts (see, by analogy, judgment of 12 September 2006, *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraph 81, and order of 14 May 2012, *Sepracor Pharmaceuticals (Ireland)* v *Commission*, C-477/11 P, not published, EU:C:2012:292, paragraph 54).

67 Therefore, the operative part of the orders under appeal, in so far as it dismisses the actions brought by the Slovak Republic as inadmissible, is well founded, so that the first ground of appeal must be dismissed.

The second ground of appeal

Arguments of the parties

68 By its second ground of appeal, raised in the alternative, the Slovak Republic argues that the General Court infringed its obligation to state reasons.

69 In the first place, the General Court did not give any reasons for the conclusion that the amounts claimed constituted own resources. The statement of reasons supporting that conclusion was all the more important in the present cases since, on the one hand, that conclusion constitutes the premiss of the General Court's assessment regarding the admissibility of the applications, which the Slovak Republic claims is incorrect, and that, on the other hand, the treatment of those amounts as 'own resources' was contested by the Slovak Republic in its observations on the pleas of inadmissibility. Similarly, the General Court should have set out the reasons justifying the applicability, which the Slovak Republic had also challenged before the General Court, of the case-law relating to the obligations of Member States concerning own resources in bilateral relations, to a tripartite relationship such as that at issue in the present case.

70 In the second place, the General Court failed to justify its conclusion that the concept of conditional payment could resolve the complex problem of access to justice and the urgency of the situation arising in the present cases.

71 In the third place, the Slovak Republic states that the reasons given for the orders under appeal are almost identical to those of several orders issued by the General Court on the same day, albeit under different factual circumstances. It refers in particular to the order of 14 September 2015, *Slovenia* v *Commission* (T-585/14, EU:T:2015:662), which, in its view, concerned a case of loss of traditional own resources due to the grant of an import license for sugar and involved, unlike the present cases, a bilateral relationship between the Member State and the Commission.

72 The Commission contests the merits of all those arguments.

Findings of the Court

73 It must be observed that the obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of the first paragraph of Article 53 of that statute and Article 117 of the Rules of Procedure of the General Court. It has consistently been held that the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose that court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (judgment of 19 December

2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, EU:C:2012:821, paragraph 83 and the case-law cited).

74 Furthermore, it is settled case-law that the obligation on the General Court to state reasons does not require it to provide an account which follows exhaustively, one after the other, all the arguments put forward by the parties to the case. It is sufficient that the reasoning enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, inter alia, to that effect, order of 12 July 2016, *Pérez Gutiérrez* v *Commission*, C-604/15 P, not published, EU:C:2016:545, paragraph 27 and the case-law cited).

75 In the present case, the General Court clearly set out, in the orders under appeal, the reasons which led it to conclude that the letters at issue were not capable of being the subject of an action for annulment under Article 263 TFEU. It is clear from the examination of the first ground of appeal raised by the Slovak Republic that the reasons given for those orders enabled that Member State to understand the reasoning which led to the finding of inadmissibility and to contest its validity and that those reasons enabled the Court of Justice to exercise its review.

76 It follows that the orders under appeal are not vitiated by an infringement of the obligation to state reasons.

77 That conclusion is not called into question by the arguments put forward by the Slovak Republic.

78 First, in so far as that Member State argues that the General Court should have set out the reasons why it considered that it could apply Decision 2007/436 and Regulation No 1150/2000 in order to assess the actionable nature of the letters at issue, it must be observed that the General Court responded to the arguments raised before it and alleging the inapplicability of those texts by considering that those arguments concerned the assessment of the merits of the appeals.

79 In those circumstances, secondly, it is also irrelevant, even if it were established, that the reasons given for the orders under appeal are almost identical to those given in other cases concerning other factual circumstances.

80 Thirdly, by correctly pointing out that, although the condition relating to mandatory legal effects must be interpreted in the light of the principle of effective judicial protection, such an interpretation cannot have the effect of setting aside that condition without going beyond the jurisdiction conferred by the Treaty on the EU courts, the General Court responded to the requisite legal standard to the arguments of the Slovak Republic alleging inadequate effective judicial protection given the alleged urgency of the situation.

81 In the light of all the foregoing considerations, the second ground of appeal must be dismissed and the appeals must therefore be dismissed in their entirety.

Costs

82 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings pursuant to 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.

83 Since the Commission has applied for costs to be awarded against the Slovak Republic and the Slovak Republic has been unsuccessful, it must be ordered to bear its own costs and pay those incurred by the Commission.

84 Under Article 140(1) of the Rules of Procedure, which is also applicable to appeal proceedings by virtue of Article 184(1) thereof, Member States and institutions which intervene in the proceedings are to bear their own costs.

85 Accordingly, the Czech Republic, the Federal Republic of Germany and Romania are to bear their own costs.

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

1. **Dismisses the appeals;**

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

3. **Orders the Czech Republic, the Federal Republic of Germany and Romania to bear their own costs.**

ORDER OF THE COURT (Seventh Chamber)

21 April 2016 (*)

(Appeal — Article 181 of the Rules of Procedure of the Court — Intra-ACP programme (African, Caribbean and Pacific States) of the Global Climate Change Alliance (GCCA) — European Commission's request to terminate the mission of an expert chosen by the other contracting party — Action for annulment — Right to an effective judicial remedy)

In Case C-279/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 8 June 2015,

Alexandre Borde, residing in Paris (France),

Carbonium SAS, established in Paris,

represented by A. Herzberg, Rechtsanwalt,

appellants,

the other party to the proceedings being:

European Commission, represented by S. Bartelt and F. Moro, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Seventh Chamber),

composed of C. Toader (Rapporteur), President of the Chamber, and A. Rosas and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 181 of the Rules of Procedure of the Court,

makes the following

Order

1 By their appeal, Alexandre Borde and Carbonium SAS seek to have set aside the order of the General Court of the European Union of 25 March 2015 in *Borde and Carbonium* v *Commission* (T-314/14, unpublished, EU:T:2015:197) ('the order under appeal') in which the General Court dismissed their action for annulment of the Commission's requests of 19 and 20 February 2014 to terminate Mr Borde's assignment as an expert involved in the performance of framework contract EuropeAid/127054/C/SER/Multi ('the framework contract'), concerning a mission for the evaluation of the Intra-ACP programme of the GCCA ('the requests at issue').

Background to the dispute

2 The relevant background to the dispute, as set out in the order under appeal, may be summarised as follows.

3 On 8 October 2009, the European Commission concluded a framework contract, in the context of its EuropeAid programme and of its multiple framework contract entitled ‘Beneficiaries 2009’, with a consortium led by Euronet Consulting EEIG (‘the other contracting party’), whose members include Nordic Consulting Group (‘NCG’). The subject-matter of the framework contract was the short-term recruitment of experts in the environment sector for projects in the field of external aid in the exclusive interest of third countries benefiting from that aid.

4 The framework contract first of all comprises special conditions and a set of annexes, which include Annex I, containing the general conditions governing the contract, and Annex II, containing the global terms of reference. Article 11 of the special conditions confers exclusive jurisdiction on the courts of Brussels (Belgium) for settling disputes arising out of or relating to the framework contract or a specific contract concluded by the Commission in the context of the framework contract.

5 Secondly, the general conditions of the framework contract, in Article 17.2 thereof, provide that ‘in the course of performance, and on the basis of a written and justified request, to which the [other contracting party] shall provide [its] own and the staff member’s observations, the Contracting Authority can ask for a replacement if it considers that a member of staff is inefficient or does not perform [his] duties under the contract.’

6 Lastly, point 3.2 of the global terms of reference provides that the other contracting party is responsible for all administrative aspects of the assignment entrusted to it by a specific contract, such as, in particular, establishing a contract with the experts.

7 Pursuant to the framework contract, on 20 and 27 December 2013 the Commission concluded two specific contracts with the other contracting party, bearing reference 2013/336038 and 2013/331334, respectively. The terms of those contracts foresaw the use of two experts for evaluation assignments in respect of two Commission programmes: the final evaluation of the GCCA programme and the mid-term evaluation of the GCCA programme in the context of the intra-ACP programme under the 10th European Development Fund.

8 Following the conclusion of the specific contracts between the Commission and the other contracting party, NCG concluded four agreements with Mr Borde covering his services as an expert with regard to the evaluation of the GCCA programme.

9 Each of those four expert service agreements stipulate in their clause 15.3 that any disagreement between Mr Borde and NCG in consequence of or connected to the agreement, and which cannot be settled amicably, is to be settled by arbitration under Belgian law.

10 Mr Borde’s assignment as expert for the evaluation of the GCCA programme started on 30 December 2013 and was to end within a period of 25 weeks with the submission of the final report. In the context of the evaluation of the GCCA programme, it was envisaged that his first mission would be in Fiji. That mission took place from 17 to 21 February 2014.

11 On the basis of feedback received from the EU Delegation, Commission staff expressed their concerns to NCG about Mr Borde’s lack of professionalism — which, in their view, risked jeopardising the success of the whole evaluation — in two e-mails sent on 19 and 20 February 2014, and asked for him to be replaced.

12 NCG replied that it shared those concerns and proposed that Mr Borde complete his work with respect to the mission in Fiji, but that a replacement would be sought for the subsequent missions.

13 By the requests at issue, the Commission expressed doubts to NCG as regards Mr Borde's ability to achieve the objectives he had been set and, in order to avoid the risk of the quality of the evaluation being jeopardised, proposed that the expert's mission be terminated and the search for a replacement initiated. NCG immediately contacted Mr Borde in order to inform him of the Commission's request.

14 On 26 February 2014, NCG e-mailed the Commission Mr Borde's remarks concerning his mission in Fiji, in which he disputed the facts which had led the Commission to request the termination of his mission.

15 On 27 February 2014, that institution acknowledged receipt of Mr Borde's remarks by e-mail addressed to NCG. It also noted that, since he was unsuitable for carrying out the mission entrusted to him, it had requested that he be replaced under the provisions of the framework contract.

16 Subsequently, on a proposal by the other contracting party dated 2 March 2014, the Commission accepted a new junior expert without it being necessary to modify the specific contracts with the other contracting party under the terms of Article 20.1 of the general conditions of the framework contract. In line with point 5.4.3 of the guidelines of that contract, it was sufficient to introduce into the Commission's internal system a rider to the specific contracts concerning the replacement of Mr Borde by another junior expert, which was done on 21 March 2014 and subsequently notified to the other contracting party.

The proceedings before the General Court and the order under appeal

17 By application lodged at the Registry of the General Court on 29 April 2014, Mr Borde and Carbonium SAS brought an action for annulment of the requests at issue.

18 By separate document lodged at the Registry of the General Court on 27 August 2014, the Commission raised a plea of inadmissibility, pursuant to Article 114(1) of the Rules of Procedure of the General Court.

19 On 14 October 2014, Mr Borde and Carbonium SAS lodged their observations concerning that plea and requested that the General Court reject it.

20 By the order under appeal, adopted pursuant to Article 114 of those Rules, the General Court, without opening the oral procedure, upheld the plea of inadmissibility and dismissed the action.

Forms of order sought

21 In their appeal, Mr Borde and Carbonium SAS claim that the Court should:

– set aside the order under appeal;

– declare the action admissible;

– primarily, give final judgment on the substance of the action and annul the requests at issue or, in the alternative, refer the case back to the General Court for that court to rule on the substance or, in the further alternative, refer the case back to the General Court for that court to examine the admissibility and merits of the action together, and

– order the Commission to pay the costs.

22 The Commission contends that the Court should:

– dismiss the action as in part inadmissible and in part unfounded and

– order Mr Borde and Carbonium SAS to pay the costs.

The appeal

23 Under Article 181 of its Rules of Procedure, where the appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal in whole or in part.

24 It is appropriate to apply that provision to the present case.

25 In support of their appeal, Mr Borde and Carbonium SAS put forward six grounds of appeal. The first of those grounds alleges that the General Court distorted the clear sense of the evidence. By their second to fifth grounds, Mr Borde and Carbonium SAS claim that the General Court erred in law in the application of the fourth paragraph of Article 263 TFEU. Thus, by their second ground, they argue that the General Court incorrectly held that challengeable acts were restricted to acts defined under Article 288 TFEU. The third ground alleges that the General Court erred and should have found that the requests at issue constituted a decision within the meaning of Article 288 TFEU. By their fourth ground, Mr Borde and Carbonium SAS claim that the General Court incorrectly held to be decisive the fact that those requests are inseparable from the contractual framework. The fifth ground concerns the application, with regard to a triangular relationship, of criteria developed in the Court's case-law concerning bilateral relationships. By their sixth and final ground, Mr Borde and Carbonium SAS submit that the General Court infringed their right to an effective judicial remedy.

The first ground of appeal

– Arguments of the parties

26 By their first ground, Mr Borde and Carbonium SAS claim that the General Court's statement of the facts is 'inaccurate and distorted ..., disregarding the appellants' right to be heard'.

27 The Commission contends that the first ground is, primarily, inadmissible and, on a subsidiary basis, ineffective.

– Findings of the Court

28 Pursuant to consistent case-law of the Court of Justice, it is apparent from Articles 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice that an appeal lies on points of law only and thus that the General Court has exclusive jurisdiction to establish and assess the relevant facts and evidence. The establishment of those facts and the assessment of that evidence thus do not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject as such to review by the Court of Justice on appeal (see order of 10 July 2012 in *Rügen Fisch* v *OHIM*, C-582/11 P, unpublished, EU:C:2012:434, paragraph 46 and the case-law cited therein).

29 Where an appellant alleges distortion of the evidence by the General Court, he must, pursuant to Article 256 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 168(1)(d) of its Rules of Procedure, indicate precisely the evidence alleged to have been distorted and show the errors of appraisal which, in his view, led to such distortion. Moreover, it is the Court's settled case-law that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (judgments of 17 June 2010 in in *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 16 and the case-law cited therein, and 27 October 2011 in *Austria* v *Scheucher — Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 59 and the case-law cited therein).

30 In the present case, the General Court found, in paragraphs 4 and 5 of the order under appeal, that Article 17.2 of the general conditions of the framework contract allowed the Contracting Authority, in the course of performance of the contract, to ask for a replacement of a person if it considered that he was

inefficient or did not perform his duties under the contract. The contractual provisions also provided that the other contracting party was to be responsible for all administrative aspects of the assignment entrusted to it.

31 In paragraph 31 of the order under appeal, the General Court inferred from those facts that the requests at issue fell within the context of the framework contract between the Commission and the other contracting party, in that they concerned the replacement of an expert, that replacement having its basis in the provisions of that contract.

32 It must be stated that Mr Borde and Carbonium SAS have not proven that the General Court's findings are based on a clear distortion of the evidence submitted before it and which is obvious from the documents in the file before the Court of Justice.

33 It follows that the first ground of appeal must be rejected as manifestly unfounded.

The fourth and fifth grounds of appeal

– Arguments of the parties

34 By their fourth and fifth grounds, which should be examined together and second, the appellants claim that the General Court erred in law in so far as it held to be decisive the fact that the requests at issue were inseparable from the contractual framework and also in so far as it applied, with regard to a triangular relationship, criteria developed concerning bilateral relationships.

35 The Commission contends that those grounds of appeal are unfounded.

– Findings of the Court

36 By those two grounds, the appellants are essentially seeking to show that the General Court erred in law in finding that the requests at issue did not have, in relation to the appellants, the characteristics of a challengeable act for the purposes of Article 263 TFEU.

37 It is the Court's settled case-law that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position are acts or decisions which may be the subject of an action for annulment (see, inter alia, order of 14 May 2012 in *Sepracor Pharmaceuticals (Ireland)* v *Commission*, C-477/11 P, unpublished, EU:C:2012:292, paragraph 51 and the case-law cited therein).

38 Thus, an action for annulment is available against all acts adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see, inter alia, order of 31 March 2011 in *Mauerhofer* v *Commission*, C-433/10 P, unpublished, EU:C:2011:204, paragraph 57 and the case-law cited therein).

39 However, the interpretation and application of the FEU Treaty in compliance with the law, which may be ensured in practice by means of actions for annulment, does not apply where the applicant's legal position falls within the contractual relationships whose legal status is governed by the national law agreed to by the contracting parties. Were the EU judicature to hold that it had jurisdiction to adjudicate on the annulment of acts falling within purely contractual relationships, not only would it risk rendering Article 272 TFEU — which grants the Courts of the European Union jurisdiction pursuant to an arbitration clause — meaningless, but would also risk, where the contract does not contain such a clause, extending its jurisdiction beyond the limits laid down by Article 274 TFEU, which specifically gives national courts or tribunals ordinary jurisdiction over disputes to which the European Union is a party (see, to that effect, judgment of 9 September 2015 in *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P, EU:C:2015:562, paragraphs 18 and 19 and the case-law cited therein).

40 Mr Borde and Carbonium SAS have not demonstrated how the General Court failed to apply correctly the principles developed in the case-law cited in paragraphs 37 to 39 above.

41 The General Court observed in paragraph 26 of the order under appeal that, having regard to the absence of any contractual link between Mr Borde and Carbonium SAS, on the one hand, and the Commission, on the other, it was open to the former parties to bring an action for annulment against the requests at issue provided those measures constituted challengeable acts with respect to them.

42 In paragraphs 31 to 33 of the order under appeal, the General Court examined the requests at issue in this connection. From that examination, it concluded that all of the effects of the requests were produced and exhausted within the framework of the contractual relationship between the Commission and the other contracting party, in relation to which Mr Borde and Carbonium SAS were third parties.

43 In the light of all those factors, it must be held that the General Court was fully entitled to hold, in paragraph 35 of the order under appeal, that the requests at issue could not be the subject of an action for annulment under Article 263 TFEU (see, by analogy, order of 31 March 2011 in *Mauerhofer* v *Commission*, C-433/10 P, unpublished, EU:C:2011:204, paragraph 63).

44 It is also necessary to reject the argument submitted by Mr Borde and Carbonium SAS in support of their fifth ground of appeal, according to which the General Court incorrectly applied, with regard to a triangular relationship, criteria developed in the Court of Justice's case-law concerning bilateral relationships.

45 The factual circumstances which gave rise to the order of 31 March 2011 in *Mauerhofer* v *Commission* (C-433/10 P, unpublished, EU:C:2011:204) called into question contracts concluded between the Commission and a consortium, and between that consortium and experts. Therefore, the inferences drawn from that order are also applicable in respect of multilateral relationships.

46 The fourth and fifth grounds must therefore be rejected as manifestly unfounded.

The second and third grounds of appeal

– Arguments of the parties

47 By their second and third grounds, the appellants claim, first, that the General Court incorrectly restricted challengeable acts to acts defined under Article 288 TFEU whereas it should have found that the requests at issue constituted acts for the purposes of that latter provision.

48 The Commission contends that those grounds are unfounded.

– Findings of the Court

49 The second and third grounds are based on the premise that the requests at issue constitute acts against which an action for annulment may be brought in accordance with Article 263 TFEU.

50 As is apparent from paragraph 43 of the present order, the Tribunal was fully entitled to hold that the requests at issue did not constitute such acts. Both those grounds are therefore ineffective.

51 Therefore, the grounds in question must be dismissed as manifestly unfounded.

The sixth ground of appeal

– Arguments of the parties

52 By their sixth ground, the appellants submit that the General Court infringed their right to an effective judicial remedy.

53 The Commission contends that that ground is unfounded.

– Findings of the Court

54 Although 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, such an interpretation nevertheless cannot have the effect of setting aside those conditions (judgment of 21 January 2016 in *SACBO* v *Commission and INEA*, C-281/14 P, EU:C:2016:46, paragraph 46 and the case-law cited therein).

55 The appellants' right to an effective judicial remedy in order to obtain compensation for the harm which they claim to have suffered is ensured by the possibility, first, of referring the matter to an arbitrator under Belgian law, in accordance with the provisions of the contract concluded between NCG and Mr Borde, and, secondly, of bringing an action for damages as provided for under Article 268 TFEU, which is an autonomous form of action and whose exercise is subject to conditions imposed in view of its specific objective, which are therefore different to those for an action for annulment (see, to that effect, judgment of 21 January 2016 in *SACBO* v *Commission and INEA*, C-281/14 P, EU:C:2016:46, paragraph 47 and the case-law cited therein).

56 Consequently, the sixth ground must be rejected as manifestly unfounded.

57 Accordingly, the appeal in its entirety must be dismissed as manifestly unfounded.

Costs

58 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 costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against Mr Borde and Carbonium SAS and the latter have been unsuccessful in their grounds of appeal, they must be ordered, jointly and severally, to pay the costs.

On those grounds, the Court (Seventh Chamber) hereby orders:

1. The appeal is dismissed.

2. Mr Borde and Carbonium SAS shall pay the costs jointly and severally.

[Signatures]

* Language of the case: English.

JUDGMENT OF THE COURT (Eighth Chamber)

7 September 2016 (*)

(Reference for a preliminary ruling — Public procurement — Directive 2004/18/EC — Article 2 — Principle of equal treatment — Obligation of transparency — Contract for the supply of a complex communications system — Difficulties in performance of the contract — Disagreement of the parties in regard to areas of responsibility — Settlement — Reduction in the scope of the contract — Transformation of a rental of equipment into a sale of equipment — Material amendment to a contract — Justification by the objective expediency of achieving a settlement agreement)

In Case C-549/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Højesteret (Supreme Court, Denmark), made by decision of 27 November 2014, received at the Court on 2 December 2014, in the proceedings

Finn Frogne A/S

v

Rigspolitiet ved Center for Beredskabskommunikation,

THE COURT (Eighth Chamber),

composed of D. Šváby (Rapporteur), President of the Chamber, J. Malenovský and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Finn Frogne A/S, by K. Dyekjær, C. Bonde, P. Gjørtler, H.B. Andersen and S. Stenderup Jensen, advokater, and J. Grayston, Solicitor,

– the Danish Government, by C. Thorning, acting as Agent, and P. Hedegaard Madsen, advokat,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Grasso, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the European Commission, by L. Grønfeldt and A. Tokár, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 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 (OJ 2004 L 134, p. 114, and corrigendum, OJ 2004 L 351, p. 44).

2 The request has been made in proceedings between Finn Frogne A/S ('Frogne') and Rigspolitiet ved Center for Beredskabskommunikation (Centre for Emergency Communication of the National Police, Denmark; 'CFB') concerning the propriety of a settlement agreement concluded by CFB, in its capacity as the contracting authority, and Terma A/S, the successful tenderer for a public contract, in connection with the performance of that contract.

Legal context

EU law

3 According to recital 2 of Directive 2004/18:

'The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency. However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty.'

4 Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts', provides:

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

5 Article 28 of that directive provides:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. … In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

6 Article 31 of Directive 2004/18 is worded as follows:

'Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

(1) for public works contracts, public supply contracts and public service contracts:

…

(c) insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice as referred to in Article 30 cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

…

(4) for public works contracts and public service contracts:

(a) for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:

– when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities,

or

– when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works or services may not exceed 50% of the amount of the original contract;

…’

7 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) (‘Directive 89/665’), includes an Article 2d, entitled ‘Ineffectiveness’. According to that article:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2004/18/EC;

…

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

– the contracting authority considers that the award of a contract without prior publication of a contract notice in the *Official Journal of the European Union* is permissible in accordance with Directive 2004/18/EC,

– the contracting authority has published in the *Official Journal of the European Union* a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and,

– the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

8 In 2007, the Danish State initiated a procedure for the award of a public contract, in the form of a competitive dialogue, for the supply of a global communications system common to all emergency response services and for the maintenance of that system for several years. CFB subsequently became the competent public authority for that contract.

9 That contract was awarded to Terma. The contract with Terma, concluded on 4 February 2008, involved a total amount of 527 million Danish kroner (DKK) (approximately EUR 70 629 800), DKK 299 854 699 (approximately EUR 40 187 000) of which related to a minimum solution which was described in the tender specifications, with the remainder relating to options and services which would not necessarily be subject to a request for performance.

10 In the course of the performance of that contract, difficulties arose in meeting delivery deadlines, with CFB and Terma both disagreeing as to which party was responsible for making it impossible to perform the contract as stipulated.

11 Following negotiations, the parties agreed to a settlement under which the scope of the contract was to be reduced to the supply of a radio communications system for regional police forces, worth approximately DKK 35 million (approximately EUR 4.69 million), while CFB would acquire two central server farms, worth approximately DKK 50 million (approximately EUR 6.7 million), which Terma had itself acquired with a view to leasing them to CFB in performance of the original contract. As part of that settlement, each party intended to waive all rights arising from the original contract other than those resulting from the settlement.

12 Before finalising that settlement, CFB published on 19 October 2010, in the *Official Journal of the European Union*, a notice for voluntary ex ante transparency regarding the settlement agreement which it intended to conclude with Terma, pursuant to Article 2d(4) of Directive 89/665.

13 Frogne, which had not applied for pre-selection to participate in the tendering procedure for the original contract, brought an action before the Klagenævnet for Udbud (Complaints Board for Public Procurement, Denmark) (the ‘Complaints Board’). Before ruling on the merits, the latter, by decision of 10 December 2010, refused to allow that action to have suspensive effect.

14 The settlement was concluded on 17 December 2010.

15 Frogne’s action before the Complaints Board was dismissed by decision of 3 November 2011.

16 The legal action brought by Frogne following this decision was also dismissed by a decision of the Østre Landsret (Eastern Regional Court, Denmark) of 20 December 2013.

17 In the first place, the Østre Landsret (Eastern Regional Court) held that the amendment of the original contract as put in place by the settlement concluded between CFB and Terma constituted a material amendment to that contract, as defined in the case-law of the Court of Justice.

18 In the second place, the Østre Landsret (Eastern Regional Court) took the view, however, first, that that settlement had not been the result of an intention on the part of Terma and CFB to renegotiate the material terms of the original contract in order to optimise their subsequent collaborative effort under materially altered terms, but had rather been a settlement of the dispute between the parties in place of a termination of that contract in circumstances where the performance of that contract appeared impossible, a settlement in which each party agreed to significant waivers with a view to achieving an acceptable solution, of an order of magnitude significantly smaller in comparison with that contract, while allowing each of them to avoid the risk of what were likely to be disproportionate losses. Second, there was no basis on which to assume that the intention of CFB or Terma had been to circumvent the public procurement rules.

19 In those circumstances, the Østre Landsret (Eastern Regional Court) took the view that the principles of equal treatment and transparency did not preclude the conclusion of this settlement provided that there was a close link between the original contract and the services provided in connection with it. This was the case with regard to the provision of a radio communications system for regional police forces, but not with regard to the sale of the two central server farms. In respect of the latter aspect, that court held that CFB's decision to resort to the settlement agreement at issue and the conclusion of that agreement were contrary to the principle of equal treatment and the obligation of transparency. The fact that the conclusion of that agreement allowed the contracting authority to address risks related to a situation of conflict was deemed irrelevant to the legality of that conclusion.

20 However, the Østre Landsret (Eastern Regional Court) ruled that CFB's assessment to the effect that the conclusion of the settlement agreement with Terma was permitted without prior publication of a notice of contract under the EU rules was not manifestly wrong. Taking into consideration the notice for voluntary ex ante transparency which the contracting authority had published in the *Official Journal of the European Union* regarding the settlement the conclusion of which was envisaged under Article 2d(4) of Directive 89/665, and the fact that, before concluding it, it had waited not only for the expiry of the 10-day period provided for in that provision, but also for the Complaints Board's ruling on the possible suspensive effect of Frogne's action before it, the Østre Landsret (Eastern Regional Court) found that that agreement could not be declared invalid, with the result that the action before it should not be upheld.

21 Before the Højesteret (Supreme Court, Denmark), to which it has appealed, Frogne argues that the question as to whether a public contract intended as part of a settlement relating to an original public contract must be the subject of a tendering procedure depends solely on whether or not such an amendment to the original contract is material. In the present case, it submits, the change is material, whether it relates to the subject matter of the contract as amended or to the contract's significantly reduced value, since the amended contract was likely to interest smaller undertakings. Furthermore, it submits, neither economic considerations nor the protection of the situation of the successful tenderer may be relied on to justify an infringement of the principle of equal treatment and of the obligation of transparency.

22 CFB considers the two aspects of the settlement. With respect, first, to the limitation of the contract's scope to the supply of a radio communications system for the regional police forces alone, it draws attention to the importance of the fact that the amendment consisted in a significant reduction in the services to be supplied, a situation which, it claims, is not governed by EU law. As regards, second, the acquisition of the central server farms, only the lease of which was provided for in the original contract, it considers, in essence, that the fact that such equipment was sold rather than leased did not constitute a material change in that contract.

23 More generally, CFB believes that where the performance of a contract gives rise to difficulties — which, it submits, is not unusual in certain types of contracts, such as those relating to the development

of IT systems — the contracting authority must be allowed a broad discretion to enable it to reach a reasonable solution in the event of difficulties in performance. Otherwise, the contracting authority would be obliged either to refrain from making reasonable adjustments or to terminate the contract, with the risks and losses which this would entail. Interpreting Directive 2004/18 as meaning that a new tendering procedure is required in such a case would, in practice, prevent a settlement from being concluded, thus amounting to an interference with the law of obligations which is not permitted by the Treaties.

24 The Højesteret (Supreme Court) is unsure as to the scope of Article 2 of Directive 2004/18, in particular as to whether the principle of equal treatment and the obligation of transparency imply that a contracting authority cannot consider entering into a settlement to resolve the difficulties arising from the performance of a public contract without this automatically giving rise to the obligation to organise a new tendering procedure relating to the terms of that settlement.

25 According to the Højesteret (Supreme Court), the new element in comparison with the situations previously examined by the Court lies in those difficulties in performing the contract, the attribution of fault for which to one or other of the parties being disputed, and, ultimately, the relevant question is whether it is possible to have recourse to a settlement in order to bring an end to those difficulties without having to organise a new tendering procedure.

26 In those circumstances, the Højesteret (Supreme Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is Article 2 of Directive 2004/18, read in conjunction with the judgments of the Court of Justice of the European Union of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351), and of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182), to be interpreted as meaning that a settlement agreement which introduces limitations on and amendments to the services to be provided as originally agreed by the parties under a contract previously put out to tender and also mutual agreement to waive the application of remedies for breach in order to avoid subsequent litigation constitutes a contract which in itself requires a tendering procedure, in a situation where performance of the original contract has encountered difficulties?’

The question referred for a preliminary ruling

27 By its question, the referring court asks, in essence, whether Article 2 of Directive 2004/18 must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to it without a new tendering procedure being initiated, even in the case where the amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute with an uncertain outcome, which arose from the difficulties encountered in the performance of that contract.

28 It follows from the Court’s case-law that the principle of equal treatment and the obligation of transparency resulting therefrom preclude, following the award of a public contract, the contracting authority and the successful tenderer from amending the provisions of that contract in such a way that those provisions differ materially in character from those of the original contract. Such will be the case if the proposed amendments would either extend the scope of the contract considerably to encompass elements not initially covered or to change the economic balance of the contract in favour of the successful tenderer, or if those changes are liable to call into question the award of the contract, in the sense that, had such amendments been incorporated in the documents which had governed the original contract award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure (see, to that effect, inter alia, judgment of 19 June 2008, *pressetext*

Nachrichtenagentur, C-454/06, EU:C:2008:351, paragraphs 34 to 37).

29 As regards the latter case, it must be noted that an amendment of the elements of a contract consisting in a reduction in the scope of that contract's subject matter may result in it being brought within reach of a greater number of economic operators. Provided that the original scope of the contract meant that only certain undertakings were capable of presenting an application or submitting a tender, any reduction in the scope of that contract may result in that contract being of interest also to smaller economic operators. Moreover, since the minimum levels of ability required for a specific contract must, pursuant to the second subparagraph of Article 44(2) of Directive 2004/18, be related and proportionate to the subject matter of the contract, a reduction in that contract's scope is capable of resulting in a proportional reduction of the level of the abilities required of the candidates or tenderers.

30 In principle, a substantial amendment of a contract after it has been awarded cannot be effected by direct agreement between the contracting authority and the successful tenderer, but must give rise to a new award procedure for the contract so amended (see, by analogy, judgment of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 42). The position would be otherwise only if that amendment had been provided for by the terms of the original contract (see, to that effect, judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 37, 40, 60, 68 and 69).

31 However, it follows from the order for reference that, according to the analysis of the Østre Landsret (Eastern Regional Court), to which the Højesteret (Supreme Court) refers, the particular aspect of the situation at issue in the main proceedings lies in the fact that the amendment of the contract, described as material, arose not out of the desire of the parties to renegotiate the essential terms of the contract by which they were originally bound, as defined in the abovementioned case-law of the Court, but out of objective difficulties, with unpredictable consequences, encountered in the performance of that contract, difficulties which certain interested parties who submitted observations to the Court also state are unpredictable where complex contracts are concerned, such as contracts involving the development of IT systems, as is the case here.

32 However, it must be held that neither (i) the fact that a material amendment of the terms of a contract results not from the deliberate intention of the contracting authority and the successful tenderer to renegotiate the terms of that contract, but from their intention to reach a settlement in order to resolve objective difficulties encountered in the performance of the contract nor (ii) the objectively unpredictable nature of the performance of certain aspects of the contract can provide justification for the decision to carry out that amendment without respecting the principle of equal treatment from which all operators potentially interested in a public contract must benefit.

33 As regards, first, the reasons that may lead the contracting authority and the successful tenderer to contemplate a substantial amendment to that contract involving the initiation of a new award procedure, it must be noted, first, that the reference to the deliberate intention of the parties to renegotiate the terms of that contract is not a decisive factor. It is true that the Court refers to such an intention in paragraph 44 of the judgment of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543), the first judgment in which the Court examined this issue. However, as is clear from paragraphs 42 to 44 of that judgment, that formulation related to the specific factual context of the case giving rise to that judgment. On the other hand, the question whether there has been a material amendment must be analysed from an objective point of view, on the basis of the criteria set out in paragraph 28 above.

34 Second, it follows from paragraph 40 of the judgment of 14 November 2013, *Belgacom* (C-221/12, EU:C:2013:736) that the principles of equal treatment and non-discrimination and the obligation of transparency which is to be inferred from those principles, arising from the FEU Treaty, cannot be disregarded where there is an intention to modify substantially a service concession contract or grant

exclusive rights with the aim of providing for a reasonable solution designed to bring an end to a dispute which has arisen between public entities and an economic operator, for reasons outside their control, as to the scope of the agreement by which they are bound. Since those principles and that obligation form the basis of Article 2 of Directive 2004/18, as is apparent from a reading of recital 2 of that directive, that standard also applies in the context of the application of that directive.

35 As regards, second, the objectively unpredictable nature of certain matters which may form the subject matter of a public contract, it must, admittedly, be recalled that, in accordance with Article 31 of Directive 2004/18, contracting authorities can opt for a direct award of a contract, that is to say, negotiating the terms of the contract with a selected economic operator without prior publication of a contract notice, in various cases, many of which are characterised by the unforeseeability of certain circumstances. However, as is clear from the wording of the last sentence of the second paragraph of Article 28 of that directive, Article 28 may be applied only in the specific cases and circumstances referred to expressly in Article 31, with the result that the list of exceptions concerned must be regarded as exhaustive. It does not, however, appear that the situation at issue in the main proceedings corresponds to one of those situations.

36 Furthermore, the very fact that, because of their subject matter, certain public contracts may immediately be categorised as being unpredictable in nature means that there is a foreseeable risk that difficulties may occur at the implementation stage. Accordingly, in respect of such a contract, it is for the contracting authority not only to use the most appropriate procurement procedures, but also to take care when defining the subject matter of that contract. Furthermore, as is clear from paragraph 30 above, the contracting authority may retain the possibility of making amendments, even material ones, to the contract, after it has been awarded, on condition that this is provided for in the documents which governed the award procedure.

37 Although the principle of equal treatment and the obligation of transparency must be guaranteed even in regard to specific public contracts, this does not mean that the particular aspects of those contracts cannot be taken into account. That legal imperative and that practical necessity are reconciled, first, through strict compliance with the conditions of a contract as they were laid down in the contract documents up to the end of the implementation phase of that contract, but also, second, through the possibility of making express provision, in those documents, for the option for the contracting authority to adjust certain conditions, even material ones, of that contract after it has been awarded. By expressly providing for that option and setting the rules for the application thereof in those documents, the contracting authority ensures that all economic operators interested in participating in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders (see, by analogy, judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraphs 112, 115, 117 and 118).

38 By contrast, where such contingencies are not provided for in the contract documents, the requirement to apply, in respect of a given public contract, the same conditions to all economic operators makes it necessary, in the case of a material amendment to that contract, to initiate a new tendering procedure (see, by analogy, judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 127).

39 Lastly, it is necessary to make it clear that all of those developments are without prejudice to the potential consequences of the notice for voluntary ex ante transparency which has been published in connection with the contract at issue in the main proceedings.

40 In the light of the foregoing, the answer to the question is that Article 2 of Directive 2004/18 must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that

amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility.

Costs

41 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 (Eighth Chamber) hereby rules:

Article 2 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 must be interpreted as meaning that, following the award of a public contract, a material amendment cannot be made to that contract without a new tendering procedure being initiated even in the case where that amendment is, objectively, a type of settlement agreement, with both parties agreeing to mutual waivers, designed to bring an end to a dispute the outcome of which is uncertain, which arose from the difficulties encountered in the performance of that contract. The position would be different only if the contract documents provided for the possibility of adjusting certain conditions, even material ones, after the contract had been awarded and fixed the detailed rules for the application of that possibility.

[Signatures]

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* Language of the case: Danish.

ORDER OF THE GENERAL COURT (Fourth Chamber)

12 October 2011 (*)

(Actions for annulment – Debit note – Objection of inadmissibility – Contractual nature of the dispute – Nature of the action – Act open to challenge)

In Case T-353/10,

Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro AE, established in Athens (Greece), represented by E. Tzannini, lawyer,

applicant,

v

European Commission, represented by D. Triantafyllou and A. Sauka, acting as Agents,

defendant,

APPLICATION for partial annulment of a debit note issued by the Commission on 22 July 2010 for recovery of the sum of EUR 109 415.20 paid to the applicant in the context of financial assistance in support of a medical research project,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

1 The applicant, the Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro AE, is a maternity hospital specialised in the fields of obstetrics, gynaecology and surgery. The applicant is a member of a consortium which, in December 2003, concluded a contract with the Commission of the European Communities on a medical research project, known as Dicoems, under which the Commission agreed to pay its financial contribution in several instalments ('the contract'). The project at issue commenced on 1 January 2004 and was concluded on 30 June 2006, but the contract connected with it is still in force, as the Commission has not yet paid the third and final instalment.

2 Article 12 of the contract stipulates that it is governed by Belgian law. Furthermore, Article 13 thereof provides that the General Court or, depending on the circumstances in the specific case, the Court of Justice, has sole jurisdiction to adjudicate in any dispute between the European Union and the members of the consortium relating to the validity, application or interpretation of the contract.

3 By letter of 29 April 2009, the Commission informed the applicant that it would be subject to an investigation, in the form of a financial audit, on account of its participation in the Dicoems project. It is apparent from that letter that the applicant would be required, during that investigation, to submit the time sheets of the staff working on the project. At the time of the audit, which was performed from 3 to 6 August 2009, it was found that the applicant had not submitted the time sheets recording the hours worked by its staff for which it was requesting reimbursement.

4 In October 2009, the Commission sent the applicant the draft audit report, which stated that the time sheets were missing, and requested it to submit its observations. Since the Commission was not convinced by the observations submitted by the applicant by letter of 5 November 2009, it maintained, by letter of 23 December 2009, the findings which it had set out in the audit report.

5 On 27 April 2010, the Commission sent the applicant an information letter prior to a recovery procedure, requesting it to reimburse EUR 109 415.20 to the Commission. On 26 May 2010, the applicant requested the Commission to re-examine and approve the observations it had previously submitted.

6 Considering, however, that the applicant's answer did not provide any new evidence, the Commission, on 22 July 2010, sent it a debit note in which it was requested to pay EUR 109 415.20 by 6 September 2010 ('the debit note').

7 In addition, under the heading 'Conditions of payment', the debit note stated as follows:

'1. You are liable for all bank charges.

2. The Commission reserves the right, after obtaining information, to operate a set off in respect of mutual debts which are certain, of a fixed amount and due.

3. Where the Commission's account has not been credited by the final date for payment, the debt determined by the Communities shall bear interest at the interest rate applied by the European Central Bank to its main refinancing operations as published in the *Official Journal of the* [*European Union*], C series, in force on the first calendar day of the month of the final date for payment, 09-2010 + 3.5 percentage points.

4. Where the Commission's account has not been credited by the final date for payment, the Commission reserves the right to:

– execute any financial guarantee previously provided

– proceed to enforcement in accordance with Article 299 TFEU

– record the failure to pay in a database accessible to the authorising officers of the budget of the European Union until the payment has been received in its entirety.'

Procedure and forms of order sought

8 By application lodged at the Registry of the General Court on 31 August 2010, the applicant brought the present action.

9 By a separate document lodged on 8 October 2010, the Commission raised an objection of inadmissibility.

10 The Commission contends that the Court should:

– dismiss the action as inadmissible;

– order the applicant to pay the costs.

11 The applicant claims in essence that the Court should:

– dismiss the objection of inadmissibility raised by the Commission;

– annul the debit note, in so far as the Commission is demanding that it pay a sum exceeding that which it itself admitted it owed the Commission, in its letter of 5 November 2009, and which it refuses to pay the Commission or to offset that latter sum against that owed to it by the Commission in respect of the third instalment of the contract;

– order the Commission to pay the costs.

Law

12 Under Article 114(1) of the Rules of Procedure, if a party so applies, the General Court may give a decision on admissibility without going to the substance of the case. Under Article 114(3), the remainder of the proceedings is to be oral, unless the Court decides otherwise. In the present case, the Court considers that it has sufficient information from the documents before it to rule on the application submitted by the Commission and that there is no need to open the oral procedure.

13 The Commission raises an objection of inadmissibility on the grounds, first, that the dispute between it and the applicant is of a contractual nature, which means that the Court is not competent to adjudicate on it in the context of an action for annulment brought under Article 263 TFEU, and, secondly, that the debit note sent to the applicant merely provides information and is not an act open to challenge for the purposes of Article 263 TFEU.

Arguments of the parties

14 The Commission submits, first, that the debit note was issued in the context of the contract, on account of the insufficient justification by the applicant of the expenditure committed to under its contractual obligations. The incomplete performance of a contract constitutes an issue of contractual liability, and the exchange of letters, letters of formal notice and related payments is not subject to the review of legality provided for by Article 263 TFEU. Were that not the case, the Court would extend its jurisdiction beyond the limits set by the TFEU, which allow it to hear and determine contractual disputes only on the basis of specific arbitration clauses, under Article 272 TFEU. This excludes the parallel application of other legal remedies.

15 The Commission submits, second, that the debit note is merely an informative preparatory measure which does not alter the applicant's legal position. It refers, in this connection, to the provisions of the Financial Regulation and the detailed rules for the implementation of the Financial Regulation, and to Case T-260/04 *Cestas* v *Commission* [2008] ECR II-701, paragraph 76. According to the Commission, the applicant's legal position can be altered only by a judicial decision determining the amount payable or, in the alternative, by a definitive, enforceable decision adopted by it under Article 299 TFEU.

16 The applicant submits, first, that the fact that a dispute is made subject to the General Court's jurisdiction by means of an arbitration clause does not preclude it from having recourse to that court under Article 263 TFEU. Nor does it follow from the arbitration clause either that one of those legal

means is subsidiary to the other. Furthermore, this dispute does not arise out of the interpretation or performance of the terms of the contract, but exclusively concerns the complete failure to state reasons in the debit note. The applicant also takes the view that, where an act is adopted by the Commission in the exercise of its own powers, the sole fact that that act forms part of a contractual procedure is not sufficient to conclude that an action for its annulment, brought by an individual concerned by that measure and to whom it is formally addressed, is inadmissible.

17 Second, the applicant submits that the Commission has failed to fulfil its obligation to distinguish clearly between an enforceable measure and a document merely providing information. Consequently, the debit note must be analysed according to its content. It submits that, applying that criterion, the debit note constitutes a definitive act producing enforceable effects, in accordance with the provisions of Article 299 TFEU. That is apparent from its actual wording, which contains a threat of enforcement in the event of non-payment and all the information needed for enforcement, such as the exact amount, the final date for payment, the date on which interest starts to be accrued and the threat of penalties. The applicant also takes the view that, in the context of the internal administrative and accounting audit, the acts definitively laying down the position of the Commission are acts which are open to challenge. That procedure was concluded with the adoption of the debit note and there were no further legal measures to be taken after that note was issued.

Findings of the Court

The nature of the present action, as brought by the applicant

18 As a preliminary point, it must be recalled that it is for the applicant to choose the legal basis of its action and not for the Courts of the European Union themselves to choose the most appropriate legal basis (Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077, paragraph 35; orders of 26 February 2007 in Case T-205/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 38, and 10 April 2008 in Case T-97/07 *Imelios* v *Commission*, not published in the ECR, paragraph 19).

19 In the present case, although the application is not expressly founded on the provisions governing an action for annulment, it is apparent from the pleadings submitted by the applicant to the Court that the action, which seeks annulment of the debit note, is founded on Article 263 TFEU.

20 Thus, on the first page of its application, the applicant describes its action as ‘seeking the annulment of the debit note’. Likewise, in its claims submitted on page 22 of the application, it requests the Court, inter alia, to ‘annul the contested debit note’ and to ‘annul also that part of the contested decision in respect of which the third instalment [of the Commission’s payments] has not been paid’. In addition, in point 18 of its observations on the objection of inadmissibility, after having observed that ‘in an action for annulment, the court examin[ed] the legality of acts ... intended to produce binding legal effects with regard to third parties, by bringing about a significant change in their legal position’, the applicant points out that ‘[t]he debit note must be considered to be such an act’. Furthermore, also in point 18, the applicant states that ‘in any event, th[is] dispute does not arise from the interpretation or performance of the terms of the contract, but exclusively concerns the complete failure to state reasons in the debit note’.

21 Therefore, the present action must be examined as an action for annulment.

Admissibility of the present action as an action for annulment brought under Article 263 TFEU

22 Under Article 263 TFEU, the Courts of the European Union are to review the legality of acts of the institutions intended to produce legal effects vis-à-vis third parties by bringing about a distinct change in their legal position (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Joined Cases

T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Phillip Morris International and Others* v *Commission* [2003] ECR II-1, paragraph 81).

23 According to settled case-law, that jurisdiction concerns only the acts referred to by Article 288 TFEU, which the institutions must adopt under the conditions laid down by the Treaty in the exercise of their prerogatives as public authorities (see, to that effect, orders in Joined Cases T-314/03 and T-378/03 *Musée Grévin* v *Commission* [2004] ECR II-1421, paragraphs 62, 63 and 81, and in *Evropaïki Dynamiki* v *Commission*, paragraph 39).

24 On the other hand, acts adopted by the institutions in a purely contractual context from which they are inseparable are, by their very nature, not among the measures covered by Article 288 TFEU, annulment of which may be sought pursuant to Article 263 TFEU (orders in *Musée Grévin* v *Commission*, paragraph 64; in *Evropaïki Dynamiki* v *Commission*, paragraph 40; in *Imelios* v *Commission*, paragraph 22; of 6 October 2008 in Case T-235/06 *Austrian Relief Program* v *Commission*, not published in the ECR, paragraph 35, and Joined Cases T-428/07 and T-455/07 *CEVA* v *Commission* [2010] ECR II-2431, paragraph 52).

25 The present action may therefore validly be brought before the Court on the basis of Article 263 TFEU only if the debit note is intended to produce binding legal effects which go beyond those stemming from the contract and which involve the exercise of the prerogatives of a public authority conferred on the Commission in its capacity as an administrative authority.

26 In this connection, it is apparent from the information in the file that the debit note forms part of the framework of the contract between the Commission and the applicant, in so far as its purpose is the recovery of a debt which is based on the terms of the contract.

27 First, a sum of EUR 117 306.85 was paid by the Commission to the applicant on the basis of the contract. Second, under Article II.31(1) of the general conditions included in Annex II to that contract, the Commission has the right to request a member of the consortium to reimburse any sum improperly received, or whose recovery is justified in accordance with the contract. It did this by letter of 27 April 2010, asking the applicant to reimburse EUR 109 415.20 (paragraph 5 above). Third, as set out in the debit note, which also refers to the Commission's letters of 27 April and 13 July 2010, the Commission asked the applicant for the 'reimbursement of EUR 109 415.20 in relation to the [applicant's] participation in Project 507760 [Dicoems] and the implementation of the result of the audit [carried out at the applicant]'.

28 Although the legal relationship with which the proceedings are concerned forms part of a contractual framework, the applicant takes the view that the contested debit note is of an administrative nature. It correctly points out, in this connection, that an act adopted by an institution within a contractual framework must be regarded as severable from that framework if it was adopted by that institution in the exercise of its prerogatives as a public authority (see, to that effect, order in *Imelios* v *Commission*, paragraph 28).

29 However, in the present case, there is nothing to support the conclusion that the Commission acted in the exercise of its prerogatives as a public authority. As is apparent from paragraphs 26 and 27 above, the purpose of the debit note is to assert the rights which the Commission derives from the terms of the contract between it and the applicant. By contrast, it does not seek to produce legal effects vis-à-vis the applicant arising from the Commission's exercise of the prerogatives of a public authority conferred upon it by European Union law. The debit note must therefore, in the present case, be regarded as inseparable from the contractual relationship between the Commission and the applicant.

30 As observed in paragraph 7 above, the debit note admittedly contains, under the heading 'Conditions

of payment', information relating to the interest which will accrue on the debt established as receivable if it is not paid by the final date for payment, the possible recovery by offsetting or by execution of any previously provided guarantee and the possibility of enforcement and inclusion in a database accessible to the authorising officers of the Community budget. However, even if it is drafted in a way which could give the impression that it was a definitive act of the Commission, that information could, in any event and by its very nature, only be information provided in preparation for an act of the Commission related to the enforcement of the debt established as receivable, since in the debit note the Commission does not adopt a position as to the means which it intends to employ in order to recover that debt, increased by default interest accruing from the final date for payment fixed in the debit note (see, to that effect, *Cestas* v *Commission*, paragraphs 71 to 74).

31 It is apparent from the foregoing that, in accordance with the considerations set out in paragraph 25 above, by its very nature that debit note is not among the acts whose annulment may be sought from the European Union courts pursuant to Article 263 TFEU.

32 It follows that, in any event, the present action must be dismissed as inadmissible.

On the possibility of reclassifying the present action as an action under an arbitration clause, brought pursuant to Article 272 TFEU

33 Having regard to the arbitration clause provided for in Article 13 of the contract, which provides that the Courts of the European Union have jurisdiction to adjudicate in any dispute relating to the validity, application or interpretation of the contract, it is necessary to consider whether the present action can be reclassified as an action brought pursuant to Article 272 TFEU.

34 According to settled case-law, where an action for annulment or an action for damages is brought before the Court when the dispute is, in point of fact, contractual in nature, the Court reclassifies the action, provided that the conditions for such a reclassification are satisfied (Case T-26/00 *Lecureur* v *Commission* [2001] ECR II-2623, paragraph 38; orders in *Musée Grévin* v *Commission*, paragraph 88; and in Case T-265/03 *Helm Düngemittel* v *Commission* [2005] ECR II-2009, paragraph 54, and judgment in *CEVA* v *Commission*, paragraph 57).

35 Examination of the case-law shows that, when faced with a dispute which is contractual in nature, the Court considers itself unable to reclassify an action for annulment either where the applicant's express intention not to base his application on Article 272 TFEU precludes such a reclassification (see, to that effect, orders in *Musée Grévin* v *Commission*, paragraph 88; and of 2 April 2008 in Case T-100/03 *Maison de l'Europe Avignon Méditerranée* v *Commission*, not published in the ECR, paragraph 54, and judgment in *CEVA* v *Commission*, paragraph 59), or where the action is not based on any plea alleging infringement of the rules governing the contractual relationship in question, whether they be contractual clauses or provisions of the national law designated in the contract (see, to that effect, orders in *Evropaïki Dynamiki* v *Commission*, paragraph 57; and *Imelios* v *Commission*, paragraph 33, and judgment in *CEVA* v *Commission*, paragraph 59).

36 In the present case, in support of its application for annulment of the debit note the applicant puts forward four pleas alleging, respectively, a failure to state reasons in the debit note, a failure to take into consideration the time sheets compiled *ex post* by the applicant, a failure to take into consideration factual arguments put forward by the applicant and the infringement of the principle of legitimate expectations.

37 Those four pleas, which are founded exclusively on considerations of the administrative law, are characteristic of an action for annulment. In addition, in its observations on the objection of inadmissibility, the applicant does not request the reclassification of its action either expressly or

impliedly. Lastly, contrary to Article 44(1)(c) of the Rules of Procedure, the applicant does not put forward, even briefly, any plea, argument or complaint alleging infringement of the provisions of the contract or of those of Belgian law, to which the contract is subject under Article 12 thereof.

38 Therefore, in accordance with the case-law cited in paragraph 35 above, it is not possible to reclassify the present action as an action brought under Article 272 TFEU.

39 It follows from the above that the objection of inadmissibility raised by the Commission must be upheld and consequently the present action must be dismissed as inadmissible.

Costs

40 Pursuant to Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

41 In the present case, although the applicant has been unsuccessful, the Court considers that the Commission did not use clear and unambiguous wording when it drafted the debit note. Certain information in the note and, in particular, the reference to the possible adoption of an enforceable decision under Article 299 TFEU, could give the applicant the impression that that note was a definitive act adopted by the Commission in the exercise of its own powers. In the light of that fact, the Court will make an equitable assessment of the case in ruling that the Commission is to bear its own costs and to pay those incurred by the applicant.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. The European Commission shall bear its own costs and pay those incurred by the Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro AE.

Luxembourg, 12 October 2011.

E. Coulon I. Pelikánová

Registrar President

* Language of the case: Greek

JUDGMENT OF THE COURT (Fifth Chamber)

11 September 2014 (*)

(Reference for a preliminary ruling — Public procurement — Directive 89/665/EEC — Article 2d(4) — Interpretation and validity — Procedures for review of the award of public supply and public works contracts — Ineffectiveness of the contract — Exception)

In Case C-19/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 14 December 2012, received at the Court on 15 January 2013, in the proceedings

Ministero dell'Interno

v

Fastweb SpA,

Intervening party:

Telecom Italia SpA,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 March 2014,

after considering the observations submitted on behalf of:

– Fastweb SpA, by P. Stella Richter and G.-L. Tosato, avvocati,

– Telecom Italia SpA, by F. Cardarelli, F. Lattanzi and F.S. Cantella, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Fiengo, avvocato dello Stato,

– the Austrian Government, by M. Fruhmann, acting as Agent,

– the Polish Government, by B. Majczyna and by M. Szwarc and E. Gromnicka, acting as Agents,

– the European Parliament, by J. Rodrigues and L. Visaggio, acting as Agents,

– the Council of the European Union, by P. Mahnič Bruni and A. Vitro, acting as Agents,

– the European Commission, by L. Pignataro-Nolin and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2d(4) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

2 The request has been made in proceedings between the Ministero dell'Interno, Dipartimento di Pubblica Sicurezza (Ministry of the Interior, Department of Public Safety; 'the Ministry of the Interior') and Fastweb SpA, concerning the award to Telecom Italia SpA, under a negotiated procedure without prior publication of a contract notice, of a public contract for the supply of electronic communications services.

Legal context

EU Law

Directive 2007/66

3 Recitals 3, 13, 14, 21, 26 and 36 in the preamble to Directive 2007/66 state:

'(3) … the guarantees of transparency and non-discrimination sought by [Directive 89/665 and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14)] should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by [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 (OJ 2004 L 134, p. 114)] and [by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)]. Directives [89/665] and [92/13] should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.

...

(13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive [2004/18]. This corresponds to a procedure without prior call for competition within the meaning of Directive [2004/17].

...

(21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.

...

(26) In order to avoid legal uncertainty which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases where the contracting authority or contracting entity considers that the direct award of any contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with Directives [2004/18] and [2004/17] and has applied a minimum standstill period allowing for effective remedies. The voluntary publication which triggers this standstill period does not imply any extension of obligations deriving from Directive [2004/18] or Directive [2004/17].

...

(36) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [('the Charter')]. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

Directive 89/665

4 The third recital in the preamble to Directive 89/665 is worded as follows:

'… the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; … for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law.'

5 Under the third subparagraph of Article 1(1) of Directive 89/665:

'Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2004/18], decisions taken by the contracting authorities may be reviewed

effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.'

6 Paragraph 1 of Article 2 of Directive 89/665, which is entitled 'Requirements for review procedures', provides:

'Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

...

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

7 The first subparagraph of Article 2(7) of Directive 89/665 provides:

'Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.'

8 Article 2d of Directive 89/665, entitled 'Ineffectiveness', provides:

'1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) if the contracting authority has awarded a contract without prior publication of a contract notice in the [Official Journal] without this being permissible in accordance with Directive [2004/18];

...

2. The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).

...

4. The Member States shall provide that paragraph 1(a) of this Article does not apply where:

– the contracting authority considers that the award of a contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with Directive [2004/18],

– the contracting authority has published in the [Official Journal] a notice as described in Article 3a of this Directive expressing its intention to conclude the contract, and

– the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

– …’.

9 Under Article 3a of Directive 89/665, which is entitled ‘Content of a notice for voluntary *ex ante* transparency’, the notice referred to in the second indent of Article 2d(4) is to state the name and contact details of the contracting authority; a description of the object of the contract; the justification for the contracting authority’s decision to award the contract without prior publication of a contract notice*;* the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and, where appropriate, any other information deemed useful by the contracting authority.

Directive 2004/18

10 Article 2 of Directive 2004/18, entitled ‘Principles of awarding contracts’, provides:

‘Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.’

11 Under Article 31 of Directive 2004/18, entitled ‘Cases justifying use of the negotiated procedure without publication of a contract notice’:

‘Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

(1) for public works contracts, public supply contracts and public service contracts:

...

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

...’

Directive 2009/81/EC

12 Under Article 28 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 18, p. 216), entitled ‘Cases justifying use of the negotiated procedure without publication of a contract notice’:

‘In the following cases, contracting authorities/entities may award contracts by a negotiated procedure without prior publication of a contract notice and shall justify the use of this procedure in the contract award notice as required in Article 30(3):

1. for works contracts, supply contracts and service contracts:

...

(e) when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

...’

13 Article 60 of that directive, entitled ‘Ineffectiveness’, provides:

‘1. Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority/entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a) where the contracting authority/entity has awarded a contract without prior publication of a contract notice in the [Official Journal] without this being permissible in accordance with this Directive;

...

4. Member States shall provide that paragraph 1(a) does not apply where:

– the contracting authority/entity considers that the award of a contract without prior publication of a contract notice in the [Official Journal] is permissible in accordance with this Directive;

– the contracting authority/entity has published in the [Official Journal] a notice as described in Article 64 expressing its intention to conclude the contract, and,

– the contract has not been concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice.

– …’

Italian law

14 Directive 2007/66 was transposed into Italian law by Legislative Decree No 53 of 20 March 2010, the content of which was subsequently incorporated into Articles 120 to 125 of Legislative Decree No 104/2010 of 2 July 2010 laying down the Code of Administrative Procedure (decreto legislativo n. 104 — Codice di procedura amministrativa; ordinary supplement to GURI No 158 of 7 July 2010, ‘the Code of Administrative Procedure’).

15 Under Article 121 of the Code of Administrative Procedure, in the event of serious infringements, such as the unauthorised award of a contract by means of a negotiated procedure without prior publication of a notice, it is necessary — save where otherwise provided and notwithstanding the discretion reserved to the administrative courts — to render ineffective the contract subsequently concluded.

16 Among the exceptions to that rule, Article 121(5) of the Code of Administrative Procedure, which transposes Article 2d(4) of Directive 89/665 into national law, provides that a contract is nevertheless to retain its effects if, by a reasoned decision adopted before the award procedure was initiated, the contracting authority had declared that it considered the award of a contract by negotiated procedure without prior publication of a contract notice to be permissible under the Code of Administrative Procedure, if it had published a notice for voluntary *ex ante* transparency and if it did not conclude the contract concerned before the expiry of a period of at least 10 calendar days with effect from the day following the date on which that notice was published.

17 Under Article 122 of the Code of Administrative Procedure, concerning the other cases of infringement, the national courts are to establish, within the limits laid down in that provision, whether to declare the contract ineffective.

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

18 The order for reference relates that, in 2003, the Ministero dell’Interno entered into an agreement with

Telecom Italia for the management and development of telecommunications services.

19 As that agreement was due to expire on 31 December 2011, the Ministero dell'Interno appointed Telecom Italia, by decision of 15 December 2011, as its supplier and technological partner for the management and development of those services.

20 The Ministero dell'Interno considered it possible, for the purposes of awarding the electronic communications contract, to use the negotiated procedure without prior publication of a contract notice, provided for in Article 28(1)(e) of Directive 2009/81 and in Article 57(2)(b) of Legislative Decree No 163 of 12 April 2006 laying down the Code of public works, services and supply contracts in implementation of Directives 2004/17/EC and 2004/18/EC (decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE; ordinary supplement to GURI No 100 of 2 May 2006), as amended by Legislative Decree No 152 of 11 September 2008 (ordinary supplement to GURI No 231 of 2 October 2008) ('Legislative Decree No 163/2006').

21 Under Article 57(2)(b) of Legislative Decree No 163/2006, the contracting authority may award a contract by a negotiated procedure without prior publication of a contract notice, 'if, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator'.

22 In the circumstances, the Ministero dell'Interno formed the view that, for technical reasons and in order to protect certain exclusive rights, Telecom Italia was the only economic operator in a position to perform the contract at issue.

23 After the Avvocatura Generale (State Legal Advisory Service) had given a favourable opinion regarding the intended procedure on 20 December 2011, the Ministero dell'Interno published a notice in the Official Journal on the same day, announcing its intention of awarding the contract to Telecom Italia.

24 On 22 December 2011, the Ministero dell'Interno invited Telecom Italia to take part in the negotiations.

25 Following those negotiations, the parties signed a framework agreement on 31 December 2011 for the 'provision of electronic communications services, including voice telephony, mobile telephony and data transmission services, to the Civil Police and to the Armed Service of the Carabinieri'.

26 The contract award notice was published in the Official Journal on 16 February 2012.

27 Fastweb brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio; 'the TAR') for annulment of the award of the contract, and a declaration that the contract was ineffective, on the ground that the conditions laid down in Article 28 of Directive 2009/81 and in Article 57 of Legislative Decree No 163/2006 for use of a negotiated procedure without prior publication of a contract notice were not satisfied.

28 The TAR upheld the action brought by Fastweb. It found that the reasons set out by the Ministero dell'Interno as justification for the use of that procedure did not constitute 'technical reasons' for the purposes of Article 57(2)(b) of Legislative Decree No 163/2006, by dint of which the contract could be awarded only to a particular economic operator, but rather reasons of expediency. However, although the TAR annulled the decision awarding the contract, it went on to hold that, pursuant to Article 121(5) of the Code of Administrative Procedure, it was unable to declare that the agreement concluded on 31 December 2011 was ineffective, since the conditions laid down in that provision for a derogation

from the general rule were satisfied. Nevertheless, on the basis of Article 122 of the Code of Administrative Procedure, the TAR declared the contract to be ineffective as from 31 December 2013.

29 The Ministero dell'Interno and Telecom Italia each lodged an appeal against that judgment before the Consiglio di Stato.

30 By order of 8 January 2013, the Consiglio di Stato upheld the annulment of the award of the contract, on the ground that the Ministero dell'Interno had failed to demonstrate that the conditions for using a negotiated procedure without prior publication of a notice were satisfied. In fact, the Consiglio di Stato found that what the information in the file made clear was not the objective impossibility of entrusting the contract to different economic operators, but the inexpediency of such a choice, essentially because, in the Ministry's view, it involved changes and costs and necessitated a period of adjustment.

31 In that connection, although the Consiglio di Stato points out that the rules laid down in Directive 2009/81 concerning reviews are almost identical to those laid down in Directive 89/665, its observations are concentrated on Directive 89/665.

32 Being uncertain, however, as to the inferences properly to be drawn from that annulment in terms of the effects of the contract at issue in the light of the wording of Article 2d(4) of Directive 89/665, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 2d(4) of Directive [89/665] be construed as meaning that, if, before awarding the contract directly to a specific economic operator, selected without prior publication of a contract notice, a contracting authority published the notice for voluntary *ex ante* transparency in the [Official Journal] and waited at least 10 days before concluding the contract, the national court is — always and in any event — precluded from declaring the contract to be ineffective, even if it is established that there has been an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure?

(2) Is Article 2d(4) of Directive [89/665] — if interpreted as making it impossible to declare a contract ineffective, in accordance with national law (Article 122 of the Code [of Administrative Procedure]), even though the national court has established an infringement of the provisions permitting, subject to certain conditions, the award of a contract without a competitive tendering procedure — compatible with the principles of equality of the parties, of non-discrimination and of protecting competition, and does it guarantee the right to an effective remedy enshrined in Article 47 of the Charter …?'

Consideration of the questions referred

Question 1

33 By its first question, the referring court asks in essence whether, on a proper construction of Article 2d(4) of Directive 89/665, where a public contract is awarded without prior publication of a contract notice, but the conditions laid down in Directive 2004/18 for use of that procedure are not satisfied, the contract is not to be declared ineffective if the contracting authority had published in the Official Journal a notice to ensure *ex ante* transparency and, before concluding the contract, had allowed the 10-day minimum standstill period to elapse from the day following the date on which that notice was published.

34 At the outset, it should be borne in mind that the provisions of Directive 89/665, which are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to

reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment in *Commission* v *Austria*, C-212/02, EU:C:2004:386, paragraph 20 and the case-law cited).

35 In addition, as can be seen from recitals 3 and 4 to Directive 2007/66, the aim of the directive is to strengthen the guarantees of transparency and non-discrimination that Directive 89/665 seeks to establish, in order to enhance the effectiveness of review proceedings brought in the Member States by persons with an interest in obtaining a public contract.

36 The third subparagraph of Article 1(1) of Directive 89/665 requires Member States to take measures to ensure that decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of that directive.

37 To that end, paragraph 1(b) of Article 2 of Directive 89/665, which is entitled 'Requirements for review procedures', provides that Member States are to ensure that bodies responsible for review procedures have the power to set aside or to ensure the setting aside of decisions taken unlawfully.

38 Article 2d(1)(a) of Directive 89/665 provides in that respect that the body responsible for review procedures is to declare the contract ineffective if the contracting authority has awarded the contract without prior publication of a contract notice in the Official Journal, if it was not permissible to do so under Directive 2004/18.

39 In Article 2d(4) of Directive 89/665, however, the EU legislature has laid down an exception to that rule regarding the ineffectiveness of a contract. Under that provision, the general rule does not apply if: (i) the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal is permissible in accordance with Directive 2004/18; (ii) the contracting authority has published in the Official Journal a notice as described in Article 3a of Directive 89/665 announcing that it intends to conclude the contract; and (iii) the contract was not concluded before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of that notice.

40 Since Article 2d(4) of Directive 89/665 constitutes an exception to the rule regarding the ineffectiveness of contracts, laid down in Article 2d(1) of that directive, it must be interpreted strictly (see, by analogy, the judgment in *Commission* v *Germany*, C-275/08, EU:C:2009:632, paragraph 55 and the case-law cited). Nevertheless, the exception must be construed in a manner consistent with the objectives that it pursues. Thus, the principle of strict interpretation does not mean that the terms in which the exception is framed in Article 2d(4) of Directive 89/665 must be construed in such a way as to deprive that exception of its intended effect (see, by analogy, *Future Health Technologies*, C-86/09, EU:C:2010:334, paragraph 30 and the case-law cited).

41 Fastweb contends that, in accordance with the objectives of Directive 89/665 and the rules on the freedom of establishment and the competitive conditions to which EU public procurement law is intended to give effect, that exception is merely optional. In that regard, Fastweb contends that recitals 20 to 22 to Directive 2007/66 make it clear that Article 2d(4) of Directive 89/665 does not preclude the application of more severe penalties under national law or, therefore, the possibility for the national court to decide, after weighing the general and the individual interests involved, whether the contract must be declared ineffective.

42 In that regard, it should be noted that, under Article 2(7) of Directive 89/665, the effects of the exercise of the powers referred to in Article 2(1) of that directive on a contract concluded subsequent to its award are to be determined, save in the situations contemplated in Articles 2d, 2e and 2f of that directive, by national law. It follows that, in the situations contemplated, in particular, in Article 2d of

Directive 89/665, the measures that may be taken for the purposes of actions brought against the contracting authorities are to be determined solely by the rules laid down in that directive. In that regard, it should be noted that, under Article 2(7) of Directive 89/665, the cases contemplated in Articles 2d, 2e and 2f of that directive do not fall under the general rule that the effects of an infringement of EU public procurement law are to be determined by national law. Consequently, it is not permissible for Member States to lay down in their national law provisions regarding the effects of infringements of EU public procurement law in circumstances such as those contemplated in Article 2d(4) of Directive 86/665.

43 Even though, according to recitals 13 and 14 to Directive 2007/66, the unlawful direct award of contracts is the most serious breach of EU law in the field of public procurement, which it is necessary to penalise, in principle, by a declaration that the contract is ineffective, recital 26 to that directive emphasises the need to avoid the legal uncertainty that could arise as a result of the contract being deprived of effects in the specific case contemplated in Article 2d(4) of Directive 89/665.

44 As the Advocate General noted in point 57 of his Opinion, the intention of the EU legislature in introducing, in Article 2d(4) of Directive 89/665, that exception to the general rule regarding the ineffectiveness of a contract, is to reconcile the various interests in play, that is to say, the interests of the undertaking that has been adversely affected, to which it is important to make available the remedies of pre-contractual interim relief and of annulment of the contract unlawfully concluded, and the interests of the contracting authority and the undertaking selected, which entails the need to prevent the legal uncertainty that might be engendered by the ineffectiveness of the contract.

45 Having regard to the foregoing, it should be noted that it would be contrary both to the wording and to the purpose of Article 2d(4) of Directive 89/665 to allow the national courts to declare that the contract is ineffective where the three conditions laid down in that provision are satisfied.

46 However, in order to attain the objectives referred to in the third subparagraph of Article 1(1) of Directive 89/665, including the availability of effective remedies against decisions taken by contracting authorities in breach of public procurement law, it is important that the body responsible for the review procedure should, when verifying whether the conditions laid down in Article 2d(4) of Directive 89/665 have been fulfilled, carry out an effective review.

47 Specifically, the condition laid down in the first indent of Article 2d(4) of Directive 89/665 relates to the need for the contracting authority to consider it permissible under Directive 2004/18 to award the contract without prior publication of a contract notice in the Official Journal. The condition laid down in the second indent of Article 2d(4) of Directive 89/665 relates to the additional need for the contracting authority to publish in the Official Journal a notice, as described in Article 3a of that directive, announcing its intention of concluding the contract. Under Article 3a(c) of Directive 89/665, the notice must state the justification for the contracting authority's decision to award the contract without prior publication of a contract notice.

48 On that last point, the 'justification' must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review.

49 As emerges from the order for reference, the contracting authority in the case before the referring court, acting on the basis of Article 31(1)(b) of Directive 2004/18, used the negotiated procedure without prior publication of a contract notice. In that regard, it should be borne in mind that the negotiated procedure may only be used in the circumstances precisely delimited in Articles 30 and 31

of Directive 2004/18 and that, as compared with open and restricted procedures, that procedure is exceptional (see judgment in *Commission* v *Belgium*, C-292/07, EU:C:2009:246, paragraph 106 and the case-law cited).

50 In its review, the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, it acted diligently and whether it could legitimately hold that the conditions laid down in Article 31(1)(b) of Directive 2004/18 were in fact satisfied.

51 Among the factors which the review body must take into consideration in that regard are the circumstances and the reasons, mentioned in the notice provided for in the second indent of Article 2d(4) of Directive 89/665, which led the contracting authority to use the negotiated procedure laid down in Article 31 of Directive 2004/18.

52 If, at the conclusion of its review, the review body finds that the conditions laid down in Article 2d(4) of Directive 89/665 are not satisfied, it must then declare that the contract is ineffective, in accordance with the rule laid down in Article 2d(1)(a) of that directive. It must determine, on the basis of national law, the consequences of the declaration of ineffectiveness under Article 2d(2) of Directive 89/665.

53 On the other hand, if the review body finds that those conditions are satisfied, it must maintain the effects of the contract, pursuant to Article 2d(4) of Directive 89/665.

54 Consequently, the answer to Question 1 is that, on a proper construction of Article 2d(4) of Directive 89/665, where a public contract is awarded without prior publication of a contract notice in the Official Journal, but that was not permissible under Directive 2004/18, the contract may not be declared ineffective if the conditions laid down in that provision are satisfied, which it is for the referring court to determine.

Question 2

55 By its second question, the referring court essentially asks — in the event that the answer to Question 1 is in the affirmative — whether Article 2d(4) of Directive 89/665 is valid in the light of the principle of non-discrimination and the right to an effective remedy under Article 47 of the Charter.

56 In that regard, Fastweb contends that the publication in the Official Journal of a notice for voluntary *ex ante* transparency and observance of the 10-day minimum standstill period between that publication and conclusion of the contract does not ensure consistency with the principle of effective judicial protection. Such publication does not guarantee that potential competitors are informed of the award of a contract to a particular economic operator, especially if publication takes place during a period when activities are reduced or suspended.

57 As regards the fundamental right to effective judicial protection, the first paragraph of Article 47 of the Charter states that ‘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’.

58 It is settled law that the setting of reasonable time-limits for bringing proceedings, in the interests of legal certainty and for the protection of both the individual and the administrative authority concerned, is compatible with the fundamental right to effective judicial protection. Such time-limits must not make it impossible in practice or excessively difficult to exercise the rights conferred by the EU legal order (see, to that effect, the judgment in *Pelati*, C-603/10, EU:C:2012:639, paragraph 30 and the case-law cited).

59 Furthermore, the provisions of Directive 89/665, which is intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified. Such protection cannot be effective if the interested party is unable to rely on those rules *vis-à-vis* the contracting authority (see, to that effect, the judgment in *Commission* v *Austria*, EU:C:2004:386, paragraph 20).

60 Accordingly, effective legal protection requires that the interested parties be informed of an award decision a reasonable period before the contract is concluded so that they have a real possibility of bringing proceedings and, in particular, of applying for interim measures pending conclusion of the contract (see, to that effect, judgments in *Commission* v *Spain*, C-444/06, EU:C:2008:190, paragraphs 38 and 39, and *Commission* v *Ireland*, C-456/08, EU:C:2010:46, paragraph 33).

61 In providing for the publication in the Official Journal of a notice, in accordance with Article 3a of Directive 89/665, announcing the intention of concluding a contract, the second indent of Article 2d(4) of Directive 89/665 guarantees the transparency of the award of a contract. Accordingly, that provision is designed to ensure that all the candidates potentially concerned are in a position to take cognisance of the contracting authority's decision to award the contract without prior publication of a contract notice. Moreover, in accordance with the third indent of that provision, the contracting authority must observe a 10-day standstill period. The interested parties are thus given an opportunity to challenge the award of a contract before the courts before the contract is concluded.

62 In addition, it should also be noted that, even when the standstill period of at least 10 calendar days, provided for in Article 2d(4) of Directive 89/665, has elapsed, operators adversely affected may bring an action for damages under Article 2(1)(c) of Directive 89/665.

63 In that regard, as was noted in paragraph 44 above, account must be taken of the fact that, by the exception laid down in Article 2d(4) of Directive 89/665, the EU legislature is seeking to accommodate divergent interests, namely, the interests of the undertaking adversely affected, by conferring upon it the right to bring pre-contractual proceedings for interim relief and the right to obtain annulment of a contract that has been concluded unlawfully, and the interests of the contracting authority and of the undertaking selected, limiting the legal uncertainty that may be engendered by the ineffectiveness of the contract.

64 In the light of the foregoing, it must be held that, in providing for the effects of a contract to be maintained, Article 2d(4) of Directive 89/665 is not contrary to the requirements flowing from Article 47 of the Charter.

65 The same holds true with regard to the principle of non-discrimination, which, in the field of public procurement, pursues the same objectives, including the free movement of services and the opening up of undistorted competition in all the Member States (see, inter alia, *Wall*, C-91/08, EU:C:2010:182, paragraph 48, and *Manova*, C-336/12, EU:C:2013:647, paragraph 28). As has already been stated in paragraph 61 above, the second indent of Article 2d(4) of Directive 89/665 is designed to ensure that all the candidates potentially concerned are in a position to take cognisance of the contracting authority's decision to award the contract without prior publication of a contract notice and accordingly to bring proceedings for a review of its legality.

66 In the light of the foregoing, the answer to Question 2 is that examination of that question has not revealed anything which might affect the validity of Article 2d(4) of Directive 89/665.

Costs

67 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 (Fifth Chamber) hereby rules:

1. **On a proper construction of Article 2d(4) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, where a public contract is awarded without prior publication of a contract notice in the *Official Journal of the European Union*, but that was not permissible under 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, the contract may not be declared ineffective if the conditions laid down in that provision are in fact satisfied, which it is for the referring court to determine.**

2. **Examination of the second question has not revealed anything which might affect the validity of Article 2d(4) of Directive 89/665, as amended by Directive 2007/66.**

[Signatures]

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* Language of the case: Italian.

JUDGMENT OF THE COURT (Fifth Chamber)

12 December 2013 (*)

(Procedures for awarding public contracts in the water, energy, transport and telecommunications sectors – Directive 93/38/EEC – Directive not transposed into national law – Whether the State may rely on that directive against a body holding a public service concession in the case where that directive has not been transposed into national law)

In Case C-425/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Administrativo e Fiscal do Porto (Portugal), made by decision of 26 June 2012, received at the Court on 18 September 2012, in the proceedings

Portgás – Sociedade de Produção e Distribuição de Gás SA

v

Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 July 2013,

after considering the observations submitted on behalf of:

– Portgás – Sociedade de Produção e Distribuição de Gás SA, by J. Vieira Peres, advogado,

– the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território, by M. Ferreira da Costa and M. Pires da Fonseca, acting as Agents,

– the European Commission, by M. Afonso and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy,

transport and telecommunications sectors (OJ 1993 L 199, p. 84), as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 (OJ 1998 L 101, p. 1) ('Directive 93/38').

2 The request has been made in proceedings between Portgás – Sociedade de Produção e Distribuição de Gás SA ('Portgás') and the Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território (Ministry of Agriculture, the Sea, the Environment and Town and Country Planning; 'the Ministério') concerning a decision ordering the recovery of financial aid which was granted to that company under the European Regional Development Fund, on the ground that, when it procured gas meters from another company, Portgás had not complied with the European Union law rules on public procurement.

Legal context

European Union law

3 Article 2(1) of Directive 93/38 provides:

'This Directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

(b) when they are not public authorities or public undertakings, have as one of their activities any of those referred to in paragraph 2 or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.'

4 Among the activities mentioned in Article 2(2) of Directive 93/38 is the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas.

5 Under Article 4(1) and (2) of that directive:

'1. When awarding supply, works or service contracts, or organising design contests, the contracting entities shall apply procedures which are adapted to the provisions of this Directive.

2. Contracting entities shall ensure that there is no discrimination between different suppliers, contractors or service providers.'

6 Article 14(1)(c)(i) of Directive 93/38 provides that the directive applies to contracts awarded by contracting entities which carry out activities in the field of gas transport or distribution, provided that the estimated value of those contracts, net of value added tax, is not less than EUR 400 000.

7 Under Article 15 of Directive 93/38, supply and works contracts and contracts which have as their object services listed in Annex XVI A to that directive are to be awarded in accordance with the provisions of Titles III, IV and V thereof.

8 In accordance with Article 45(2) of Directive 93/38, the Portuguese Republic was required to adopt the measures necessary to comply with that directive and to apply them by 1 January 1998 at the latest. As regards the amendments made to Directive 93/38 by Directive 98/4, those amendments were to be transposed into the Portuguese domestic legal system by 16 February 2000 at the latest.

Portuguese law

9 Directive 93/38 was transposed into Portuguese law by Decree-Law No 223/2001 of 9 August 2001 (*Diário da República* I, series -A, No 184, of 9 August 2001, p. 5002). In accordance with Article 53(1) thereof, Decree-Law No 223/2001 entered into force 120 days after the date of its publication.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 Portgás is a company limited by shares under Portuguese law which is active in the natural gas production and distribution sector.

11 On 7 July 2001, Portgás concluded a contract for the supply of gas meters with Soporgás – Sociedade Portuguesa de Gás Lda. The value of that contract was EUR 532 736.92.

12 On 21 December 2001, Portgás submitted an application for Community co-financing under the European Regional Development Fund, which was approved. The contract awarding financial aid to cover the eligible expenditure of Project POR/3.2/007/DREN, which included the procurement of those gas meters, was signed on 11 October 2002.

13 Following an audit carried out by the Inspecção-Geral das Finanças (Inspectorate General of Finances), on 29 October 2009, the manager of the Programa Operacional Norte (Operational Programme North) ordered the recovery of the financial assistance which had been granted to Portgás in connection with that project, on the ground that, with regard to the procurement of those gas meters, Portgás had failed to comply with the rules of European Union law on public procurement, with the result that all expenditure that had been the subject of public co-financing was ineligible.

14 Portgás brought a special administrative action before the Tribunal Administrativo e Fiscal do Porto (Porto Administrative and Customs Court) by which it sought annulment of the decision ordering that recovery. Before that court, Portgás claimed that the Portuguese State could not require it, as a private undertaking, to comply with the provisions of Directive 93/38. According to Portgás, at the time when the contract was entered into with Soporgás – Sociedade Portuguesa de Gás Lda, the provisions of that directive had not yet been transposed into the Portuguese legal system and, therefore, they could not have direct effect in relation to Portgás.

15 The Ministério contended before the referring court that Directive 93/38 is addressed not only to the Member States but also to all contracting entities, as defined in that directive. According to the Ministério, in its capacity as the holder of the only public service concession in the area covered by the concession, Portgás was subject to the obligations arising from that directive.

16 Since it had doubts as to the interpretation of the provisions of European Union law invoked in the main proceedings, the Tribunal Administrativo e Fiscal do Porto decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘May Articles 4(1) and 14(1)(c)(i) of … Directive 93/38 …, and the other provisions of [that directive] and the general principles of Community law applicable, be interpreted as meaning that they create obligations for private persons who hold public service concessions – in particular an entity covered by Article 2(1)(b) of Directive 93/38 … – where that directive has not been transposed into national law by the Portuguese State, so that failure to comply with those obligations may be invoked against the entity holding the individual concession by the Portuguese State by means of an act attributable to one of its Ministries?’

The question referred for a preliminary ruling

17 By its question, the referring court is asking, in essence, whether Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 may be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public service concession, that undertaking comes within the group of persons covered by that directive and, if so, whether the authorities of the Member State concerned may rely on those provisions in circumstances where Directive 93/38 has not yet been transposed into the domestic system of that Member State.

18 As a preliminary point, it should be recalled that, according to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case 8/81 *Becker* [1982] ECR 53, paragraph 25, and Case C-282/10 *Dominguez* [2012] ECR, paragraph 33 and the case-law cited).

19 So far as Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 are concerned, it must be pointed out that those provisions require, in unconditional and precise terms, contracting entities carrying out activities in, inter alia, the gas transport and distribution sectors to award supply contracts, the estimated value of which is not less than EUR 400 000, in accordance with the provisions of Titles III, IV and V of that directive and to ensure that there is no discrimination between different suppliers, contractors or service providers.

20 It follows that those provisions of Directive 93/38 are unconditional and sufficiently precise to be relied on before national courts.

21 That being so, it is necessary to establish whether those provisions may be relied on, before national courts, against a private undertaking, such as Portgás, in its capacity as the exclusive holder of a public service concession.

22 In this connection, it should be recalled that, in accordance with the third paragraph of Article 288 TFEU, the binding nature of a directive, which constitutes the basis for the possibility of relying on it, exists only in relation to ‘each Member State to which it is addressed’. It follows, according to settled case-law, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against such a person before a national court (Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; and *Dominguez*, paragraph 37 and the case-law cited).

23 So far as concerns the entities against which the provisions of a directive may be relied on, it is apparent from the Court’s case-law that those provisions may be relied on against a State, regardless of the capacity in which the latter is acting, whether as employer or public authority. In either case, it is necessary to prevent the State from being able to take advantage of its own failure to comply with European Union law (see, to that effect, Case 152/84 *Marshall* [1986] ECR 723, paragraph 49; Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 17; and *Dominguez*, paragraph 38).

24 Thus, according to settled case-law, the entities against which reliance may be placed on the provisions of a directive that are capable of having direct effect include a body, whatever its legal form, which has been given responsibility, pursuant to a measure adopted by the State, for providing a public-interest service under the control of the State and which has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals (*Foster and Others*, paragraph 20; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23; Case

C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24; Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 40; and *Dominguez*, paragraph 39).

25 It follows from that case-law that, even if a private party comes within the group of persons covered by a directive, the provisions of that directive may not be relied on as such against that person before the national courts. Consequently, as the Advocate General has noted in point 41 of his Opinion, the mere fact that a private undertaking which is the exclusive holder of a public service concession is among the entities expressly referred to as constituting the group of persons covered by Directive 93/38 does not mean that the provisions of that directive may be relied on against that undertaking.

26 Rather, it is necessary that that public service should be provided under the control of a public authority and that that undertaking should have special powers beyond those which result from the normal rules applicable in relations between individuals (see, to that effect, *Rieser Internationale Transporte*, paragraphs 25 to 27).

27 As regards the position of Portgás, it is apparent from the order for reference that that undertaking has been entrusted by the Portuguese State with providing, as holder of an exclusive concession, a public service, namely, the operation of the gas distribution network in the region of northern Portugal.

28 However, the information provided by the referring court does not enable the Court to determine whether, at the time of the facts at issue in the main proceedings, that public service was provided under the control of State authorities and whether Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals.

29 In this connection, it should be observed that, as regards the question whether that public-interest service was provided under the control of the Portuguese authorities, Portgás has argued, without being contradicted by the Portuguese Government, that the Portuguese State does not hold a majority or the entirety of its share capital and that the Portuguese State may neither appoint members to its management and supervisory bodies nor issue instructions concerning the operation of its public service activity. However, it is not clear from the documents before the Court whether those circumstances were satisfied at the time of the facts at issue in the main proceedings.

30 As to whether Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals, it should be observed that, although that undertaking enjoyed, pursuant to the concession contract, special and exclusive rights, that does not mean, as the Advocate General has noted in point 39 of his Opinion, that it had such special powers. The fact that Portgás could request that the expropriations necessary for the establishment and operation of the infrastructures be carried out, without, however, being able itself to do so, is not sufficient, in itself, for a finding that Portgás had special powers going beyond those which result from the normal rules applicable in relations between individuals.

31 In those circumstances, is for the referring court to establish whether, at the time of the facts at issue in the main proceedings, Portgás was a body which had been given responsibility for providing, under the control of a public authority, a public-interest service and whether that undertaking had, for that purpose, such special powers.

32 On the assumption that Portgás featured among the entities against which, pursuant to the case-law cited in paragraph 24, the provisions of Directive 93/38 may be relied on by an individual, it is necessary to examine whether those provisions could also be relied on against Portgás by the Portuguese authorities.

33 In this connection, it should be observed that, although the Court has held that unconditional and

sufficiently precise provisions of a directive may be relied on by individuals against a body which has been given responsibility, under the control of the State, for a public-interest service and which has, for that purpose, special powers (see, to that effect, *Foster and Others*, paragraphs 18 and 20, and *Dominguez*, paragraphs 38 and 39 and the case-law cited), the case in the main proceedings has arisen in a context different from the context of that case-law.

34 In the context of the present case, it should be recalled that, according to the case-law of the Court, the obligation on a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 288 TFEU and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of the Member States (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 40 and the case-law cited) as well as on bodies which, under the control of those authorities, have been given responsibility for a public-interest service and which have, for that purpose, special powers. It follows that the authorities of the Member States must be in a position to ensure that such bodies comply with the provisions of Directive 93/38.

35 It would be contradictory to rule that State authorities and bodies satisfying the conditions set out in paragraph 24 of the present judgment are required to apply Directive 93/38, while denying those authorities the possibility to ensure compliance, if necessary before national courts, with the provisions of that directive by a body satisfying those conditions when that body must itself also comply with Directive 93/38.

36 Furthermore, the Member States would be able to take advantage of their own failure to comply with European Union law in failing correctly to transpose a directive into national law if compliance with the provisions of Directive 93/38 by such bodies could not be ensured on the initiative of a State authority.

37 Lastly, that approach would make it possible for a private competitor to rely on the provisions of Directive 93/38 against a contracting entity which satisfies the criteria set out in paragraph 24 of the present judgment, whereas State authorities could not rely on the obligations flowing from that directive against such an entity. Consequently, whether or not such a contracting entity would be required to comply with the provisions of Directive 93/38 would depend on the nature of the persons or bodies relying on Directive 93/38. In those circumstances, Directive 93/38 would no longer be applied in a uniform manner in the domestic legal system of the Member State concerned.

38 It follows that a private undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38 and the authorities of a Member State may therefore rely on those provisions against it.

39 In the light of all the foregoing considerations, the answer to the question referred is that:

– Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 must be interpreted as meaning that they cannot be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public-interest service concession, that undertaking comes within the group of persons covered by Directive 93/38, in circumstances where that directive has not yet been transposed into the domestic system of the Member State concerned.

– Such an undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in

relations between individuals, is obliged to comply with the provisions of Directive 93/38 and the authorities of a Member State may therefore rely on those provisions against it.

Costs

40 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 (Fifth Chamber) hereby rules:

Articles 4(1), 14(1)(c)(i) and 15 of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998, must be interpreted as meaning that they cannot be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public-interest service concession, that undertaking comes within the group of persons covered by Directive 93/38, in circumstances where that directive has not yet been transposed into the domestic system of the Member State concerned.

Such an undertaking, which has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and which has, for that purpose, special powers going beyond those which result from the normal rules applicable in relations between individuals, is obliged to comply with the provisions of Directive 93/38, as amended by Directive 98/4, and the authorities of a Member State may therefore rely on those provisions against it.

[Signatures]

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* Language of the case: Portuguese.

JUDGMENT OF THE COURT (Fifth Chamber)

17 October 2013 (*)

(Request for a preliminary ruling – Protection of the ozone layer – Scheme for greenhouse gas emission allowance trading within the Community – Method of allocating allowances – Allocation of allowances free of charge)

In Joined Cases C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decisions of 19, 20, 24 and 28 October 2011 and of 18 November 2011, received at the Court on 14, 21 and 25 November 2011 and on 2 and 14 December 2011, in the proceedings

Iberdrola SA,

Gas Natural SDG SA,

intervening parties:

Administración del Estado and Others (C-566/11),

Gas Natural SDG SA,

intervening parties:

Endesa SA and Others (C-567/11),

Tarragona Power SL,

intervening parties:

Gas Natural SDG SA and Others (C-580/11),

Gas Natural SDG SA,

Bizcaia Energía SL,

intervening parties:

Administración del Estado and Others (C-591/11),

Bahía de Bizcaia Electricidad SL,

intervening parties:

Gas Natural SDG SA and Others (C-620/11),

and

E.ON Generación SL and Others (C-640/11),

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fifth Chamber, A. Rosas, D. Šváby (Rapporteur) and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 February 2013,

after considering the observations submitted on behalf of:

– Iberdrola SA and Tarragona Power SL, by J. Folguera Crespo, L. Moscoso del Prado González and E. Peinado Iríbar, abogados,

– Gas Natural SDG SA, by Á. Martín-Rico Sanz, procuradora, and by A. Morales Plaza and R. Espín Martí, abogados,

– Endesa SA, by F. De Borja Acha Besga and J.J. Lavilla Rubira, abogados, and by M. Merola, avvocato,

– Bizcaia Energía SL, by J. Briones Méndez, procurador, and by J. García Sanz, abogado,

– Bahía de Bizcaia Electricidad SL, by F. González Ruiz, procuradora, and by J. Abril Martínez, abogado,

– E.ON Generación SL, by J. Gutiérrez Aceves, procuradora, and by J.C. Hernanz Junquero, abogado,

– the Spanish Government, by S. Centeno Huerta, acting as Agent,

– the European Commission, by L. Banciella, E. White and K. Mifsud-Bonnici, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 10 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

2 The requests have been made in proceedings between a number of electricity producers and the Administración del Estado (the national administration) concerning the reduction in the remuneration for electricity production.

Legal context

European Union ('EU') law

3 The aim of Directive 2003/87, according to Recital 5 in the preamble thereto, is to contribute to fulfilling the commitments of the European Community and its Member States to reduce anthropogenic greenhouse gas emissions effectively, in accordance with Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1), through an efficient European market in greenhouse gas emission allowances ('emission allowances'), with the least possible diminution of economic development and employment.

4 Recital 7 of Directive 2003/87 is worded as follows:

'Community provisions relating to allocation of allowances by the Member States are necessary to contribute to preserving the integrity of the internal market and to avoid distortions of competition.'

5 Article 1 of the directive defines its objectives as follows:

'This Directive establishes a scheme for [emission allowance] trading within the Community ... in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.'

6 Article 10 of Directive 2003/87, entitled 'Method of allocation', provides:

'For the three-year period beginning 1 January 2005 Member States shall allocate at least 95% of the allowances free of charge. For the five-year period beginning 1 January 2008, Member States shall allocate at least 90% of the allowances free of charge.'

7 In accordance with Article 12(1) of the directive, allowances are transferable and may be traded between persons within the Community and, under certain conditions, between persons within the Community and persons in third countries.

8 Article 12(3) of Directive 2003/87 provides:

'Member States shall ensure that, by 30 April each year at the latest, the operator of each installation surrenders a number of allowances equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that these are subsequently cancelled.'

9 In the Communication of 29 November 2006 from the Commission to the Council and to the European Parliament on the assessment of national allocation plans for the allocation of greenhouse gas emission allowances in the second period of the EU Emissions Trading Scheme accompanying Commission Decisions of 29 November 2006 on the national allocation plans of Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Sweden and the United Kingdom in accordance with Directive 2003/87 (COM(2006) 725 final), it is stated that:

'As noted by the High-Level Group on Competitiveness, Energy and the Environment insufficient maturity of energy markets is alleged to have led to insufficient competitive pressure to reduce the pass-through of the value of allowances in electricity prices and hence to so-called windfall profits for electricity producers. The Group has furthermore recommended that Member States consider differentiated allocation between sectors in the second allocation period ...'

10 Recitals 15 and 19 to Directive 2009/29/EC of the European Parliament and of the Council of 23 April

2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ 2009 L 140, p. 3), state that:

‘(15) The additional effort to be made by the Community economy requires, inter alia, that the revised Community scheme operate with the highest possible degree of economic efficiency and on the basis of fully harmonised conditions of allocation within the Community. Auctioning should therefore be the basic principle for allocation, as it is the simplest, and generally considered to be the most economically efficient, system. This should also eliminate windfall profits and put new entrants and economies growing faster than average on the same competitive footing as existing installations.

...

(19) Consequently, full auctioning should be the rule from 2013 onwards for the power sector, taking into account its ability to pass on the increased cost of CO_2 ...’

Spanish law

11 Directive 2003/87 was transposed into Spanish law by Law 1/2005 regulating the greenhouse gas emissions trading scheme (Ley 1/2005 por la que se establece un régimen para el comercio de derechos de emisión de gases de efecto invernadero) of 9 March 2005 (BOE No 59 of 10 March 2005, p. 8405; ‘Law 1/2005’). That law imposes an obligation on every operator of a production unit with a rated thermal input exceeding 20 MW to surrender, by 30 April each calendar year, a number of emission allowances equal to the total verified emissions of greenhouse gases from that installation during the preceding calendar year. For the purposes of the surrender, the operators may use both the allowances which were allocated to them for each installation under the national allocation plan and those bought on the emission allowances market. Article 16 of Law 1/2005 provides that the allocation of allowances under the national allocation plan ‘is to be free’ during the period from 2005 to 2008.

12 Following the adoption of Law 54/1997 on the Electricity Sector (Ley 54/1997 del sector eléctrico) of 27 November 1997 (BOE No 285 of 28 November 1997, p. 35097) transposing into Spanish law the European directives on the internal electricity market, the activity of electricity production in Spain is open to all operators who meet the technical and financial conditions laid down.

13 A wholesale electricity market was set up in accordance with Law 54/1997. It is supervised by the Compañía Operadora del Mercado de Electricidad SA, a private entity entrusted with impartially ensuring market transparency and the independence of market participants. The market operates in accordance with a balancing mechanism which matches the energy demand for each programming period with the offers received for the same period. The energy is sold at the price offered by the producer which was last to be admitted to the system and whose admission was necessary if electricity demand was to be met. It is a ‘marginalist’ market in which all producers whose offers are accepted receive the same ‘marginal’ price, which corresponds to the offer made by the operator of the last production unit to be admitted. That price is set at the intersection of the curves of energy supply and demand.

14 In 2006, the Spanish Government regulated by royal decree the electricity tariffs applicable to consumers in such a way that they cover, inter alia, the electricity prices set on the on-the-day market. A growing tariff deficit emerged because subsequent royal decrees failed to take fully into account the costs arising in relation to electricity production on the open market.

15 On 24 February 2006, the Consejo de Ministros (Council of Ministers) adopted Royal Decree-Law 3/2006 (Real Decreto-Ley 3/2006, BOE No 50 of 28 February 2006, p. 8015, and corrigendum, BOE

No 53 of 3 March 2006, p. 8659; 'Royal Decree-Law 3/2006'), which entered into force on 1 March 2006 and the main aim of which is to amend the mechanism used in Spain for matching the offers to sell electricity and the bids to purchase it, submitted simultaneously on the on-the-day and intraday electricity generation markets by operators from the same entrepreneurial group.

16 Article 2 of Royal Decree-Law 3/2006, entitled 'Greenhouse gas emission allowances under the 2006-2007 National Allocation Plan', provides for the remuneration of electricity production to be reduced by an amount equivalent to the value of the emission allowances allocated free of charge to electricity producers in accordance with the 2005-2007 National Allocation Plan, during the corresponding periods.

17 As justification for that reduction, the explanatory memorandum for Royal Decree-Law 3/2006 refers to the fact that electricity producers opted for 'integration of the value of the [emission allowances] in the formation of prices in the wholesale electricity market'. It also provides the following explanation:

'In addition, the taking into account of the value of the [emission allowances] in the formation of prices in the wholesale electricity market is intended to reflect [that integration] by reducing, by equivalent amounts, the remuneration payable to the generating units concerned. Furthermore, the sharp increase in tariff deficit during 2006 makes it advisable to deduct the value of the emission allowances for the purposes of determining the amount of that deficit. The existing risk of high prices in the electricity-generation market, with their immediate and irreversible negative effects on end-consumers, justifies the urgent adoption of the provisions laid down in the present measure and the exceptional nature of those provisions.'

18 On 15 November 2007, the Ministro de Industria, Turismo y Comercio (Ministry of Industry, Tourism and Commerce) adopted, pursuant to Article 2(3) of Royal Decree-Law 3/2006, Ministerial Order ITC/3315/2007 regulating, for 2006, the reduction of remuneration for electricity production by an amount equivalent to the value of the greenhouse gas emission allowances allocated free of charge (Orden ministerial ITC/3315/2007 sobre la regulación para el año 2006 de la minoración de la retribución de la actividad de producción de energía eléctrica en el importe equivalente al valor de los derechos de emisión de gases de efecto invernadero asignados gratuitamente, BOE No 275 of 16 November 2007, p. 46991, 'Ministerial Order ITC/3315/2007'). In that connection, it is specified in the preamble to that ministerial order that 'the sum by which the remuneration for production plants is to be reduced shall be equivalent to the surplus income obtained through the incorporation in sale offers of the cost of emission allowances allocated free of charge'.

The disputes in the main proceedings and the question referred for a preliminary ruling

19 The applicants in the main proceedings – electricity producers in Spain – brought actions before the Chamber for Contentious Administrative Proceedings of the Audiencia Nacional (High Court) for annulment of Ministerial Order ITC/3315/2007, claiming, inter alia, that the order is contrary to Directive 2003/87 in so far as it neutralises the 'free of charge' nature of emission allowances.

20 Those actions were dismissed by the Audiencia Nacional, which held that the Order did not neutralise the 'free of charge' nature of emission allowances.

21 The applicants in the main proceedings brought appeals before the Tribunal Supremo (the Supreme Court) against the judgments of the Audiencia Nacional. The Tribunal Supremo has doubts regarding the concept of 'allocation free of charge' as used in Directive 2003/87.

22 First, it is arguable that Directive 2003/87 does nothing to stop Member States from precluding

electricity producers from passing on in the wholesale price for electricity the cost of emission allowances allocated to them free of charge.

23 Secondly, according to the Tribunal Supremo, those measures could have the effect of neutralising the 'free of charge' nature of the initial allocation of emission allowances and undermining the very purpose of the scheme established by Directive 2003/87, which is to reduce greenhouse gas emissions by means of an economic incentive mechanism.

24 In those circumstances, the Tribunal Supremo decided to stay the proceedings and to refer the following question, which is framed in the same terms in Cases C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11, to the Court of Justice for a preliminary ruling:

'May Article 10 of Directive [2003/87] be interpreted as not preventing application of national legislative measures of the kind under review in these proceedings, the purpose and effect of which are to reduce remuneration for electricity production by an amount equivalent to the value of the [emission allowances] allocated free of charge during the relevant period?'

25 By Order of the President of the Court of 18 January 2012, Cases C-566/11, C-567/11, C-580/11, C-591/11, C-620/11 and C-640/11 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the question referred

26 By its question, the referring court asks, in essence, whether Article 10 of Directive 2003/87 must be interpreted as precluding application of national legislative measures, such as those at issue in the main proceedings, the purpose and effect of which are to reduce remuneration for electricity production by an amount equal to the increase in such remuneration brought about through the incorporation, as an additional production cost, in the selling prices offered on the wholesale electricity market, the value of the emission allowances allocated free of charge.

27 As is apparent from its wording – according to which, during the period at issue, Member States are to allocate at least 95% of the emission allowances free of charge – Article 10 of Directive 2003/87 precludes charges imposed in respect of the allocation of allowances.

28 On the other hand, neither Article 10 nor any other provision of the directive concerns the use of emission allowances or expressly restricts the right of Member States to adopt measures which may affect the economic implications of using emission allowances.

29 Consequently, Member States are free, as a rule, to adopt economic policy measures, such as price controls on the markets for certain goods or essential resources, determining the manner in which the value of the emission allowances allocated free of charge to producers is to be passed on to consumers.

30 Nevertheless, the adoption of such measures must not neutralise the principle that emission allowances are allocated free of charge; nor may it undermine the objectives pursued by Directive 2003/87.

31 As regards the first aspect, it should be noted that the allocation 'free of charge' under Article 10 of Directive 2003/87 precludes not only the direct fixing of a price for the allocation of emission allowances but also the subsequent levying of a charge in respect of their allocation.

32 In the present case, as is apparent from the recitals to Royal Decree-Law 3/2006 and from Ministerial Order ITC/3315/2007, the rules at issue in the main proceedings are designed to ensure that the

consumer does not bear the effects of the incorporation, in the selling prices offered on the electricity market, of the value of emission allowances allocated free of charge.

33 The Spanish electricity producers in question have incorporated, in the selling prices that they offer on the wholesale electricity market, the value of the emission allowances, in the same way as any other production cost, even though those allowances had been allocated to them free of charge.

34 As the referring court explains, that practice is undoubtedly cogent from an economic point of view, in so far as an undertaking's use of emission allowances allocated to it represents an implied cost, known as an 'opportunity cost', which consists in the income that the undertaking has forgone by not selling those allowances on the emission allowances market. However, the combination of that practice with the pricing system on the electricity generation market in Spain results in windfall profits for electricity producers.

35 It should be noted that the on-the-day electricity trading market in Spain is a 'marginalist' market in which all producers whose offers have been accepted receive the same price, that is, the price offered by the operator of the last production unit to be admitted to the system. Since, during the period concerned, that marginal price was determined by the offers from operators of combined gas and steam power plants – technology attracting free emission allowances – the incorporation of the value of the allowances into the selling prices offered is passed on in the overall market price for electricity.

36 Accordingly, the reduction in remuneration provided for in Ministerial Order ITC/3315/2007 applies not only to undertakings that have received emission allowances free of charge, but also to power plants that do not need allowances, such as hydroelectric and nuclear power plants, as the emission allowance value incorporated in the costs structure is passed on in the price for electricity, which is received by every producer active on the wholesale electricity market in Spain.

37 Furthermore, as can be seen from the documents before the Court, the rules at issue in the main proceedings take into account factors other than the quantity of allowances allocated: in particular, the type of power plant and its emission factor. The reduction in remuneration for electricity production provided for under those rules is calculated in such a way that it absorbs only the extra charged as a result of the opportunity costs relating to emission allowances being incorporated in the price. This is confirmed by the fact that the levy is not incurred where power plant operators sell allowances allocated free of charge on the secondary market.

38 Accordingly, the aim of the rules at issue in the main proceedings is not subsequently to impose a fee for the allocation of emission allowances, but to mitigate the effects of the windfall profits accrued through the allocation of emission allowances free of charge on the Spanish electricity market.

39 It should be noted, in that regard, that the allocation of emission allowances free of charge under Article 10 of Directive 2003/87 was not intended as a way of granting subsidies to the producers concerned, but of reducing the economic impact of the immediate and unilateral introduction by the European Union of an emission allowances market, by preventing a loss of competitiveness in certain production sectors covered by that directive.

40 As was stated in paragraph 9 above, insufficient competitive pressure to limit the extent to which the value of emission allowances is passed on in electricity prices has led electricity producers to make windfall profits. As can be seen from recitals 15 and 19 to Directive 2009/29, it is in order to eliminate windfall profits that, with effect from 2013, emission allowances are to be allocated by means of a full auctioning mechanism.

41 It follows that the mechanism established by Directive 2003/87 for the allocation of emission

allowances free of charge does not require electricity producers to be able to pass on the value of those allowances in electricity prices and thus make windfall profits.

42 Consequently, the concept of 'free of charge' allowances as used in Article 10 of Directive 2003/87 does not preclude rules such as those at issue in the main proceedings, under which the remuneration for electricity producers is to be reduced in order to counterbalance windfall profits resulting from the allocation of emission allowances free of charge, provided that – as was pointed out in paragraph 30 above – they do not undermine the objectives pursued by that directive.

43 As regards that second aspect, it should be noted that the principal objective of Directive 2003/87 is to reduce greenhouse gas emissions substantially. That objective must be attained in compliance with a series of sub-objectives and through recourse to certain instruments. The principal instrument for that purpose is the EU scheme for greenhouse gas emissions trading. As indicated in recitals 5 and 7 to Directive 2003/87, among the other sub-objectives to be fulfilled by the scheme are the safeguarding of economic development and employment and the preservation of the integrity of the internal market and of conditions of competition (see, Case C-505/09 P *Commission* v *Estonia* [2012] ECR, paragraph 79).

44 Consequently, the question that arises in the present case is, more specifically, whether, by counterbalancing the windfall profits accrued as a result of the allocation of allowances free of charge, the rules at issue in the main proceedings undermine the purpose of the system established by Directive 2003/87 for reducing emissions, based on the incorporation of environmental costs into the product price.

45 It should be noted, in the first place, that the allocation of emission allowances free of charge was a transitional measure intended to prevent undertakings from losing competitiveness as a result of the scheme for emission allowance trading. Accordingly, it is not directly related to the environmental objective of reducing emissions.

46 In the second place, it should be noted that the rules at issue in the main proceedings do not affect the emission allowances market, but rather the windfall profits made by all electricity producers in Spain as a result of the value of those allowances being incorporated into the price quoted in the offers accepted for the purposes of setting prices on the wholesale electricity market, in light of the fact that it is a 'marginalist' market.

47 Undertakings may use their free emission allowances for their electricity production activities or they may sell them on the emission allowances market, depending on the value of those allowances on the market and the profits that they could accordingly yield.

48 It should be stated, in the third place, that the rules at issue in the main proceedings do not compromise the environmental objective of Directive 2003/87, which is to encourage the reduction of emissions.

49 First, in order to reduce greenhouse gas emissions, Directive 2003/87 introduced an emissions trading scheme. As provided in Article 1 of that directive, the incentive to reduce emissions is to be cost-effective and economically efficient, it being understood that the producer may decide to invest in more efficient technologies emitting less greenhouse gas, or to use more emission allowances, or even to scale back production, choosing the most economically advantageous option. In view of the fact that, under the rules at issue in the main proceedings, the value of emission allowances can be converted into money by selling them, it is clear that the rules do not have the effect of deterring electricity producers from reducing greenhouse gas emissions.

50 Second, the costs relating to greenhouse gas emissions have been incorporated into the selling prices offered by producers on the wholesale electricity market. As higher production costs weaken their

position on that market, electricity producers have an incentive to reduce the emissions associated with their activities.

51 Lastly, Law 1/2005 requires electricity producers to surrender each year a number of emission allowances equal to the total verified emissions from the production plant during the preceding calendar year and to ensure that those allowances are subsequently cancelled, in accordance with Article 12(3) of Directive 2003/87.

52 However, a number of producers have claimed, in observations submitted to the Court, that the reduction in the remuneration for electricity production, at issue in the main proceedings, is designed in such a way that it negates the incentive to reduce greenhouse gas emissions.

53 It is true that, according to the replies to the written questions put by the Court, the formula laid down in Ministerial Order ITC/3315/2007 for calculating that reduction could cause the operator of an electrical power plant which has reduced its greenhouse gas emissions to have to pay a higher amount by way of levy.

54 However, the Spanish Government stated that that additional cost does not cancel out the profit generated from involvement in emission allowance trading.

55 In that regard, it should be noted that the incentive to reduce the emissions of each power plant lies in the advantage to be gained by reducing its need for emission allowances, which have a financial value that can be converted into money through their sale, whether or not they have been allocated free of charge.

56 Moreover, in order for Directive 2003/87 to attain its objective of reducing greenhouse gas emissions in a cost-effective and economically efficient manner, it is not necessary, as was noted in paragraph 41 above, for undertakings to pass on in consumer prices the costs relating to emission allowances allocated to them free of charge.

57 Additionally, since, on the Spanish electricity generation market, a single price is paid to all producers and the end consumer has no knowledge of the technology used to generate the electricity that he consumes and the tariff for which is set by the State, the extent to which electricity producers may pass on in prices the costs associated with the use of emission allowances has no impact on the reduction of emissions.

58 It follows that, although a levy lowering the remuneration for electricity production, such as that imposed by the rules at issue in the main proceedings, may diminish the incentive to reduce greenhouse gas emissions, it does not remove that incentive entirely.

59 In the light of all the foregoing considerations, the answer to the question is that Article 10 of Directive 2003/87 must be interpreted as not precluding application of national legislative measures, such as those at issue in the main proceedings, the purpose and effect of which are to reduce remuneration for electricity production by an amount equal to the increase in such remuneration brought about through the incorporation, in the selling prices offered on the wholesale electricity market, of the value of the emission allowances allocated free of charge.

Costs

60 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 (Fifth Chamber) hereby rules:

Article 10 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC must be interpreted as not precluding application of national legislative measures, such as those at issue in the main proceedings, the purpose and effect of which are to reduce remuneration for electricity production by an amount equal to the increase in such remuneration brought about through the incorporation, in the selling prices offered on the wholesale electricity market, of the value of the emission allowances allocated free of charge.

[Signatures]

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* Language of the case: Spanish.

JUDGMENT OF THE COURT (Grand Chamber)

19 July 2012 (*)

(Appeals — Competition — Agreements, decisions and concerted practices — Spanish market for the purchase and first processing of raw tobacco — Price-fixing and market-sharing — Infringement of Article 81 EC — Attributability of unlawful conduct of subsidiaries to their parent companies — Presumption of innocence — Rights of the defence — Obligation to state the reasons on which the decision is based — Equal treatment)

In Joined Cases C-628/10 P and C-14/11 P,

Two APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 28 December 2010 and 7 January 2011 respectively,

Alliance One International Inc., formerly Standard Commercial Corp., established in Danville (United States),

Standard Commercial Tobacco Co. Inc., established in Wilson (United States),

represented by M. Odriozola Alén and A. João Vide, abogados,

appellants,

the other parties to the proceedings being:

Trans-Continental Leaf Tobacco Corp. Ltd, established in Vaduz (Liechtenstein),

applicant at first instance,

European Commission, represented by F. Castillo de la Torre, E. Gippini Fournier and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

and

European Commission, represented by F. Castillo de la Torre, E. Gippini Fournier and R. Sauer, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Alliance One International Inc.,

Standard Commercial Tobacco Co. Inc.,

Trans-Continental Leaf Tobacco Corp. Ltd,

represented by M. Odriozola Alén and A. João Vide, abogados,

applicants at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, M. Safjan and A. Prechal, Presidents of Chambers, K. Schiemann, E. Juhász, G. Arestis, A. Arabadjiev (Rapporteur), D. Šváby, M. Berger and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 November 2011,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2012,

gives the following

Judgment

1 By their appeal (C-628/10 P) Alliance One International Inc. ('AOI'), formerly Standard Commercial Corp. ('SCC'), and Standard Commercial Tobacco Co. Inc. ('SCTC') seek to have set aside the judgment of 27 October 2010 in Case T-24/05 *Alliance One International and Others* v *Commission* [2010] ECR II-5329 ('the judgment under appeal'), whereby the General Court of the European Union dismissed their action for the annulment of Commission Decision C(2004) 4030 final of 20 October 2004 relating to a proceeding under Article 81(1) [EC] (Case COMP/C.38.238/B.2 − Raw tobacco — Spain) ('the contested decision') and, further, the annulment of that decision, in so far as it relates to them, and reduction of the fine imposed on them by that decision.

2 By its appeal (C-14/11 P) the European Commission seeks to have set aside the judgment under appeal to the extent that it annulled the contested decision in so far as it relates to Trans-Continental Leaf Tobacco Corp. Ltd ('TCLT') and, further, dismissal of the action brought by TCLT before the General Court.

I – Background to the dispute

3 The facts which gave rise to the dispute in this case, as set out in paragraphs 1 to 40 of the judgment under appeal, can be summarised as follows.

4 World Wide Tobacco España SA ('WWTE'), Agroexpansión SA ('Agroexpansión') and Tabacos Españoles SL ('Taes') are three of four undertakings engaged in the first processing of raw tobacco in Spain (the four undertakings being hereinafter referred to as 'the processors').

5 Between 1995 and 5 May 1998 two thirds of the capital of WWTE was held by TCLT, a wholly owned subsidiary of SCTC, which is itself a wholly owned subsidiary of SCC (now AOI). The remaining third was held by the chairman of WWTE and two members of his family.

6 On 5 May 1998 TCLT increased its holding in WWTE to 86.94%, the remainder of the shares being held as own shares by WWTE (9.73%) and by a natural person (3.33%). In October 1998 WWTE acquired that person's shares and SCC acquired a direct holding of 0.04% in WWTE's share capital. In May 1999 TCLT and SCC increased their holding in WWTE to 89.64% and 0.05% respectively, the remainder being held as own shares by WWTE.

7 Agroexpansión is a member of a group of companies of which Dimon Inc. is the ultimate holding company. Dimon holds, through its wholly owned subsidiary Intabex Netherlands BV ('Intabex'), all the shares in Agroexpansión.

8 All shares in Taes and in Deltafina SpA ('Deltafina'), which is an Italian company whose main activities are the first processing of raw tobacco in Italy and the marketing of processed tobacco, are held by Universal Leaf Tobacco Co. Inc. ('Universal Leaf'). The latter is itself a 100% owned subsidiary of the United States company Universal Corp. ('Universal').

9 On 3 and 4 October 2001 the Commission carried out inspections pursuant to Article 14 of Council Regulation No 17 of 6 February 1962, First regulation implementing Articles [81 EC] and [82 EC] (OJ 1962, English Special Edition, Series I, 1959-1962, p. 87) at the premises of, among others, WWTE, in order to check information that the Spanish processors and producers of raw tobacco had infringed Article 81 EC.

10 On 11 December 2003 the Commission adopted a statement of objections which it addressed to 20 undertakings or associations, including SCTC and SCC.

11 On 20 October 2004 the Commission adopted the contested decision which relates to, inter alia, a horizontal cartel entered into and implemented on the Spanish raw tobacco market by the processors and Deltafina.

12 According to the Commission's findings, the object of that cartel was to fix each year, in the period from 1996 to 2001, the average delivery price for each variety and grade of raw tobacco and to share out the quantities of each variety of raw tobacco that each of the processors could purchase from the producers. Between 1999 and 2001 the processors and Deltafina also agreed price brackets per quality grade for each raw tobacco variety as well as average minimum prices per producer and producer group.

13 In the contested decision, the Commission held that that cartel was a single and continuous infringement of Article 81(1) EC, attributed liability for the cartel to, among others, Deltafina and the processors, ordered those undertakings to bring immediately to an end that infringement, and to refrain immediately from any restrictive practice having the same or similar object or effect, and further imposed the following fines, namely EUR 108 000 on Taes, EUR 1 822 500 on WWTE, EUR 2 592 000 on Agroexpansión and EUR 11 880 000 on Deltafina.

14 The contested decision also provides that the three parent companies of WWTE are jointly and severally liable for payment of the fine imposed on WWTE, as is Dimon Inc. for payment of the fine imposed on Agroexpansión. On the other hand, Intabex was not held liable for the fine imposed on Agroexpansión, and Universal and Universal Leaf are also not identified as jointly and severally liable for the fines imposed on Taes and Deltafina.

15 As regards the persons to whom the contested decision was addressed, the Commission stated, in recitals 375 and 376 of the contested decision:

> '(375) In the present case, three of the four Spanish processors of raw tobacco are controlled (to the extent of 100% or 90%) by US multinationals. There are other factual elements that confirm the presumption that the conduct of Agroexpansión and WWTE has to be ascribed to their respective parent companies. In these cases, the two companies — the parent company and the subsidiary — must be regarded as being jointly responsible for the infringements established in this decision.
>
> (376) [On the other hand], following the issuing of the Statement of Objections and the hearing of the parties, it has become apparent that the evidence in the file could not warrant a similar conclusion in respect of Universal['s] ... and Universal Leaf [Tobacco Co. Inc.'s] shareholdings in

Taes and Deltafina. In fact, apart from the corporate link between the parents and their subsidiaries, there is no indication in the file of any material involvement of Universal … and Universal Leaf in the facts which are being considered in this decision. It would therefore not be appropriate to address them a decision in this case. The same conclusion would apply, a fortiori, to Intabex … in so far as its 100% shareholding in Agroexpansión was purely financial.'

16 As regards more particularly WWTE, the Commission distinguished two periods, in the light of the circumstances set out in paragraphs 5 and 6 of this judgment. The first period is from 1995 until 4 May 1998 inclusive ('the first period') and the second from 5 May 1998 until the date of adoption of the contested decision ('the second period').

17 As regards the first period, the Commission concluded, in recitals 391 and 392 of the contested decision and on the basis of a number of factors set out in, inter alia, recitals 388 to 390 of that decision, that WWTE was jointly controlled by SCC, through SCTC and TCLT, and the chairman of WWTE and his family, that SCC and/or its subsidiaries exercised effective influence over the conduct of WWTE and that SCC had put in place certain mechanisms which, considered together, enabled it to keep track of the activities of WWTE and thus to exert effective control over the latter's commercial policy.

18 With regard to the second period, the Commission concluded, in recitals 397 and 400 of the contested decision and on the basis of a number of factors set out in, inter alia, recitals 393 to 398 of that decision that, either directly or through SCTC and TCLT, SCC had exclusive control of WWTE, that the arguments deployed by SCC in its reply to the statement of objections did not warrant any different conclusion in that respect, that SCC and/or its subsidiaries SCTC and TCLT exercised decisive influence over the commercial policy of WWTE and that they must, therefore, be held jointly responsible for the anti-competitive practices at issue.

II – The procedure before the General Court and the judgment under appeal

19 By application lodged at the Registry of the General Court on 21 January 2005, AOI, SCTC and TCLT brought an action for annulment of the contested decision, in so far as it concerned them.

20 AOI, SCTC and TCLT put forward two pleas in law in support of the action. The first plea alleged infringement of Article 81(1) EC and Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and, in the alternative, failure to state sufficient reasons for the contested decision. By their second plea the applicants alleged a breach of the principle of equal treatment.

21 Having decided to examine those two pleas together, the General Court first of all rejected as unfounded the second part of the first plea on failure to state sufficient reasons for the contested decision.

22 Next, the General Court rejected the second plea claiming an infringement of the principle of equal treatment, holding that the Commission had applied the same principles to all the parent companies concerned for the purposes of determining whether to attribute liability to them for the infringement committed by their subsidiaries. Specifically, the General Court held that it was not apparent from the contested decision that the Commission had, in that regard, treated differently the situation of SCC and SCTC, on the one hand, from that of Universal, Universal Leaf or Intabex, on the other.

23 That finding was based on, inter alia, the following considerations, to be found in paragraphs 155 to 157 of the judgment under appeal:

'155 … this being the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, the Commission — in the interests of caution — did not rely solely on the presumption affirmed by the case law … in order to show

that the parent company in fact exercised decisive influence over the commercial policy of the subsidiary, but also took into account other factual elements tending to confirm that such influence was actually exercised. However, by proceeding in that manner, the Commission … merely raised the standard of proof required for it to be satisfied that the condition relating to the actual exercise of decisive influence is fulfilled.

156 … where, in a case concerning an infringement involving several different undertakings, the Commission adopts, within the framework laid down by the case-law, a certain method for determining whether it is appropriate to attribute liability both to the subsidiaries which materially committed that infringement and to their parent companies, it must — save in specific circumstances — rely for those purposes on the same criteria in the case of all those undertakings.

157 The Commission is bound by the principle of equal treatment, which, according to settled case-law, requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified …'

24 As regards the first part of the first plea in law, the General Court held, in respect of the first period, in paragraph 194 of the judgment under appeal, and in respect of the second period, in paragraph 217 thereof, that the Commission had established to the requisite legal standard that SCC and SCTC in fact exercised decisive influence over WWTE's conduct.

25 In paragraphs 195 to 197 and in paragraphs 218 and 219 of the judgment under appeal, the General Court held, in respect of the first and second periods, that, conversely, none of the material relied on by the Commission in the contested decision supported the conclusion that TCLT exercised decisive influence over the conduct of WWTE and that, consequently, the Commission was not justified in attributing WWTE's unlawful conduct to TCLT or in holding it jointly and severally liable for payment of the fine.

26 In particular, the General Court held, in paragraph 218 of the judgment under appeal, that the Commission could not rely on the mere fact that TCLT held virtually all the capital of WWTE, since TCLT would then be discriminated against by comparison with Intabex, Universal and Universal Leaf.

27 Lastly, in paragraphs 220 to 229 of the judgment under appeal, the General Court rejected the arguments adduced by the applicants in order to show that WWTE acted independently on the market during the period of the infringement. Consequently, the General Court annulled the contested decision in so far as it related to TCLT and dismissed the action as to the remainder.

III – Procedure before the Court and the forms of order sought

28 By order of the President of the Court of 14 September 2011, Cases C-628/10 P and C-14/11 P were joined for the purposes of the oral procedure and the judgment.

29 By their appeal, AOI and SCTC claim that the Court should:

- set aside the judgment under appeal and, in so far as it relates to them, the contested decision;
- reduce the fine imposed by that decision accordingly; and
- order the Commission to pay the costs at first instance and on appeal.

30 In its response to that appeal, the Commission submits that the Court should dismiss the appeal and order the appellants to pay the costs, both at first instance and on appeal.

31 By its appeal, the Commission asks the Court to:

– set aside the judgment under appeal in so far as it annulled that part of the contested decision relating to TCLT;

– dismiss the action brought by TCLT before the General Court, and

– order TCLT to pay the costs incurred at both instances.

32 In their response to that appeal, AOI, SCTC and TCLT submit that the Court should dismiss the appeal and order the Commission to pay the costs, both at first instance and on appeal.

IV – The appeals

33 It is appropriate to consider first the appeal lodged by the Commission.

A – The Commission's appeal

34 In support of its appeal, the Commission raises four grounds. The first and fourth grounds are based on the claim that the principle of equal treatment was incorrectly applied. By the second ground, the Commission claims an error of law in the determination of the legal test for holding parent companies to be liable. The third ground consists of the submission that the General Court breached the Commission's right to an adversarial procedure and wrongly interpreted the duty to state reasons.

35 It is appropriate to consider the first and second grounds together.

1. The first and second grounds

a) Arguments of the parties

36 By the first ground of appeal, the Commission argues, first, that the General Court disregarded the fact that the principle of equal treatment must be reconciled with the principle of legality, and accordingly no one can rely, to his own advantage, on an unlawful act committed in favour of a third party. Consequently, when an undertaking has infringed Article 81 EC, it cannot escape being penalised on the ground that no fine was imposed on other undertakings which are in similar situations.

37 Secondly, the Commission states that it submitted those arguments before the General Court, and it considers that the judgment under appeal, since it makes no mention of them, is vitiated by a failure to state reasons.

38 Thirdly, the Commission argues that TCLT could, as a parent company holding virtually all the shares in WWTE, be presumed to have exercised decisive influence over that company and the General Court did not find that TCLT rebutted that presumption or even attempted to do so.

39 Fourthly, the Commission maintains that the General Court committed an error of law by holding that TCLT was to escape all liability because of the fact that other companies in supposedly similar situations were not held liable. In particular, the Commission considers that recital 384 of the contested decision, to which the General Court referred, means that for the principle of equal treatment to apply the companies must be in a similar situation, which is not so in the present case.

40 By its second ground of appeal, the Commission argues that the General Court committed an error of law by holding that, because the choice was made that as far some undertakings were concerned the decision whether they in fact exercised decisive influence was to be based on a 'dual basis' — and not

exclusively on the presumption established in the case-law — that choice was binding on the Commission in respect of all the addressees of the contested decision. The only applicable test is the test established by the case-law, and the Commission can neither raise the standard of proof required on the matter nor bind, by such an approach, the General Court in its analysis of the law.

41 Accordingly, where the legal test established by the case-law is satisfied, it is immaterial, according to the Commission, whether or not it provided additional indicia in order to strengthen, as a precaution, the conclusion which it has reached, since those indicia are not, in any event, transformed into a binding legal test for the assessment of the actual exercise of decisive influence by a parent company on the conduct of its subsidiary.

b) Findings of the Court

42 It must be borne in mind that, in accordance with settled case-law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. That concept must be understood as designating an economic unit even if in law that unit consists of several natural or legal persons. When such an economic entity infringes the competition rules, it is for that entity, according to the principle of personal responsibility, to answer for that infringement (Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraphs 34 to 36 and case-law cited, and Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 53).

43 Specifically, the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 58; *Elf Aquitaine* v *Commission*, paragraph 54, and Case C-520/09 P *Arkema* v *Commission* [2011] ECR I-8901, paragraph 38).

44 In such a situation, since the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Article 81 EC, the Commission may address a decision imposing fines on the parent company, without having to establish the personal involvement of the latter in the infringement (see *Akzo Nobel and Others* v *Commission*, paragraph 59; *General Química and Others* v *Commission*, paragraph 38, and *Elf Aquitaine* v *Commission*, paragraph 55).

45 In order to establish whether a subsidiary determines its conduct on the market independently, the Commission is, as a general rule, bound to take into consideration the economic, organisational and legal links which tie that subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraphs 73 and 74, and *Elf Aquitaine* v *Commission*, paragraph 58).

46 The Court has made clear that, in the particular case of a parent company having a 100% shareholding in a subsidiary which has infringed the Union's rules on competition, that parent company is able to exercise decisive influence over the conduct of its subsidiary, and there is a rebuttable presumption that the parent company does in fact exercise such influence (Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 97, and *Elf Aquitaine* v *Commission*, paragraph 56).

47 In those circumstances, it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by its parent company in order for it to be presumed that the parent exercises decisive influence over the commercial policy of that subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to

show that its subsidiary acts independently on the market (*Akzo Nobel and Others* v *Commission*, paragraph 61; *Elf Aquitaine* v *Commission*, paragraph 57, and *Arkema* v *Commission*, paragraph 41).

48 First, it must be emphasised that the presumption established in the case-law cited in paragraphs 46 and 47 of this judgment is rebuttable.

49 Further, that case-law does not imply that the Commission is bound to rely exclusively on that presumption. There is nothing to prevent the Commission from establishing that a parent company actually exercises decisive influence over its subsidiary by means of other evidence or by a combination of such evidence and that presumption.

50 In this case, as found by the General Court in paragraphs 134 to 147 of the judgment under appeal, it is clear from the contested decision and was confirmed by the Commission, in the procedure at first instance, that the Commission had decided, in order to assess whether the parent companies actually exercised decisive influence over the subsidiaries, to hold the parent companies liable only where there was evidence to support the presumption of actual exercise by the parent companies of decisive influence which arises from the control by the parent companies of the entire share capital of the subsidiaries (the 'dual basis' method) and, accordingly, had waived reliance on the application solely of the presumption of decisive influence.

51 Further, it is common ground that the reason for that approach was the fact that, when the contested decision was adopted, the Commission had doubts, in the light of the case-law as it stood at that time, as to whether control by a parent company of the entire share capital of its subsidiary could alone bring into play the presumption, even where it had not been rebutted, and whether that control was thereby sufficient to demonstrate the actual exercise of decisive influence by a parent company over its subsidiary.

52 Consequently, first, the Commission was justified in choosing to adopt, in order to determine the liability of the parent companies concerned, one of the methods open to it, in the light of what is stated in paragraph 49 of this judgment, as a legal basis for the assessment of whether such decisive influence existed.

53 Secondly, the General Court was correct to find, in paragraph 155 of the judgment under appeal, that, in choosing that method, the Commission imposed upon itself, in respect of the assessment of whether liability for the cartel at issue could be attributed to the parent companies, a standard of proof of the actual exercise of decisive influence which was more onerous than that which, as a general rule, would have been regarded as sufficient, in the light of the case-law cited in paragraphs 46 and 47 of this judgment.

54 However, in paragraphs 195 to 197 and 218 and 219 of the judgment under appeal, the General Court found that none of the evidence in the contested decision was capable of supporting the presumption that TCLT actually exercised decisive influence over WWTE and that the lack of such evidence had led the Commission, in accordance with its chosen method, not to attribute liability to the parent companies Intabex, Universal and Universal Leaf.

55 On the basis of those findings, the General Court held that the Commission could not hold TCLT to be jointly and severally liable for payment of the fine concerned without discriminating against it as compared with Intabex and as compared with Universal and Universal Leaf.

56 It must be stated that, in its appeal, the Commission does not challenge those findings. Consequently, the Commission does not challenge the fact that it applied the chosen method, namely the 'dual basis' method, to all the parent companies whose subsidiaries took part in the cartel at issue, with the exception of TCLT, in respect of whom the criteria on which that method is based were not met in the contested decision. It follows that the Commission attributed liability to that company solely on the basis of the presumption concerned.

57 However, in paragraphs 156 and 157 of the judgment under appeal, the General Court held that the principle of equal treatment requires that, where the Commission adopts a method such as that in the present case in order to determine whether liability should be attributed to parent companies whose subsidiaries have taken part in the same cartel, the Commission must, save in specific circumstances, rely on the same criteria in the case of all those parent companies.

58 In that regard, in accordance with the Court's settled case-law, when the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in an agreement or a concerted practice contrary to Article 81(1) EC (see, to that effect, Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraphs 63 to 68, and Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 97 to 100).

59 Since the attribution of responsibility to a parent company for an infringement committed by a subsidiary may have, according to the method of calculation adopted by the Commission, a significant effect on the amount of the fine which may be jointly and severally imposed on those companies, the General Court was correct to hold, in paragraph 156 of the judgment under appeal, that the same logic applies where the Commission adopts, in respect of one cartel and within the framework set by the case-law, one specific method for the determination of the responsibility of the parent companies concerned for the infringements of their subsidiaries.

60 As regards the specifics of the present case, it is clear that, contrary to what is claimed by the Commission, the General Court's finding is based not on the similarity of the factual situations of TCLT, on the one hand, and Intabex, Universal and Universal Leaf, on the other, but on the comparability of the situations of those companies in the light both of the standard of proof which the Commission considered had to be required, for the cartel at issue, in order to establish that the parent companies actually exercised decisive influence over their subsidiaries, and of the evidence in the contested decision.

61 It follows that the General Court was correct to find that there was a difference in treatment which led it partially to annul the contested decision.

62 That finding is not called into question by the requirements of the principle of legality, contrary to what is claimed by the Commission.

63 That is because, as observed by the Advocate General in point 64 of her Opinion, since the Commission adopted a method which was consistent with the Court's case-law in relation to decisive influence, no illegality could have been committed by the Commission, and accordingly the principle of legality could not in the present case relieve the Commission of the obligation to respect the principle of equal treatment.

64 Lastly, as regards the alleged failure to state sufficient reasons in the judgment under appeal, it must be recalled that, in accordance with the Court's settled case-law, the duty incumbent upon the General Court under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know the grounds on which the judgment under appeal is based and provides the Court of Justice with sufficient material for it to exercise its powers of review on appeal (Case C-480/09 P *AceaElectrabel Produzione* v *Commission* [2010] ECR I-13355, paragraph 77 and case-law cited).

65 In the present case, first, it is clear from paragraph 113 of the judgment under appeal that the General Court set out the arguments submitted by the Commission at first instance. Secondly, it follows from paragraphs 156 and 157 and paragraphs 218 and 219 of that judgment that the General Court implicitly rejected those arguments. That is because it held that, since the Commission had adopted a

method consistent with the case-law in relation to decisive influence, no illegality had been committed by the Commission, and accordingly the principle of legality could not in the present case relieve the Commission of the obligation to respect the principle of equal treatment.

66 Further, since those paragraphs of the judgment under appeal enable the persons concerned to know the grounds on which it is based and the Court to have sufficient material to exercise its powers of review within this appeal, that judgment is not vitiated by any failure to state reasons, contrary to what is claimed by the Commission.

67 In those circumstances, the first and second grounds relied on by the Commission in support of its appeal must be rejected.

2. The Commission's third ground of appeal: breach of the right to an adversarial procedure and incorrect interpretation of the duty to state reasons

a) Arguments of the parties

68 The Commission claims that the General Court erred in law by holding, in paragraph 196 of the judgment under appeal, that the Commission was not entitled to rely on the factual differences between the situation of TCLT, on the one hand, and Intabex and Universal, on the other, because they were not mentioned in the contested decision. The Commission considers that it explained those differences in the defence which it submitted to the General Court.

69 The Commission takes the view that the duty to state reasons does not require reasons to be stated for the fact that the measure at issue was not addressed to certain third parties, and therefore considers that it was not obliged to explain, in the contested decision, why it decided not to address that decision to Intabex and Universal or to justify, in that decision, why the treatment of those companies was allegedly different.

70 The Commission states that TCLT neither relied on a breach of the principle of equal treatment during the administrative procedure nor claimed, during that procedure, that its interest in WWTE was purely financial. Accordingly, the Commission claims that the argument of alleged discrimination could be rebutted by it, for the first time, only in the Commission's defence before the General Court.

71 In those circumstances, the approach followed by the General Court prevented the Commission from defending itself against an allegation of discrimination. The Commission considers that it is entitled to rely on any element which it deems necessary for its defence whenever an argument is raised for the first time before the General Court. In particular, according to the case-law, the Commission is not obliged to set out in its decisions all the arguments which it might later use to oppose submissions that its measures are unlawful.

b) Findings of the Court

72 It must be recalled that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review (*Elf Aquitaine* v *Commission*, paragraph 147).

73 In the context of individual decisions, according to the Court's settled case-law, the purpose of the obligation to state reasons for an individual decision is both to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision may be vitiated by a defect which may permit its legality to be contested (*Elf Aquitaine* v *Commission*, paragraph 148).

74 The statement of reasons must, therefore, in principle be notified to the person concerned at the same time as the decision adversely affecting him. A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the European Union courts (*Elf Aquitaine* v *Commission*, paragraph 149 and case-law cited).

75 In particular, where a decision concerning the application of the competition rules of European Union law affects several addressees and relates to whether liability for the infringement can be attributed, the decision must contain an adequate statement of reasons with respect to each of the addressees, in particularly those of them who, according to that decision, must bear the liability for that infringement. Accordingly, with regard to a parent company held to be responsible for the unlawful conduct of its subsidiary, such a decision must, as a general rule, contain a statement of reasons capable of justifying the attribution of liability for that infringement to the parent company.

76 In the present case, it must be borne in mind that the General Court found that (i) the Commission had decided, as is clear from the contested decision, that it would attribute responsibility to each of the parent companies concerned only if there were sufficient evidence to support, in each individual case, the presumption of actual exercise of decisive influence arising from ownership of the entire share capital of their respective subsidiaries, (ii), as regards TCLT, that decision makes no mention of any evidence in support of that presumption and (iii) the lack of such evidence led the Commission not to attribute responsibility to the parent companies Intabex, Universal and Universal Leaf.

77 Accordingly, by ruling in paragraph 196 of the judgment under appeal that a fact relied on by the Commission for the first time in its defence before the General Court cannot be taken into account, the General Court did not err in law.

78 Moreover, by that application of the relevant case-law, the General Court did not impose on the Commission any obligation to state reasons for the fact that the contested decision was not addressed to certain third parties or to set out every relevant argument that could possibly be used. The General Court did no more, in essence, than find, in paragraph 195 of the judgment under appeal, that the statement of reasons in the contested decision was inadequate in the light of the criteria which the Commission had imposed on itself and, in paragraph 196 of that judgment, that it was not possible for the Commission to remedy such an inadequacy in the proceedings before it.

79 Accordingly, the General Court was correct to rule that the Commission's rights of defence do not extend to the possibility that the Commission may defend the lawfulness of the contested decision against claims of discrimination by producing, during the proceedings, evidence which serves to establish the responsibility of a parent company but which is not mentioned in that decision.

80 It follows that the third ground relied on by the Commission in support of its appeal must be rejected.

3. The Commission's fourth ground of appeal: misapplication of the principle of equal treatment

a) Arguments of the parties

81 The Commission considers that, contrary to what was held by the General Court, the factual situations of Universal and Intabex, on the one hand, and TCLT, on the other, are not identical, so that no breach of the principle of equal treatment could be found.

82 First, the Commission states that, unlike Intabex, TCLT was not a purely financial intermediary company, but the main customer of WWTE. That fact justified both the use of the presumption of actual exercise of decisive influence and the finding that that presumption was not rebutted by TCLT.

83 Secondly, the Commission claims that the reasons which led the General Court to hold that Universal was in the same situation as that of TCLT are not set out in the judgment under appeal. Since the General Court did not respond to the explanations put forward by the Commission to differentiate the

situation of TCLT and that of Universal, the judgment under appeal is vitiated by a failure to state sufficient reasons.

b) Findings of the Court

84 It follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, 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 (Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51, and Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 179).

85 The Court has also stated that the appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 85, and *ThyssenKrupp Nirosta* v *Commission*, paragraph 180).

86 In the present case, it is clear that, by its arguments concerning the fact that the factual situations of Universal and Intabex, on the one hand, and TCLT, on the other, are not the same, the Commission asks the Court to check findings of fact made by the General Court.

87 Further, as stated in paragraph 60 of this judgment, the findings made by the General Court are based not on a comparison of the factual situations of those companies, but on the comparability of their situation with regard to the standard of proof which the Commission considered should be required and the evidence mentioned in the contested decision.

88 Moreover, as observed by the Advocate General in point 134 of her Opinion, the complaint of an alleged failure to state sufficient reasons as regards the comparability of the respective situations of TCLT and Universal is ineffective, since the judgment under appeal sets out to the requisite legal standard the reasons which led the General Court to hold that TCLT and Intabex were in a similar situation. Where the General Court ruled that the Commission had without any justification treated TCLT and Intabex differently, the General Court previously established, to the requisite legal standard, the existence of the unequal treatment which it had identified.

89 In those circumstances, the fourth ground relied on by the Commission in support of its appeal cannot be accepted and, as a result, the Commission's appeal must be dismissed in its entirety.

B – The appeal by AOI and SCTC

90 In support of their appeal, AOI and SCTC rely on three grounds, claiming respectively an infringement of Article 81(1) EC and Article 23(2) of Regulation No 1/2003, infringement of Article 48(2) of the Rules of Procedure of the General Court and of the rights of the defence and, lastly, infringement of Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter'), which states the principle of equal treatment. In the event of annulment, AOI and SCTC seek a reduction of the fine imposed on them.

1. The first ground of appeal: infringement of Article 81(1) EC and Article 23(2) of Regulation No 1/2003

91 The first ground contains two parts based on, first, the claim that the parent companies of WWTE were not, during the first period, that is before 5 May 1998, in a position to exercise decisive influence over

their subsidiary and, second, the claim that the judgment under appeal deprives AOI and SCTC of some of their fundamental rights.

a) The first part of the first ground of appeal: no decisive influence by SCC and SCTC over WWTE

i) Arguments of the parties

92 First, AOI and SCTC claim that the General Court erred in having found that, during the first period, they were in a position to exercise decisive influence over the conduct of WWTE. During that period, SCC owned, through TCLT, only 66% of WWTE's share capital. However, decisions of the general meeting of WWTE could be adopted only with a majority representing 75% of the share capital.

93 AOI and SCTC consider that, if 'decisive influence' for the purposes of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) is a negative concept which is therefore demonstrated where a shareholder has a power to block actions, such a concept is inadequate to establish liability under Article 81(1) EC, a provision which implies that liability can be attributed only as a consequence of positive actions carried out by the parent company in respect of its subsidiaries.

94 Further, AOI and SCTC claim that the General Court erred in declaring that, if they in fact exercised decisive influence over the conduct of WWTE, that necessarily implied that they were in a position to exercise such influence. That is because those two criteria, namely the ability to exercise decisive influence, on the one hand, and the actual exercise of such influence, on the other, are independent of each other.

95 AOI and SCTC state that the evidence provided by the Commission demonstrated not that SCC gave instructions to WWTE, but solely that SCC was informed of the practices at issue. However, that information alone was not evidence that SCC exercised or was able to exercise decisive influence over the conduct of WWTE.

96 AOI and SCTC consider that, in the absence of a finding that TCLT was jointly and severally liable, the indirect and negative control exercised over WWTE by SCC was not sufficient ground to attribute to SCC liability for the conduct of WWTE.

97 Secondly, AOI and SCTC claim that the General Court wrongly applied the concept of a single undertaking. In their opinion, if economic, organisational and legal links formed WWTE, SCC and the minority shareholder into a unit, the single undertaking ought to include all those parties. Since SCC was not able, during the first period, to exercise by itself decisive influence over WWTE, WWTE and SCC alone could not be deemed to be a single economic unit.

98 AOI and SCTC state that the Commission made no mention of the influence which the minority shareholder was or was not able to exercise and that the General Court did not determine whether that minority shareholder was in a position to influence WWTE. Accordingly, there was no reason to attribute responsibility for the conduct of WWTE solely to SCC.

99 The Commission contends that the first part of the first ground should be rejected. In particular, the Commission argues that the argument put forward by AOI and SCTC that, in cases of joint control, liability for the subsidiary's infringement must be attributed to both shareholders who jointly exercise that control was not made at first instance and, consequently, the Commission considers that that argument is inadmissible.

ii) Findings of the Court

100 First, the Commission's claim of inadmissibility in respect of the argument made by AOI and SCTC concerning the erroneous application of the concept of a single undertaking must be rejected, since

that argument can be regarded as a development of the argument previously presented before the General Court and narrated in paragraphs 56 and 57 of the judgment under appeal.

101 As regards the substance, the Court has previously ruled that the exercise of joint control, by two parent companies who are independent of each other, of their subsidiary does not, in principle, preclude a finding by the Commission of the existence of an economic unit comprising one of those parent companies and the subsidiary concerned, and that this applies even if the proportion of the subsidiary's share capital owned by that parent company is smaller than that owned by the other parent company (see, to that effect, *AceaElectrabel Produzione* v *Commission,* paragraph 64). That being the case, a fortiori a parent company and its subsidiary, which is itself a parent company of the company which has committed an infringement, can both be deemed to be members of an economic unit which includes the latter company.

102 Moreover, as stated in paragraphs 42 to 44 of this judgment, the Commission may address a decision imposing fines to the parent company of a subsidiary which has participated in an infringement of Article 81 EC without being required to establish that parent company's personal involvement in the infringement, provided that the parent company in fact exercises decisive influence over the commercial policy of that subsidiary.

103 It follows that the mere fact that SCC and SCTC exercised, during the period at issue, only joint control over WWTE does not preclude a finding that those companies formed an economic unit, provided that it is established that SCC and SCTC in fact exercised decisive influence over the commercial policy of WWTE.

104 In that regard, it must be recalled that the General Court examined in detail, in paragraphs 172 to 193 of the judgment under appeal, the evidence relied on by the Commission before concluding, in paragraph 194 of that judgment, that that evidence established to the requisite legal standard that such decisive influence was in fact exercised.

105 Having regard, in particular, to the factors examined in paragraphs 182 to 186 of the judgment under appeal, which concern the influence exercised by SCTC over WWTE, the considerations mentioned in paragraphs 172 to 194 of the judgment under appeal are not vitiated by any error of law and, further, could constitute a valid basis, contrary to what is claimed by AOI and SCTC, for the General Court's finding that such decisive influence was in fact exercised.

106 In the light of the foregoing, the first part of the first ground of appeal put forward by AOI and SCTC must be rejected.

b) The second part of the first ground of appeal: breach of fundamental rights

i) Arguments of the parties

107 AOI and SCTC consider that the judgment under appeal is in breach of some of their fundamental rights, namely the right to the presumption of innocence and the principles of legality and individual liability for criminal offences and penalties in Articles 48 and 49 of the Charter. In their opinion, the entry into force of the Charter has a direct impact on this case, since those principles now have the same value as primary law.

108 AOI and SCTC maintain that, in accordance with those fundamental rights, a presumption of guilt is in principle forbidden and should be permitted only in exceptional circumstances. However, the General Court applied the presumption of the actual exercise of decisive influence arising from 100% ownership of the shares of a subsidiary although there were, in this case, no exceptional circumstances. Further, the fines imposed on them were substantial and not minimal.

109 The Commission considers that the second part of the first ground put forward in support of the appeal is inadmissible, and argues, inter alia, that it is based on new arguments.

ii) Findings of the Court

110 As correctly stated by the Commission, AOI and SCTC did not raise in their application at first instance the arguments relied on in the second part of their first ground of appeal.

111 In accordance with settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court would in effect allow that party to bring before the Court a wider case than that heard by the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the assessment by the General Court of the pleas argued before it (*AceaElectrabel Produzione* v *Commission*, paragraph 113 and case-law cited).

112 Consequently, the second part of the first ground of appeal must be rejected as being inadmissible.

113 In any event, the argument summarised in paragraph 108 of this judgment is wholly unfounded, in the light of the case-law cited in paragraphs 46 and 47 of this judgment.

114 The first ground of appeal must therefore be dismissed in its entirety.

2. The second ground of appeal raised by AOI and SCTC: infringement of the rights of the defence and Article 48(2) of the Rules of Procedure of the General Court

a) Arguments of the parties

115 First, AOI and SCTC claim that the General Court infringed the rights of the defence by adopting as its own, contrary to Article 48(2) of its Rules of Procedure, a new argument submitted by the Commission in its reply to a written question of the General Court.

116 In that reply, the appellants claim that the Commission backtracked on its earlier statements that Universal and Universal Leaf had succeeded, during the administrative procedure, in rebutting the presumption of the actual exercise of decisive influence arising from 100% ownership of the shares of Deltafina and asserted, for the first time, that it had chosen not to rely exclusively on that presumption, but to establish responsibility on a dual basis, by also taking into account additional evidence which it claimed was lacking as regards the parent companies Universal and Universal Leaf. AOI and SCTC had no opportunity, in their written pleadings, to respond to that argument claiming such a dual basis.

117 Secondly, AOI and SCTC state that the Commission is obliged, in accordance with settled case-law, to follow the reasoning to be found in the contested decision and cannot justify that decision *a posteriori* before the European Union courts. That requirement applies a fortiori to the General Court.

118 AOI and SCTC state that recitals 371 to 373 of the contested decision contain no reference to the dual basis test adopted by the General Court. The way in which the General Court therefore determined the method allegedly applied by the Commission was by inferring it, *a posteriori*, from the context of that decision. The reasons which might have led the Commission to express itself ambiguously in that decision do not permit, in any event, the General Court to remedy the flaws in the Commission's reasoning or to engage in *a posteriori* reasoning.

119 The Commission considers that the second ground of appeal is inadmissible, because an argument based on a procedural irregularity before the General Court is admissible on appeal only if that irregularity harmed the interests of the appellant. AOI and SCTC have not established that their interests have been harmed. Further, the Commission maintains that this ground of appeal is ineffective.

b) Findings of the Court

120 First of all, the argument whereby the Commission claims that this ground is inadmissible must be rejected. As stated by the Advocate General in points 187 and 188 of her Opinion, the arguments relied on by AOI and SCTC are based on an infringement of the rights of the defence. Such an infringement, were it to be established, is capable of having the consequence that the judgment under appeal should be set aside.

121 However, as regards the substance, it must be stated at the outset that, contrary to what is claimed by AOI and SCTC, the General Court based its findings not on a new argument submitted by the Commission in the course of the proceedings, but on its own interpretation of the contested decision, considered as a whole, as is clear from paragraph 141 et seq. of the judgment under appeal. In particular, it is clear from paragraph 147 of that judgment that the statements made by the Commission in the course of the proceedings were taken into account by the General Court only to confirm its own interpretation of that decision.

122 Consequently, the argument relied on by AOI and SCTC that the General Court did not examine the reasoning to be found in the contested decision, but adopted as its own a new argument submitted by the Commission in the course of the proceedings must be rejected.

123 Further, the argument of AOI and SCTC claiming an infringement of Article 48(2) of the Rules of Procedure of the General Court is, as correctly stated by the Commission, ineffective. In any event, contrary to what is claimed by them, that provision cannot be interpreted as being intended to restrict the discretion of the General Court in such a way that the General Court would be prevented from adopting a given interpretation of a decision on the ground that the same interpretation was proposed at a late stage by one of the parties to the proceedings. Moreover, AOI and SCTC had the opportunity, at the hearing at first instance, to express a view on the Commission's statements.

124 It follows that the second ground relied on in support of the appeal must be rejected.

3. The third ground of appeal of AOI and SCTC: breach of the principle of equal treatment

a) Arguments of the parties

125 In the first place, AOI and SCTC claim that the dual basis test, adopted by the General Court in order to establish actual exercise of decisive influence and thereby to attribute to parent companies responsibility for the conduct of their 100% owned subsidiaries, contains three errors of law.

126 First, that method gives rise to discrimination between companies according to the strength of their case on appeal. By adopting a method which, as a precaution, screens cases of rebuttal of the presumption concerned according to the availability of additional evidence, the Commission acted speculatively and in such a way as to discriminate against companies affected by the contested decision as compared with those companies not affected by it.

127 Secondly, AOI and SCTC consider that the General Court erred in law by holding that the Commission had raised the standard of proof required, since the General Court did not state that the Commission had made the application of the presumption concerned subject to additional indicia. The Commission could therefore have applied that presumption without resorting to another basis to establish the actual exercise of decisive influence.

128 Thirdly, AOI and SCTC observe that, in recital 376 of the contested decision, the Commission excluded Universal and Universal Leaf from liability, because there was no indication in the file of any material involvement by those companies in the infringement. However, since the Commission never asserted that SCC or SCTC had been materially involved in the infringement committed by WWTE but none the

less attributed liability to them, the Commission applied to them different criteria and, consequently, was in breach of the principle of equal treatment.

129 In the second place, AOI and SCTC claim an infringement of principle of equal treatment in the application of the method for attributing liability for the infringement.

130 First, the General Court failed to examine whether a single economic unit existed between Deltafina, Universal and Universal Leaf. Consequently, according to AOI and SCTC, the General Court could not determine whether they were discriminated against by comparison with Deltafina, Universal and Universal Leaf. Further, it was clear from the file that Universal had informed the Commission that it supported the decision to cooperate of Taes, which is its subsidiary, and that two subsidiaries took part in the practices, which could indicate the exercise of decisive influence over those subsidiaries.

131 Second, AOI and SCTC maintain that the situation of SCC and SCTC was absolutely analogous to that of Universal and Universal Leaf, since all those companies were 100% owners of the shares of their respective subsidiaries. Since the General Court partially annulled the contested decision in so far as it concerned TCLT, it ought also to have annulled the attribution of liability to SCC and SCTC in order to ensure that there was no discrimination by comparison with Universal and Universal Leaf.

b) Findings of the Court

132 First, as regards the dual basis test adopted, according to the findings of the General Court, by the Commission in order to determine the liability of parent companies whose subsidiaries took part in the cartel which was the subject of the contested decision, it must be recalled that the General Court inferred that approach to be that of the Commission from a detailed analysis of that decision and that that analysis is not vitiated by any error of law, as stated in paragraph 121 of this judgment.

133 In particular, the General Court was correct to interpret the decision in such a way as to refute the reading of recital 376 of the contested decision proposed by AOI and SCTC, that it was because of the absence of factors indicating the material involvement of Universal Leaf and Universal in the infringement that the Commission did not attribute liability to those companies, since such a reading was inconsistent with a reading of that decision as a whole, and in particular with recitals 18, 376, 384, 391, 392, 397, 399 and 400 thereof, examined indeed by the General Court in paragraph 133 et seq. of the judgment under appeal.

134 Further, it has been stated in paragraphs 51 to 53 of this judgment that, in light of the doubts entertained by the Commission as to the legality of a decision based solely on the unrebutted presumption of decisive influence, the General Court could hold that, in the present case, it was open to the Commission to impose on itself a more onerous standard of proof than would, as a general rule, have been considered to be sufficient, having regard to the case-law cited in paragraphs 46 and 47 of this judgment.

135 It should be made clear that the dual basis test used by the General Court is an objective test, since it does no more than require that there is evidence to support the presumption of the exercise of decisive influence by the parent company concerned over its subsidiary arising from its ownership of the subsidiary's entire share capital. Accordingly, contrary to what is claimed by AOI and SCTC, that test is not based on the strength of the respective arguments presented by the companies affected by the contested decision.

136 Secondly, as regards the application in the present case of the dual basis test, it must be observed that the argument of AOI and SCTC consists, in essence, of the claim that the General Court ought to have determined whether Deltafina, Universal and Universal Leaf formed an economic unit and that, if that had been found to be the case, the General Court ought to have annulled the contested decision in so far as it concerns SCC and SCTC, because they were discriminated against by comparison with Universal and Universal Leaf.

137 Suffice it to observe, in that regard, that the General Court correctly stated, in paragraphs 141 to 147 of the judgment under appeal, that the Commission applied the same legal test to all the parent companies and that, except in the case of TCLT, the Commission attributed or did not attribute liability to those companies according to whether there was evidence to support the presumption of exercise of decisive influence by those parent companies arising from their ownership of the entire share capital of their respective subsidiaries.

138 In those circumstance, since no infringement of the principle of equal treatment has been established by AOI and SCTC, the third ground relied on in support of their appeal must be rejected.

4. The requested reduction of the fine

139 AOI and SCTC consider that, if the contested decision is annulled, the fine imposed on AOI and SCTC should be reduced.

140 Given that, in the light of all the foregoing, the contested decision should not be annulled, the request for a reduction of the fine imposed on AOI and SCTC, which, it should be added, was not submitted before the General Court, must in any event be rejected.

141 Since none of the grounds relied on by AOI and SCTC in support of their appeal can be accepted, the appeal must be dismissed.

V – Costs

142 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

143 Since AOI and SCTC have been unsuccessful with their appeal in Case C-628/10 P, they must be ordered to pay the costs of that appeal, in accordance with the form of order sought by the Commission.

144 Since the Commission has been unsuccessful with its appeal in Case C-14/11 P, it must be ordered to pay the costs of that appeal, in accordance with the form of order sought by AOI and SCTC.

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

1. **Dismisses the appeals;**

2. **Orders Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. to bear their own costs and to pay those incurred by the European Commission in relation to the appeal in Case C-628/10 P;**

3. **Orders the European Commission to bear its own costs and to pay those incurred by Alliance One International Inc., Standard Commercial Tobacco Co. Inc. and Trans-Continental Leaf Tobacco Corp. Ltd in relation to the appeal in Case C-14/11 P.**

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

16 June 2011 (*)

(Competition – Cartels – International removal services market in Belgium – Decision finding an infringement of Article 81 EC – Price-fixing – Market-sharing – Bid-rigging – Single and continuous infringement – Burden of proof)

In Case T-210/08,

Verhuizingen Coppens NV, established in Bierbeek (Belgium), represented by J. Stuyck and I. Buelens, lawyers,

applicant,

v

European Commission, represented by A. Bouquet and S. Noë, acting as Agents,

defendant,

APPLICATION for the annulment of Commission decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services), and, in the alternative, the annulment or reduction of the fine imposed on the applicant,

THE GENERAL COURT (Eighth Chamber),

composed of S. Papasavvas, acting as President, N. Wahl and A. Dittrich (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 5 May 2010,

gives the following

Judgment

Facts

Subject-matter of the dispute

1 According to Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services) ('the Decision'), a summary of which is published in the *Official Journal of the European Union* of 11 August 2009 (OJ 2009 C 188, p. 16), the applicant, Verhuizingen Coppens NV, participated in a cartel on the international removal services market in Belgium, relating to the direct or indirect fixing of prices, market sharing and the manipulation of the procedure for the submission of tenders. The European Commission states that the cartel operated for almost 19 years (from October

1984 to September 2003). Its members fixed prices, issued false quotes (‘cover quotes’) to customers and compensated each other for rejected offers by means of a financial compensation system (‘commissions’).

Applicant

2 The applicant’s predecessor was formed about 30 years ago by Mr Coppens. Verhuizingen Coppens (‘Coppens’) was set up in May 1998 when that predecessor was contributed in kind to its capital. The Decision states that Mr Coppens takes all decisions concerning the company. Before May 1998 he did so in his capacity as sole proprietor and since May 1998 he does so in his capacity as managing director. In the financial year ending 31 December 2006, Coppens achieved a consolidated worldwide turnover of EUR 1 046 318.

Administrative procedure

3 According to the Decision, the Commission opened the procedure on its own initiative because it had information that certain Belgian companies operating in the international removals sector were party to agreements that might be caught by the prohibition in Article 81 EC.

4 Accordingly, investigations were carried out at the premises of Allied Arthur Pierre NV, Interdean NV, Transworld International NV and Ziegler SA in September 2003, under Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87). Following those investigations, Allied Arthur Pierre applied for immunity from fines or a reduction in the fine in accordance with the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3). Allied Arthur Pierre admitted that it had participated in agreements on commissions and cover quotes, listed the competitors involved, inter alia a competitor previously unknown to the Commission’s services, and submitted documents corroborating its oral statements.

5 In accordance with Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), several written requests for information were sent to the undertakings involved in the anti-competitive agreements, to some competitors and to a professional organisation. On 18 October 2006, the statement of objections was adopted and notified to several undertakings. All the addressees replied to it. Their representatives, with the exception of Amertranseuro International Holdings Ltd, Stichting Administratiekantoor Portielje, Team Relocations Ltd and Trans Euro Ltd, exercised their right of access to the documents contained in the Commission’s file, which were accessible only on the Commission’s premises. They were granted access between 6 and 29 November 2006. The hearing was held on 22 March 2007.

6 On 11 March 2008, the Commission adopted the Decision.

Decision

7 The Commission states that the addressees of the Decision, including the applicant, participated in a cartel in the international removal services sector in Belgium or are deemed responsible therefor. The participants in the cartel fixed prices, shared customers and manipulated the submission of tenders at least from 1984 to 2003. As a result, they have committed a single, continuous infringement of Article 81 EC.

8 According to the Commission, the services concerned include the removal of goods of both natural persons – private individuals or employees of an undertaking or a public institution – and undertakings

or public institutions. Such removals are characterised by the fact that Belgium is either the starting place or the destination. Having regard also to the fact that the international removal companies in question are all located in Belgium and that the cartel's activity takes place in Belgium, the Commission therefore considered that the geographic centre of the cartel was Belgium.

9 The combined turnover of the participants in the cartel for international removal services in Belgium in 2002 was estimated by the Commission at EUR 41 million. As it estimated the size of the sector at approximately EUR 83 million, the combined market share of the undertakings involved was considered to be approximately 50%.

10 The Commission states that the aim of the cartel was, inter alia, to establish and maintain high prices and to share the market contemporaneously or successively in various forms: agreements on prices, agreements on sharing the market by means of false quotes (cover quotes) and agreements on a system of financial compensation for rejected offers or for not quoting at all (commissions).

11 The Commission considers that, between 1984 and the early 1990s, the cartel operated inter alia on the basis of written price-fixing agreements. At the same time the commissions and cover quotes were introduced. A commission is a hidden element in the final price which the customer had to pay without receiving a corresponding service. It is a sum of money that the removal company winning the contract for an international removal owed to the competitors that did not secure the contract, whether they submitted an estimate or abstained from doing so. It is therefore a sort of financial compensation for the removal companies that did not win the contract. The members of the cartel issued invoices to each other for commissions on the rejected offers or offers not made, referring to fictitious services, and the total for those commissions was invoiced to customers. The Commission states that that practice must be deemed to be indirect fixing of prices for international removal services in Belgium.

12 The members of this cartel also cooperated in submitting cover quotes, which led customers, that is to say, employers paying for the removal, into the mistaken belief that they could choose according to competition-based criteria. A cover quote is a fictitious quotation submitted to the customer or the person who was moving by a removal company which did not intend to carry out the removal. Through the submission of cover quotes, the removal company that wanted the contract ('the requesting firm') ensured that the institution or undertaking received several quotes, either directly or indirectly via the person who was moving. To that end, the requesting firm indicated to its competitors the price, the rate of insurance and the storage costs that they were to quote. That price, which was higher than the price quoted by the requesting firm, was then indicated in the cover quotes. According to the Commission, since the employer will usually choose the removal company that offers the lowest price, the companies involved in the same international removal as a rule knew in advance which of them would secure the contract for that removal.

13 The Commission also observes that the price quoted by the requesting firm could be higher than it might otherwise have been because the other companies involved in that removal would have submitted cover quotes indicating a price stated by the requesting firm. By way of example, the Commission refers, in recital 233 of the Decision, to an internal Allied Arthur Pierre email message dated 11 July 1997 which stated: '[T]he customer has asked for two cover quotes, so we can ask for a high price.' Therefore, the Commission states that the submission of cover quotes to customers was a manipulation of the tendering procedure so that the prices quoted in all the bids were deliberately higher than the price of the requesting firm, and at all events higher than they would have been in a competitive environment.

14 The Commission maintains that those arrangements were in place until 2003. Those complex activities had the same object of fixing prices, sharing the market, and thus of distorting competition.

15 In conclusion, the Commission adopted the operative part of the Decision, Article 1 of which is worded as follows:

‘By directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders, the following undertakings have infringed Article 81(1) [EC] … in the periods indicated:

…

(i) [Coppens], from 13 October 1992 to 29 July 2003;

…’

16 Consequently, in Article 2(k) of the Decision, the Commission imposed a fine of EUR 104 000 on the applicant.

17 For the purposes of calculating the amount of the fines, the Commission applied, in the Decision, the methodology set out in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; ‘the 2006 Guidelines’).

Procedure and forms of order sought by the parties

18 By application lodged at the Court Registry on 4 June 2008, the applicant brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure. The parties presented their oral arguments and their replies to questions put by the Court at the hearing on 5 May 2010.

20 The applicant claims that the Court should:

– annul Article 1 of the Decision in so far as it relates to the applicant;

– annul Article 2 of the Decision in so far as it relates to the applicant;

– in the alternative, substantially reduce the fine and set it at an amount not exceeding 10% of the applicant’s turnover on the international removal services market;

– in any event, order the Commission to pay the costs.

21 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

22 The applicant relies on two main pleas and one alternative plea for the cancellation or reduction of the fine.

23 The first plea alleges infringement of Article 81(1) EC.

24 This plea is divided into three limbs. First, by referring to its reduced role, the applicant disputes the finding that it participated in a complex cartel. Second, it challenges the calculation of the duration of its participation in the cartel. Third, it complains that the Commission failed to assess the relative weight of its participation.

Arguments of the parties

25 As regards the first limb of the plea, the applicant notes that it is accused only of issuing cover quotes. The Commission states expressly, in recital 296 of the Decision, that Coppens is the only company not to have participated in the agreement on commissions. Nor has the Commission established that the applicant was aware of that agreement. Consequently, the Commission's conclusion, in recital 345 of the Decision, that the applicant participated in all of the conduct at issue is incorrect. In addition, the applicant submits that the agreements on cover quotes do not in themselves have the object or effect of restricting competition. It is impossible for the applicant to know all its competitors from whom a customer might request a quote, so that the applicant is not in a position to know whether it could invoice higher prices. Thus, the removal was actually carried out by the applicant in only about 23% of the cases in which it requested cover quotes from other members of the cartel.

26 In the reply, the applicant also relies on the judgments in Case 56/65 *LTM* [1966] ECR 235, Case 5/69 *Völk* [1969] ECR 295, and Case C-234/89 *Delimitis* [1991] ECR I-935, in order to challenge whether Article 81 EC is applicable.

27 The Commission contends that it is of little consequence whether competition is distorted by the cover quotes or by the commissions, because in both cases the distortion of competition generally leads to an increase in prices for the customer. That means that the various forms of the cartel could be considered to be a single and continuous infringement of Article 81 EC. The Commission observes that the applicant does not deny that it was aware of the existence of the agreement on commissions. The infringement established in the present case is not caught by the *de minimis* rule, because the participants' combined position on the international removals market is very significant.

Findings of the Court

28 As regards the first limb of the plea, it is common ground that the applicant's active participation in the cartel was limited to issuing cover quotes (see recitals 173 and 296 of the Decision). According to the Commission's findings, Coppens is the only company not to have participated in the agreement on commissions.

29 The applicant denies, however, that it took part in a single and continuous infringement. In that connection, it should be observed that, according to the case-law, an undertaking which has participated in a multiform infringement of the competition rules by its own conduct, which met the definition of an agreement or concerted practice having an anti-competitive object within the meaning of Article 81(1) EC and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement, where it is proved that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 87 and 203). Thus, in order to hold a company liable for a single and continuous infringement, awareness (proved or presumed) of the offending conduct of the other participants in the cartel is required.

30 In addition, the mere fact that there is identity of object between an agreement in which an undertaking participated and a global cartel does not suffice to render that undertaking responsible for the global

cartel. It is only if the undertaking knew or should have known when it participated in the agreement that in doing so it was joining in the global cartel that its participation in the agreement concerned can constitute the expression of its accession to that global cartel (Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 45).

31 It must be stated that the Commission has not shown that, when the applicant participated in the agreement on cover quotes, it was aware of the other companies' anti-competitive conduct concerning the commissions, or that it could reasonably have foreseen such conduct. The Commission expressly acknowledges that, as regards the applicant's awareness of the other participants' offending conduct, the Decision is not based upon specific evidence. It contends that the applicant does not deny that it was aware of the agreement on commissions and that it failed to state to what extent it knew of the conduct of the other participants in the infringement. However, the applicant is in no way required to state, on its own initiative, the extent to which it knew of the conduct of the other participants in the infringement, since the burden of proof is borne by the Commission. The Commission must first adduce proof of a fact before the applicant can dispute this. Moreover, at the hearing, the applicant expressly stated, at the request of the Court, that it was not aware of the agreements on commissions. Therefore, the Commission has not discharged the burden of proof.

32 Accordingly, the Commission was not entitled to find that the applicant had participated in a single and continuous infringement.

33 As regards the inferences which must be drawn from that conclusion, the fact that the operative part of the Decision does not refer to the single and continuous nature of the infringement is irrelevant. It must be observed, first, that the decisional practice of the Commission is not uniform in that regard. While the Commission has made express reference to the single and continuous nature of an infringement in the operative parts of some of its decisions (see, for example, Article 1 of Commission Decision C(2006) 4180 of 20 September 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F-1/38.121 – Fittings), a summary of which is published in the *Official Journal of the European Union* of 27 October 2007 (OJ 2007 L 283, p. 63), it has not done so in other decisions, such as the Decision. The scope of the annulment cannot depend on whether or not the Commission includes a reference to a single and continuous infringement in the operative part of the Decision.

34 Second, it should be pointed out that the enacting terms of an act are inextricably linked to the statement of reasons for them, so that, if that act has to be interpreted, account must be taken of the reasons which led to its adoption (see order in Case T-387/04 *EnBW Energie Baden-Württemberg* v *Commission* [2007] ECR II-1195, paragraph 127 and the case-law cited). Although only the operative part of a decision is capable of producing legal effects, the fact remains that the assessments made in the grounds of a decision can be subject to judicial review by the judicature of the European Union to the extent that, as grounds of a measure adversely affecting the interests of those concerned, they constitute the essential basis for the operative part of that measure or if those grounds are likely to alter the substance of what was decided in the operative part (see Joined Cases T-81/07 to T-83/07 *KG Holding and Others* v *Commission* [2009] ECR II-2411, paragraph 46 and the case-law cited).

35 It is clear from the grounds of the Decision, and in particular from recitals 307 and 345, that the Commission regards the applicant as liable for participation in a single and continuous infringement. In addition, the fact that, notwithstanding the applicant's limited participation, the Commission applied a rate of 17% of the value of sales – that is, the single percentage applied to all the companies in question – in order to take into account the gravity of the applicant's infringement, can be explained only by the fact that it considers the applicant to have participated in a single and continuous infringement. Lastly, the single and continuous nature of the infringement seems also to have influenced the assessment of the duration of its participation in the infringement (see recital 380 of the Decision and the judgment of

the General Court of even date in Case T-208/08 *Gosselin* v *Commission* [2011] ECR II-0000, paragraph 167).

36 Therefore, although participation in the system of cover quotes may in itself constitute an infringement of Article 81 EC punishable by a fine, Article 1(i) and Article 2(k) of the Decision must be annulled, as the applicant requests.

37 In the light of the foregoing, there is no need to examine either the other limbs of this plea or the other pleas relied on by the applicant.

Costs

38 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Annuls Article 1(i) and Article 2(k) of Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services);

2. Orders the European Commission to pay the costs.

Papasavvas Wahl Dittrich

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]

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* Language of the case: Dutch.

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

17 June 2010 (*)

(Arbitration clause – Contracts entered into under the specific programme for research, technological development and demonstration on quality of life and management of living resources (1998 to 2002) – Seahealth and Biopal projects – Debit notes – Applications for annulment – Reclassification of the actions – Admissibility – Rule that the parties should be heard and rights of the defence – Recovery of all the financial contributions paid by the European Union – Serious financial irregularities)

In Joined Cases T-428/07 and T-455/07,

Centre d'étude and de valorisation des algues SA (CEVA), established in Pleubian (France), represented by J.-M. Peyrical, lawyer,

applicant,

v

European Commission, represented initially by L. Escobar Guerrero and W. Roels, and subsequently by Roels, acting as Agents, and by E. Bouttier, lawyer,

defendant,

APPLICATION for annulment, in Case T-428/07, of debit note No 3240908670 of 20 September 2007, relating to the Seahealth project and, in Case T-455/07, of debit note No 3240909271 of 4 October 2007, relating to the Biopal contract, and for the Commission to be ordered to repay those debit notes to CEVA,

THE GENERAL COURT (Sixth Chamber),

composed of A.W.H. Meij (Rapporteur), President, V. Vadapalas and L. Truchot, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2009,

gives the following

Judgment

Contractual framework and background to the dispute

1 On 24 December 2002, the European Commission entered into with, among others, the applicant, the Centre d'étude et de valorisation des algues SA (CEVA), a French local semi-public company, in its capacity as coordinator of a consortium, two contracts designed to enable the reimbursement of costs for research and technical development projects. Those contracts were entered into under Council Decision 1999/167/EC of 25 January 1999 adopting a specific programme for research, technological development and demonstration on quality of life and management of living resources (1998 to 2002) (OJ 1999 L 64, p. 1). One of those contracts, referred to as Seahealth (contract No GLK1-CT-2002-02433, 'the Seahealth contract'), relates to a project entitled 'Seaweed antioxidants as novel ingredients for

better health and food quality'. The other, referred to as BIOPAL (contract No QLK5-CT-2002-02431, 'the Biopal contract'), relates to a project entitled 'Algae as raw material for production of bioplastics and biocomposites contributing to sustainable development of European coastal regions'.

2 The first paragraph of Article 5 of those contracts provides that they are to be governed by Belgian law. They also contain an arbitration clause within the meaning of Article 238 EC. Those contracts are drawn up in English.

3 According to the particulars supplied by the applicant, and which are not disputed by the Commission, those two contracts were duly performed from 2003 to 2005.

4 The costs eligible for reimbursement are defined in Articles 22 to 24 of the General Conditions set out in Annex II to each of those contracts ('Annex II').

5 As regards the personnel costs, Article 23(1)(a) provides inter alia:

'All the working time charged to the contract must be recorded throughout the duration of the project, or, in the case of the coordinator, no later than two months after the end of the duration of the project, and be certified at least once a month by the person in charge of the work designated by the contractor in accordance with Article 2(2)(a) of this Annex or by the duly authorised responsible financial officer of the contractor.'

6 As regards the Community's financial contribution, Article 3(2) of Annex II provides that '[t]he Commission may, in case of suspected fraud or financial irregularity on the part of a contractor, suspend payments and/or instruct the coordinator not to make any payment to such contractor. The latter shall remain bound by his contractual obligations'.

7 Under Article 3(4) of Annex II:

'Where the total financial contribution due from the Community, taking into account any adjustments, including as a result of a financial audit as referred to in Article 26 of this Annex, is less than the total amount of the payments referred to in paragraph 1, first subparagraph, of this Article, the contractors concerned shall reimburse the difference, in euro, within the time-limit set by the Commission in its request sent by registered letter with acknowledgement of receipt ...'

8 In addition, Article 3(5) states the following:

'After the contract completion date, or the termination of the contract or of the participation of a contractor the Commission may or shall, as relevant, where financial irregularities have been discovered during a financial audit, reclaim from the contractor the repayment of all the Community's financial contribution paid to him. Interest at the rate applied by the European Central Bank for its main refinancing operations on the first day of the month during which the contractor concerned has received the funds plus two percentage points shall be added to the amount to be repaid. The interest shall cover the period between the receipt of the funds and their repayment.'

9 Article 7(4(b) of Annex II provides, inter alia, that the Commission must immediately terminate the contract or the participation of a contractor where the latter 'has made false declarations for which he may be held responsible or has deliberately withheld information in order to obtain the Community's contribution or any other advantage provided for in the contract'.

10 In the event of termination of the contract pursuant to Article 7(4)(b), Article 7(6)(c) of Annex II provides that 'the Commission may require repayment of all or part of the Community's financial contribution. Interest at the rate applied by the European Central Bank to its main refinancing operations on the first day of the month during which the contractor concerned has received the funds plus two

percentage points shall be added to the amount to be repaid. The interest shall cover the period between the receipt of the funds and their repayment'.

11 As regards the financial audit of the project, Article 26(3) of Annex II lays down the following procedure:

'On the basis of the findings made during the financial audit, a provisional report shall be drawn up. It shall be sent by the Commission to the contractor concerned, who may make observations thereon within one month of receiving it.

The final report shall be sent to the contractor concerned. The latter may communicate his observations to the Commission within a month of receiving it. The Commission may decide not to take into account the observations conveyed after that deadline.

On the basis of the conclusions of the audit, the Commission shall take all appropriate measures which it considers necessary, including the issuing of a recovery order regarding all or part of the payments made by it.'

12 In May 2006, a financial audit of CEVA was carried out by members of the Commission's staff in accordance with Article 26 of Annex II (see paragraph 11 above).

13 By letter of 1 August 2006, CEVA submitted its observations on the draft audit report which had been sent to it in June 2006, the conclusions of which mentioned irregularities concerning the expenses submitted by CEVA.

14 In October 2006, the European Anti-Fraud Office (OLAF) conducted an investigation at the premises of CEVA and seized the originals of all the contracts and supporting documents, in particular the 'time sheets' relating to the contracts in question, as well as the correspondence and memoranda exchanged at the time of the tasks. In addition, at the request of OLAF, a preliminary police investigation into 'the management by CEVA of the national and European funds ... obtained in recent years' was initiated by the prosecuting authorities in Guingamp (France), from whom the case was subsequently removed in favour of the specialised interregional court in Rennes (France).

15 In its final audit report sent to CEVA by letter of 14 December 2006, the Commission maintained its findings relating to numerous and serious irregularities in the cost statements.

16 It is apparent from that report that the auditors examined, in accordance with the provisions of Annex II, the evidence relating to the amounts of the costs declared, on the basis of tests. They pointed out that their inspection was not designed to identify incidents or fraud.

17 In that final report, the auditors concluded that the personnel expenses were ineligible for reimbursement by the European Union on the ground that the time records made by CEVA were not reliable and that the number of hours of work declared in respect of the projects in question was inaccurate.

18 Moreover, in that general conclusion of that report, the auditors stated that, with the exception of the abovementioned corrections relating mainly to the personnel costs, the costs declared to the Commission by the applicant corresponded to the amounts entered in the Commission's account books and were justified by documents and corresponding payments.

19 Undertaking, on the basis of those findings, an adjustment of the eligible costs, the auditors indicated that, out of a total amount of costs declared for 2003 and 2004 of EUR 465 409 in respect of the Seahealth contract and of EUR 351 430 in respect of the Biopal contract, the amount of the eligible costs, after adjustment, was EUR 110 971 for the Seahealth contract and EUR 32 110 for the Biopal contract.

20 By letter of 22 January 2007, the Commission terminated both contracts, pursuant to Article 7(4)(b) of Annex II, which provides, inter alia, that the Commission is to terminate a contract immediately where a contractor has made false declarations for which he may be held responsible, or has deliberately withheld information in order to obtain the Community's financial contribution or any other advantage provided for in the contract. In support of that decision, the Commission alleged infringement by the applicant of the abovementioned Article 22 and Article 23(1) of Annex II. It based its allegation on the findings concerning the personnel costs made in its final audit report and pointed out that those findings had been confirmed during the OLAF inspection.

21 By a letter dated the same day, the Commission, taking the view that the applicant had committed serious financial irregularities, informed it, with reference to Article 3(2) and (4) of Annex II, of its intention to require repayment of all the sums which had been paid to the applicant in connection with the implementation of the two contracts in question. In addition, it stated that it would not be making any further payments under those contracts.

22 By that same letter, the Commission specified that it intended to recover an amount of EUR 208 613 in respect of the Biopal contract and an amount of EUR 140 320 in respect of the Seahealth contract. It invited the applicant to submit its observations and to supply particulars, supported by bank statements, of the share of the advances which it had received in its capacity as coordinator and which it had not yet transferred to the other co-contractors.

23 By letter of 1 March 2007, the applicant submitted its observations and supplied the particulars required in the abovementioned letter from the Commission. It stated, inter alia, that it no longer had in its possession the contracts, the 'time records' or the correspondence and memoranda exchanged at the time of the tasks, which had been seized by OLAF.

24 Following that letter, the Commission re-assessed the amount of the sums to be repaid. By letter of 20 March 2007, it informed CEVA of its intention to request the repayment of a sum the amount of which was now fixed at EUR 205 745 in respect of the Biopal contract and at EUR 189 703 in respect of the Seahealth contract, and again invited it to submit its observations. Annexed to that letter, it forwarded to it a copy of the contracts and of the audit report.

25 By letter of 3 April 2007, the applicant dismissed its managing director on the ground, inter alia, of 'very serious management and accounting irregularities'.

26 By letter of 25 May 2007, the applicant submitted its observations. It first maintained that it was unable to conduct its defence. In the course of the preliminary police investigation into the management by CEVA of national and Community public financing which it had obtained in recent years, initiated at the request of OLAF, the public prosecuting authority in Rennes had confirmed that it intended that the documents seized by OLAF should remain inaccessible throughout the duration of the investigation and had refused to send it copies of those documents. In consequence, the applicant asked the Commission to send it copies 'of the documents on the basis of which [the Commission had] established [its] diagnosis and [of those] of the OLAF report'. The applicant then stated in that same letter that, following the Commission audit and the OLAF investigation, it had set up a new 'time record' system, which had been applied to the various projects since February 2007, incorporating the times as from 1 January 2007. It had, moreover, introduced a new costing model which enabled old projects to be re-costed. The applicant therefore offered, on the basis of the documents in the Commission's possession, to have the cost statements relating to the contracts in question reprocessed at its own expense by an independent service provider chosen by mutual agreement.

27 By letter of 21 August 2007, OLAF refused to send the applicant the documents and conclusions of its investigation, on the ground, inter alia, that they concerned an ongoing investigation and were therefore covered by the exceptions to the right of access to documents, provided for in 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).

28 By letter of 28 August 2007, the Commission replied to the applicant's abovementioned letter of 25 May 2007 that the contracts and the audit report which had been sent to it were sufficient to enable the applicant to conduct its defence. It stressed that OLAF's findings merely confirmed the results of the Commission's audit. It pointed out that the new time management system established by the applicant would allow the actual number of hours spent on the project to be recalculated only on the basis of 'time sheets' signed by the members of the personnel and their hierarchical superiors during the implementation of the project. Consequently, the Commission informed the applicant of its decision to require, on the basis of Article 3(5) of Annex II, the repayment of all the amounts which it had been granted in respect of the Seahealth and Biopal contracts.

29 By letter of 9 October 2007, the Commission, while noting that the applicant '[was seeking] in good faith to find a reasonable and equitable solution', confirmed that, as a result of the serious irregularities committed by the applicant in the management of the projects in question, it was obliged to recover the sums paid from it.

30 Consequently, CEVA settled debit note No 3240908670 of 20 September 2007, relating to the total amount of EUR 189 703 which it had been paid under the Seahealth contract, and debit note No 3240909271 of 4 October 2007, relating to the total amount of EUR 205 745 which it had been paid under the Biopal contract.

Procedure and forms of order sought

31 By applications lodged at the Court Registry on 22 November and 14 December 2007, the applicant brought the present actions.

32 On 16 June 2008, by way measures of organisation of procedure provided for in Article 64 of the Court's Rules of Procedure, a meeting was held before the Judge-Rapporteur, with the participation of the parties' representatives, in order to clarify certain points between the parties and to facilitate the opening of discussions between the parties for the purposes of a possible amicable settlement of the present disputes. The parties submitted their observations and it was agreed that, within one month, the Commission would inform the Court whether it was prepared to resume contact with CEVA in order to seek an amicable agreement. By letter of 10 July 2008, the Commission informed the Court that it was unable to enter into such discussions.

33 The written procedure was closed on 29 October 2008.

34 By order of 27 November 2009, after the parties had been heard, the President of the Sixth Chamber ordered the joining of Cases T-428/07 and T-455/07 for the purposes of the oral procedure and the judgment.

35 On hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) opened the oral procedure. By way of measures of organisation of procedure, it asked the parties to give written replies to a number of questions. The parties complied with that request and the Commission produced certain documents.

36 The parties presented oral argument and their replies to the Court's oral questions at the hearing on 17 December 2009.

37 The applicant claims that the Court should:

– annul debit notes Nos 3240908670 and 3240909271;

– order the Commission to repay the sums paid in accordance with those debit notes;

– in the alternative, annul the debit notes in so far as they claim full repayment of the sums paid under the Biopal and Seahealth contracts, and order the Commission to repay the sums paid in accordance with those debit notes;

– in the further alternative, appoint an expert.

38 The Commission contends that the Court should:

– declare the actions for annulment inadmissible;

– in the alternative, dismiss the claims seeking reduction of the amounts of the debit notes or appointment of an expert;

– in the further alternative, stay proceedings until the ongoing criminal proceedings in France allow CEVA to acquaint itself with the documents which it considers necessary for the defence of its interests;

– order the applicant to pay the costs.

Admissibility

Arguments of the parties

39 Without raising any formal objection of inadmissibility, the Commission submits, as its principal contention, that the present actions, seeking annulment of the abovementioned debit notes, are inadmissible.

40 The Commission submits that the present actions cannot be reclassified by the Court.

41 It argues that the Court may only exceptionally reclassify an action brought as an action for annulment as an action to enforce contractual liability where infringement of the law applicable to the contract is alleged in the application. Reliance solely on specific clauses of the contract does not permit such reclassification.

42 It recalls, in that regard, that, in the order of 26 February 2007 in Case T-205/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 57, the Court held that it 'cannot make such a reclassification since, contrary to Article 44(1)(c) of the Rules of Procedure, the applicant does not put forward, even briefly, any plea, argument or complaint alleging infringement of Luxembourg law [applicable in that case] or of specific provisions of the contract'.

43 In that regard, the Commission contends that a plea is necessarily a claim based on an infringement of the law. It infers from this that it was only for the sake of completeness, and in the light solely of the facts in that case, that the Court held, in the order in *Evropaïki Dynamiki* v *Commission*, that the applicant had not alleged any infringement of the provisions of the contract. That interpretation is confirmed by the order of 2 April 2008 in Case T-100/03 *Maison de l'Europe Avignon Méditerranée* v *Commission*, not published in the ECR.

44 Indeed, any other approach would infringe the rights of the defence and the rule that the parties should be heard. Consequently, the present actions cannot be reclassified as actions to enforce contractual liability, in so far as, contrary to Article 44(1)(c) of the Rules of Procedure, CEVA's applications do not contain any plea alleging infringement of Belgian law, which alone is applicable to the contract.

45 The applicant disputes that argument. In its reply, it maintains that, when an action for annulment or an action for damages is brought before the Court, even though the dispute is of a contractual nature, the Court reclassifies that action.

Findings of the Court

46 As a preliminary point, it must be recalled that it is for the applicant to choose the legal basis of its action and not for the Courts of the Union themselves to choose the most appropriate legal basis (see, to that effect, orders in *Evropaïki Dynamiki* v *Commission*, cited above, paragraph 38, and in Case T-235/06 *Austrian Relief Program* v *Commission* [2008] ECR II-207, paragraph 32).

47 In this case, although the applications are not expressly based on the provisions governing actions for annulment, their examination shows that the actions seek annulment of the debit notes of 20 September and 4 October 2007, relating to the Seahealth and Biopal contracts respectively ('the debit notes'), and are thus implicitly based on the provisions relating to such actions.

48 Furthermore, in the context of those actions for annulment, the applicant has also made applications for orders. In its claims, the applicant seeks, in the first place, annulment of the abovementioned debit notes. In the second place, it claims that the Court should order the Commission to repay to it the amount of those debit notes which it has, in the meantime, settled.

49 As regards those second heads of claim, it must be pointed out that, in this case, they cannot be interpreted independently of the claims for annulment of the debit notes, as separate claims for payment deriving from the contracts and implicitly based on Article 238 EC, which have been brought at the same time as the claims for annulment. Indeed, although the arguments put forward by the applicant in the applications are founded inter alia on the clauses of the contracts in question, the applications are headed 'applications for annulment'. Furthermore, the applicant does not maintain that those applications contain claims for payment. In particular, in the replies, it does not dispute that the actions are inadequately worded. It does, on the other hand, maintain that they should be reclassified.

50 It follows that the applicant has based the present actions solely on Article 230 EC.

51 Under Article 230 EC, the Community Courts review the legality of acts of the institutions intended to produce legal effects vis-à-vis third parties by bringing about a distinct change in their legal position (orders of 10 April 2008 in Case T-97/07 *Imelios* v *Commission*, not published in the ECR, paragraph 21, and in *Austrian Relief Program* v *Commission*, cited above, paragraph 34).

52 According to settled case-law, measures adopted by the institutions in a purely contractual context from which they are inseparable are, by their very nature, not among the measures covered by Article 249 EC, annulment of which may be sought pursuant to Article 230 EC (orders in Joined Cases T-314/03 and T-378/03 *Musée Grévin* v *Commission* [2004] ECR II-1421, paragraph 64, and in *Austrian Relief Program* v *Commission*, cited above, paragraph 35).

53 In this case, it is sufficient to note that the debit notes fall within the context of the Seahealth and Biopal contracts, from which they are inseparable. By those debit notes, the Commission pursues repayment of the contribution paid to the applicant under those contracts, taking as its basis the contractual clauses contained, inter alia, in Article 3 of Annex II.

54 It follows that, by their very nature, those debit notes do not constitute administrative decisions as referred to in Article 249 EC, annulment of which may be sought before the Community judicature under Article 230 EC.

55 Consequently, the present actions cannot be declared admissible in so far as they seek annulment of the debit notes under Article 230 EC.

56 As regards the abovementioned applications for orders, they are also inadmissible inasmuch as they were brought under Article 230 EC (see paragraphs 49 and 50 above), in so far as, in accordance with settled case-law, the Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them; rather, it is for the administration concerned to adopt the necessary measures to implement a judgment given in proceedings for annulment (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200 and case-law cited).

57 However, according to settled case-law, when an action for annulment or an action for damages is brought before the Court when the dispute is, in point of fact, contractual in nature, the Court reclassifies the action, provided that the conditions for such a reclassification are satisfied (Case T-26/00 *Lecureur* v *Commission* [2001] ECR II-2623, paragraph 38; orders in *Musée Grévin* v *Commission*, cited above, paragraph 88; and in Case T-265/03 *Helm Düngemittel* v *Commission* [2005] ECR II-2009, paragraph 54).

58 In that regard, contrary to the Commission's contentions, it does not follow from the case-law that such a reclassification is made subject to the condition that the law applicable to the contract is relied on in the application. On the contrary, it is apparent in particular from paragraphs 38 to 40 of the judgment in *Lecureur* v *Commission*, that the Court has agreed to reclassify an action based on Article 230 EC, in support of which the applicant alleged only infringement by the Commission of its contractual obligations.

59 In addition, examination of the case-law shows that, when faced with a dispute which is contractual in nature, the Court considers itself unable to reclassify an action for annulment either where the applicant's express intention not to base his application on Article 238 EC precludes such a reclassification (see, to that effect, orders in *Musée Grévin* v *Commission*, cited above, paragraph 88, and *Maison de l'Europe Avignon Méditerranée* v *Commission*, cited above, paragraph 54) or where the action is not based on any plea alleging infringement of the rules governing the contractual relationship in question, whether they be contractual clauses or provisions of the national law designated in the contract (see, to that effect, orders in *Evropaïki Dynamiki* v *Commission*, cited above, paragraph 57, and *Imelios* v *Commission*, cited above, paragraph 33).

60 The Commission's restrictive interpretation of the order in *Evropaïki Dynamiki* v *Commission*, is based on an erroneous view of the concept of plea in law within the meaning of, inter alia, Article 44(1)(c) of the Rules of Procedure. In that regard, the Commission's definition, according to which, in the context of an action to enforce contractual liability, a plea may be based only on infringement of the national law governing contracts, cannot be accepted. Contractual clauses, together with the applicable national law and under its aegis, form part of the rules governing the contractual relationship. Indeed, the interpretation of a contract in the light of the provisions of the applicable national law is justified only in case of doubt concerning the content of the contract or the meaning of certain of its clauses (judgment of 19 November 2008 in Case T-316/06 *Commission* v *Premium*, not published in the ECR, paragraph 53). Consequently, since the concept of plea in law covers any legal or factual argument capable of leading the Court, if it considers it well founded, to grant the form of order sought by the party putting it forward, it is undeniable that, like reliance on the applicable national law, reliance on contractual clauses constitutes a plea in law characteristic of an action based on Article 238 EC.

61 It is sufficient that one of the pleas in law characteristic of an action based on Article 238 EC is put forward in the application in accordance with Article 44(1)(c) of the Rules of Procedure in order for that action to be capable of being reclassified without any infringement of the rights of defence of the defendant institution. In that respect, although, as the Commission concedes, it is accepted that an action for annulment may be reclassified as an action based on Article 238 EC where the applicant puts forward pleas alleging infringement of the national law governing the contract, there are no grounds for not conferring the same legal effect, for the purposes of any reclassification, on pleas alleging infringement of contractual obligations.

62 The order in *Maison de l'Europe Avignon Méditerranée* v *Commission*, relied on by the Commission, does not invalidate that analysis. It is true that, in paragraph 23 of that order, the Court pointed out that the applicant had not raised 'any plea, argument or complaint alleging infringement of Belgian law, which, under the arbitration clause inserted in that agreement, [was] the only law applicable to the agreement in question'. It thus omitted to mention also the absence of any pleas alleging infringement of a clause of the contract. However, it is not apparent from that order that any such pleas had been put forward. Moreover, the abovementioned ground is not the only ground which justified the refusal to reclassify the action. The Court also took as its basis, in that order, the fundamental fact that the applicant had expressly stated that its action was based on Article 230 EC.

63 In this case, it must be observed that, as the applicant claims in the replies, in support of reclassification of the actions, the applications are expressly based on clauses of the contracts in question, namely Article 26 and Article 3(4) and (5) of Annex II. The applicant disputes in particular the Commission's interpretation and application of Article 3(5) of Annex II, allowing a full repayment of the sums paid, on which the debit notes are based, even though the irregularities discovered reveal a relatively small difference between the cost statements submitted to the Commission and the eligible costs. It complains that the Commission did not act on the basis of Article 3(4) of Annex II, authorising that institution to require reimbursement of the difference found as a result of a financial audit. In accordance with the provisions of Article 44(1)(c) of the Rules of Procedure, the applications thus contain a clear and comprehensible statement of the plea alleging irregularity, under the contractual clauses, of the recovery of the whole of the financial contribution paid under the contracts in question.

64 It follows that the present actions can be reclassified as applications based on Article 238 EC, in so far as they are based in particular on infringement of contractual clauses. Those actions are therefore admissible.

Substance

65 The applicant alleges, as its principal claim, infringement of the rule that the parties should be heard and of the rights of the defence and, in the alternative, irregularity of the recovery of the whole of the sums granted.

66 The Commission, for its part, contends as a preliminary point that, if the present actions are reclassified as claims for payment, they are in any event unfounded, on account of the preparatory nature of the debit notes.

67 The Commission argues that the debit notes are purely preparatory and informative in character with a view to a possible Commission decision to pursue the recovery procedure on the basis of Article 256 EC. Regardless of the nature of the present actions, such debit notes therefore do not constitute measures against which actions may be brought. The Commission infers from this that, if the present actions are reclassified as actions to enforce contractual liability, they must be dismissed as unfounded, on the ground that the issuing of the debit notes in question cannot constitute a fault and be the cause of the loss allegedly suffered by CEVA as a result of the repayment of the sums claimed back by the Commission.

68 In that regard, in the first place, it is sufficient to recall that, in contractual matters, the Commission must observe the principles governing contracts (see Opinion of Advocate General Kokott in Case C-294/02 *Commission* v *AMI Semiconductor Belgium and Others* [2005] ECR I-2175, I-2178, point 170). In principle, it does not have the right, in that context, to adopt unilateral measures (see, to that effect, order in *Musée Grévin* v *Commission*, cited above, paragraph 85). Consequently, the Commission is not entitled to address any measure having the nature of a decision to the contractor concerned with a view to the latter's performance of his contractual obligations of a financial nature, but is required, where appropriate, to bring a claim for payment before the court having jurisdiction.

69 Against that legal background, and in so far as the present actions are reclassified as seeking payment of the amount of the sums repaid by the applicant in response to the debit notes which were issued to it, those actions for payment must be examined in the light of the contractual clauses relied on by the parties. In the context of such actions to enforce contractual liability, the Commission's argument based on the legal nature of the debit notes is therefore completely irrelevant. Having had the present claims for payment brought before it under Article 238 EC, the Court is merely required to determine whether, under the clauses of the contracts, the Commission is entitled to recover the whole of the financial contributions paid to the applicant.

70 In the context of that examination, the fact that the applicant repaid the amounts claimed by the Commission by means of the debit notes, even though the latter do not constitute decisions adversely affecting it (see paragraphs 52 to 54 above), is irrelevant. The settlement of the debit notes by the applicant, despite the fact that they were not in the nature of decisions, cannot be considered a waiver of any claim it may have to payment of the sums in question. However, only a waiver by the applicant of that claim or the fact that that claim is time-barred, neither of which has been alleged by the Commission, could cause the applicant's claims for payment to fail, if they are justified by the clauses of the contracts (see, by analogy, Case C-142/91 *Cebag* v *Commission* [1993] ECR I-553, paragraph 18).

71 In the second place, the present actions for payment can in no way be construed, as the Commission's initial argument suggests, as claims for compensation for the loss suffered by the applicant as a result of the Commission's sending of the debit notes, in breach of its contractual obligations. Those actions ask the Court only to order the Commission to pay to the applicant the sums mentioned in the debit notes, which the Commission considers itself to be owed in performance of the contracts. In the context of those actions, the Court is therefore not required to review the legality of the debit notes. Consequently, the Commission's argument based on the idea that the issuing of the debit notes cannot constitute a fault in the performance of the contract must be held to be ineffective.

72 It follows that the Commission's initial argument must be rejected.

The plea alleging infringement of the rule that the parties should be heard and of the rights of the defence

Arguments of the parties

73 The applicant alleges infringement of the rule that the parties should be heard and of the rights of the defence. It relies on Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), relating to the right to good administration, which includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, and the right to have access to his or her file, on Article 42 of that charter, relating to the right of access to documents, and on Article 48 of that charter, enshrining the presumption of innocence and the right of defence.

74 The applicant complains in essence that the Commission acted on the basis, on the one hand, of the conclusions of the OLAF investigation and, on the other, of the 'time sheets' relating to the two contracts in question. However, the applicant never had any knowledge of OLAF's conclusions and the 'time sheets' were seized before the final audit report was drawn up. The applicant was therefore not properly heard before the Commission took the decision to claim repayment of the whole of the financial contributions paid under those contracts.

75 The Commission failed to observe the principle of good administration in the conduct of the financial audit, in so far as the audit report refers not only to the 'time sheets', but also to the conclusions of the OLAF investigation. Furthermore, it infringed the rule that the parties should be heard, by failing to send the 'time sheets' and OLAF's conclusions to CEVA.

76 In its replies, the applicant refers to the Commission's behaviour in connection with other contracts which it concluded with that institution, behaviour which, according to it, was partial and unfair.

77 The Commission disputes that argument. It contends that the rule that the parties should be heard was observed, in so far as the applicant was acquainted with all the documents, of which it was the author, on the basis of which the Commission drew up the debit notes, in the light of the audit report. Moreover, the applicant dismissed its managing director for serious misconduct, by adopting the Commission's conclusions on the irregularities which he had committed in the management of the 'time sheets'. It is therefore inconsistent to dispute those conclusions.

78 Moreover, the Commission did not use the conclusions of the OLAF report as its basis for requiring repayment of the sums paid.

Findings of the Court

79 Article 26(3) of Annex II confers on the contractor concerned the right to submit his observations on the provisional audit report and the final audit report.

80 In this case, it is necessary in the first place to examine the complaint that the Commission infringed the applicant's right to be heard during the audit procedure, in so far as the applicant did not have access to OLAF's report.

81 In that regard, it is sufficient to observe that neither the audit report nor the Commission's decision to request repayment of the financial contributions paid under the contracts in question is based on OLAF's conclusions.

82 The final audit report, on the basis of which the Commission acted, clearly shows that the auditors distinguished the financial inspection which they carried out pursuant to the contractual provisions from the inspection carried out by OLAF. It is thus clear that that report does not take OLAF's conclusions into account. It expressly states that its purpose is to examine the evidence relating to the declared costs, that it does not seek to detect 'impacts' or fraud and that it is drawn up subject to any additional finding made by OLAF.

83 In addition, it is apparent in particular from the letter of 28 August 2007 sent by the Commission to the applicant that that institution acted solely on the basis of the findings made in the final audit report. As regards OLAF's conclusions, the Commission merely indicated, in that correspondence, that OLAF's conclusions confirmed the declarations made by the auditors.

84 It follows that, in this case, the reliance on the OLAF report is not relevant, since the recovery of the whole of the financial contribution paid, contested by the applicant, was not based on that report, nor on the subsequent opening of a criminal investigation with regard to the applicant.

85 In those circumstances, the fact that the applicant did not have access to the OLAF report is not capable of infringing the rule that the parties should be heard and its right to be heard during the audit procedure. As regards the argument relating to the presumption of innocence, it is not substantiated and must also be rejected as unfounded.

86 In the second place, as regards the complaint that the applicant no longer had the 'time sheets' at its disposal when it submitted its observations on the final audit report, it should be pointed out that, contrary to the Commission's contentions, the fact that the applicant was author of the 'time sheets' does not give grounds for presuming that it was properly heard even though it no longer had access to those documents following their seizure by OLAF. Moreover, the fact that the applicant admitted the existence of irregularities, whereas it no longer had access to the 'time sheets', cannot in any way imply that it was able to defend its position and that it acknowledged all the irregularities with which it was charged and their gravity.

87 In this instance, although the Commission does not raise the point, it must be noted that the applicant still had the 'time sheets' at its disposal when it submitted its observations on the provisional audit report. However, it no longer had those 'time sheets' when it submitted its observations on the final audit report.

88 In those circumstances, even though the applicant does not dispute that the Commission confirmed the conclusions of the provisional audit report in the final audit report, the fact remains that it was unable properly to exercise its right to be heard on the final audit report in accordance with Article 26(3) of Annex II. Nor was it able to comment subsequently, with full knowledge of the facts, on the existence and gravity of the financial irregularities established following the Commission's abovementioned letters of 22 January 2007 and 20 March 2007 informing it of that institution's intention to request repayment of all the financial contributions which had been paid to it under the two contracts in question.

89 In that regard, the fact that the supporting documents held by the contractor concerned, in this instance the 'time sheets', were seized by OLAF and that they are therefore covered, according to the Commission, by the exceptions to the right of access to documents provided for by Regulation No 1049/2001 cannot justify negating the right of that contractor to be heard in accordance with Article 26(3) of Annex II during the audit procedure.

90 However, with regard to the legal consequences of the infringement, in this case, of the applicant's right to be heard under Article 26(3) of Annex II, it is important to point out that, in the context of the present actions to enforce contractual liability, such an irregularity is not, on its own, such as to justify a possible order against the Commission to pay to the applicant the sums which it claims. In the context of the present actions based on Article 238 EC, the Commission's contractual liability must be assessed in the light of all the relevant clauses of the contracts in question, relied on by the parties, and on the basis of all the available evidence before the Court, having due regard to the rule that the parties must be heard and to the rights of the defence.

91 Moreover, the abovementioned infringement of the applicant's right to be heard under Article 26(3) of Annex II could, where relevant, be taken into consideration in the examination of a claim for damages – in the form inter alia of a claim for compensatory interest – for the possible loss occasioned by that irregularity, if the applicable national law provides for the possibility of such damages being awarded in the event of an infringement of contractual obligations.

92 However, in this case, the applicant does not seek to be awarded damages for any loss resulting from the infringement of its right to be heard under Article 26(3) of Annex II. The present actions seek only to have the Commission ordered to repay to the applicant the sums which the latter unduly repaid to that institution after receiving the abovementioned debit notes.

93 As regards the applicant's arguments relating to the Commission's alleged conduct in the context of other contracts, they must in any event be rejected in so far as they have no connection with the subject-matter of the present disputes.

94 It follows that, in the circumstances of the present dispute, the plea alleging infringement of the rule that the parties should be heard and of the rights of the defence is ineffective.

95 In this instance, the Court must examine the applicant's claims for payment in the light of all the evidence submitted to it and on which the parties have been able to put forward their observations, whether in their pleadings or in their written replies to the Court's questions or at the hearing.

96 In that regard, it is apparent from the parties' written replies to the written questions put by the Court before the hearing that the applicant, after being placed under judicial investigation, and the Commission, as the party claiming damages in criminal proceedings, now had access to all the

documents on the criminal case file in France, which included the applicant's documents, among which were the 'time sheets' relating to the Seahealth and Biopal projects, which had been seized by OLAF.

97 Against that background, since the applicant was able to have access to all the documents which it considered necessary for its defence, the Commission's contention in the further alternative that proceedings should be stayed has been rendered redundant. There is therefore no need to rule on that contention.

98 It is therefore necessary to examine below the plea alleging irregularity of the recovery of all the sums at issue, in the light of all the evidence now available, to which the applicant had access and on which it was able to state its view in its replies to the Court's written questions and at the hearing.

The plea alleging irregularity of the recovery of all the sums granted to the applicant under the Seahealth and Biopal contracts

Arguments of the parties

99 The applicant points out that Article 3(5) of Annex II provides that it is only in the case of fraud or serious financial irregularities discovered during an audit that the Commission may claim full repayment of the Community contribution paid to its co-contractor.

100 In this case, the applicant acknowledges the existence of 'flagrant gaps in the recording of hours' during the period corresponding to the performance of the contracts in question. It does not dispute the inconsistencies and lack of transparency in the 'time sheet' system, observed during the Commission's audit. However, those errors or faults do not give grounds for calling in question the genuineness and quality of the work carried out by the applicant, which are not disputed by the Commission. Moreover, they are not sufficiently serious to justify the application of Article 3(5) of Annex II.

101 The applicant suggests applying retroactively to the contracts in question its new management control system allowing rigorous monitoring of hours and costs, set up in 2007 and based, on the one hand, on the costs and hours directly chargeable to the project in question and, on the other hand, on those shared between the projects. According to the new costings made using that method, the difference between the number of hours actually chargeable to each of the projects and the number of hours declared in the cost statements relating to the two contracts in question, which had been sent to the Commission, does not exceed 1.9% as regards the Seahealth contract and 5.35% as regards the Biopal contract. The applicant explains that, since the contracts were performed in 2003, 2004 and 2005, the costing parameters for each year were reconstructed from the actual end-of-year profit and loss accounts and from the pay slips during those periods.

102 In its replies to the Court's written questions, the applicant claims that it is apparent from the summary 'time sheets' drawn up, project by project, by the fraud squad of the Rennes criminal investigation department that the difference between the 'time sheets' and the cost statements was only 6% as regards the Seahealth and Biopal projects.

103 The smaller differences thereby highlighted confirm that the errors contained in the 'time sheets' were not sufficiently serious to justify the application of Article 3(5) of Annex II. The claim for repayment of all the sums paid is therefore disproportionate.

104 In the further alternative, the applicant asks the Court to appoint an expert to review the calculation of the times which it made by applying its new management control system to the contracts in question (see paragraph 101 above). At the hearing, the applicant stated that a scientific expert would be able to make a costing of the working times necessary, taking account of the scientific tasks required and of the resources to be applied under the two contracts in question.

105 The Commission contends, in the first place, that the applicant does not allege that it infringed, in any way, its contractual obligations or a provision of Belgian law. The claims seeking reduction of the amount of the sums to be returned and the appointment of an expert should therefore be rejected as contrary to the terms of Article 44(1)(c) of the Rules of Procedure.

106 In the second place, and in any event, due to the seriousness of the financial irregularities committed, the claim for full repayment of the sums paid, pursuant to Article 3(5) of Annex II, is justified. At the hearing, the Commission pointed out that the existence of an intentional element, characteristic of fraud, was not necessary in order to require such repayment where serious financial irregularities such as those discovered in this case are involved.

Findings of the Court

107 As a preliminary point, with regard to the admissibility of the present plea, it is sufficient to note that, contrary to the Commission's contentions, the plea has been put forward in a manner consistent with the provisions of Article 44(1)(c) of the Rules of Procedure (see paragraph 63 above).

108 As regards the claims in the alternative, seeking the appointment of an expert, it must be pointed out that, in accordance with the principle that each court applies its own procedural rules (Opinion of Advocate General Kokott in *Commission* v *AMI Semiconductor Belgium and Others*, cited above, point 56), those claims must be examined by the Court in the light of the provisions of Articles 65 to 67 of the Rules of Procedure, concerning measures of inquiry. The applicant therefore cannot be accused of not having based such claims on the proper law of the contracts.

109 On the basis of the conclusions of a financial audit, the Commission is authorised, under the last subparagraph of Article 26(3), to take all appropriate measures which it considers necessary, including the issuing of a recovery order regarding all or part of the payments made by it under the contracts in question.

110 In this case, as a result of the financial audit, the Commission terminated the two contracts in question, in accordance with Article 7(4)(b) of Annex II, and decided, in accordance with Article 3(2) of that annex, to make no further payments under those contracts. Those decisions are not contested by the applicant.

111 In this case, the applicant contests the recovery by the Commission, under Article 3(5) of Annex II, of all the financial contributions which had already been paid to it under the contracts in question. It complains that the Commission did not apply Article 3(4) of Annex II, which provides that the contractor concerned is to reimburse only the difference where, taking into account any adjustments, including those made as a result of a financial audit referred to in Article 26 of Annex II, the payments received exceed the total amount of the Community contribution due.

112 It must be observed that, whereas the Seahealth and Biopal contracts were duly performed from 2003 to 2005, as stated by the applicant without being contradicted by the Commission, it is apparent from the final audit report that the audit, carried out in May 2006, covered only 2003 and 2004.

113 As regards 2003 and 2004, a reading of that final audit report shows that the personnel costs were not justified by the applicant in accordance with the provisions of the contracts and were therefore declared ineligible. On the other hand, the costs other than those related to personnel expenses were considered eligible (see paragraph 19 above)

114 Moreover, it is apparent from the Commission's replies to the questions put by the Court during the hearing that that institution did not have at its disposal, at the time of the financial audit, the cost statements for 2005, which were completed after expiry of the time-limit. Those cost statements were rejected automatically following the audit report, since the Commission took the view, in the light of

the serious doubts concerning 2003 and 2004, that the applicant was no longer fulfilling its financial obligations, including in 2005.

115 It is thus apparent that the present disputes involve, on the one hand, the costs declared for 2003 and 2004, which were checked during the audit (see paragraph 16 above) and, on the other, the cost statements relating to 2005, which were rejected automatically.

116 It must therefore be established whether, in the circumstances of this case, the provision laid down in Article 3(5) of Annex II, in conjunction with Article 26(3) and Article 7(6)(c) of that annex authorised the Commission to request the repayment of all the financial contributions paid under the two contracts in question.

117 Article 26(3) and Article 7(6)(c) of Annex II merely provide for the possibility for the Commission to recover all those financial contributions, as a result, respectively, of an audit or of termination of the contract. However, they do not set out the conditions to which such full recovery is subject.

118 Those conditions are set out in Article 3(5) of Annex II, which provides that the Commission may or must, as relevant, where fraud or serious financial irregularities have been discovered during a financial audit, claim from the contractor the repayment of all the financial contribution paid to him.

119 It is apparent from the wording of Article 3(5) of Annex II that, even in the event of fraud or serious financial irregularities discovered during an audit, the Commission is not required in all cases to recover all of the financial contribution granted to the contractor in question. It is, on the other hand, required to examine, 'as relevant', whether, in the light of the circumstances of the particular case, such a measure is obligatory or appropriate, having regard to the clauses of the contract.

120 In that regard, the interpretation of Article 3(5) of Annex II mentioned by the Commission at the hearing, according to which the obligation to require repayment of the whole of the financial contribution in question refers only to cases where the contract has been terminated for fault, whereas the Commission has a discretion allowing it to take into account the contractor's good faith if the contract has not expired, cannot be accepted.

121 The Commission's argument based on the concept of termination for fault lacks precision. Even conceding that the Commission was referring to a situation where a contract has been terminated, as with the Seahealth and Biopal contracts, under Article 7(4)(b) of Annex II, which refers to false declarations for which the contractor may be held responsible and to the deliberate withholding of information in order to obtain the Community's financial contribution, the relevant clauses of Annex II clearly do not establish any automatic link between such termination under the abovementioned article and any obligation to recover the whole of the financial contribution in question under Article 3(5) of Annex II.

122 In this case, it follows that the mere fact that the contracts in question were terminated under Article 7(4)(b) of Annex II and that that termination was not contested by the applicant was not such as to impose on the Commission an obligation to recover the total amount of the sums paid to the applicant, pursuant to Article 3(5) of Annex II. It should moreover be pointed out that, whereas the Commission acted, in the termination decision, on the basis of Article 7(4)(b), rather than on the basis of Article 7(3)(e), of Annex II, which confers on it the power to terminate a contract in the event of a serious financial irregularity, it alleges only, in the present proceedings, the existence of serious financial irregularities and does not, on the other hand, refer to fraud, as it confirmed at the hearing.

123 It must therefore be determined whether, in the light of the flagrant gaps in the recording of hours, which is acknowledged by the applicant, the Commission was, at the very least, authorised by Article 3(5) of Annex II to require repayment of all the sums which it had granted under the contracts in question. If the conditions for such full recovery were not satisfied, the Commission would be entitled

only to request, under Article 3(4) of Annex II, on the basis of an assessment of all eligible costs, reimbursement of the difference between the sums paid by and the sums due from the Union.

124 That assessment must be made in the light of the contractual obligations binding upon contractors as regards the justification of their costs.

125 In this case, it was for the applicant to justify its personnel costs in accordance with the clauses of Article 23(1)(a) of Annex II, stipulating in essence that all the working time charged to the contract must be recorded throughout the duration of the contract, or, in the case of the coordinator, no later than two months after the end of the duration of the project, and be certified at least once a month by the project manager or by the duly authorised responsible financial officer of the contractor.

126 In that regard, it must be recalled that the Commission's obligation to ensure the sound financial management of Community resources, in accordance with Article 274 EC, and the need to combat fraud in connection with Community financing endow the obligations relating to financial conditions with fundamental importance (see, to that effect, Case T-500/04 *Commission* v *IIC* [2007] ECR II-1443, paragraphs 93 to 95, and judgment of 12 September 2007 in Case T-448/04 *Commission* v *Trends*, not published in the ECR, paragraph 141). In this case, the contractor's obligation to submit cost statements in accordance with the specific requirements laid down in Article 23(1) of Annex II, relating to personnel costs, is therefore one of his fundamental obligations, designed to enable the Commission to have at its disposal the necessary data in order to satisfy itself that the contributions in question have been used in accordance with the provisions of the contracts.

127 That is the reason why the Commission is authorised by Article 3(4) of Annex II to require, where appropriate, the reimbursement of sums paid corresponding to costs which it considers ineligible on the ground that they have not been justified in accordance with the provisions of the contract.

128 By contrast, where fraud or serious financial irregularities are discovered during a financial audit, Article 3(5) of Annex II provides for the possibility for the Commission to recover the whole of the financial contribution paid by the Union and thus has a deterrent purpose (see, by analogy, Case T-199/99 *Sgaravatti Mediterranea* v *Commission* [2002] ECR II-3731, paragraph 136).

129 However, the objective pursued by Article 3(5) of Annex II, which is to deter against fraud and serious financial irregularities, does not entitle the Commission to avoid the principle that contracts must be performed in good faith and that contractual clauses must not be applied unfairly, by assuming a discretionary power in the interpretation and application of those clauses.

130 In this case, it must therefore be established whether, having regard to the findings made in the final audit report and to the documents in the file which were produced and commented upon in the parties' replies to the Court's written questions and debated between the parties at the hearing, the financial irregularities committed by the applicant were sufficiently serious to justify, in the light of the principle that contracts must be performed in good faith, the recovery, under Article 3(5) of Annex II, of the whole of the financial contribution paid.

131 Admittedly, the final audit report finds only the personnel costs for 2003 to 2004 ineligible, in so far as the audit covered the period between 1 January 2003 and 31 December 2004, as has already been pointed out (see paragraph 112 above). However, it is evident from that report that the grounds on which the auditors based their finding of the absence of justification for the personnel costs declared in respect of 2003 and 2004 are capable of being applied to the personnel costs relating to 2005.

132 It is apparent from the final audit report that the 'time sheets' relating not only to 2003 and 2004, but also to 2005, contained in a box handed over to the auditors contained only an aggregate weekly and monthly statement of all the working hours completed by each member of staff for all the current projects. The working times chargeable to the Seahealth and Biopal projects had not been recorded. Those 'time sheets', signed by the former director of CEVA, were neither signed by the personnel

working on the projects nor countersigned by the project managers. Moreover, they were neither dated nor numbered, so that it was not possible to identify the date on which they had been drawn up and signed by the applicant's former director. Furthermore, the auditors found that there were different versions of sets of 'time sheets' for different projects, revealing significant contradictions between them.

133 Finally, the final audit report indicates that the person in charge of the Biopal project confirmed that he was unable to determine exactly how much of the working time of each member of the personnel was chargeable to each project, since, according to him, no recording system existed.

134 In those circumstances, the auditors took the view that the 'time sheets' were not reliable and that they had no sound basis for calculating the number of hours chargeable to the projects in question. Consequently, they considered that all the personnel costs declared in respect of 2003 and 2004, analysed during the audit, were ineligible.

135 Moreover, the Court observes that the applicant did not put forward, either in its written replies to the Court's questions or at the hearing, any serious argument invalidating the factual findings and conclusions contained in the audit report. The applicant failed, inter alia, to adduce any evidence capable of casting doubt on the fact, which is alleged against it by the Commission, that it did not undertake any recording of the working times chargeable to the contracts in question.

136 In particular, the applicant does not dispute that the 'time sheets' were reconstructed retrospectively, after the completion of the contracts, by its former director. As for the 'time sheets' described as 'summary', drawn up by the fraud squad of the Rennes criminal investigation department, which are relied on by the applicant, it is common ground that they merely summarise the time sheets thus reconstructed and compare them with the declared costs. They do not contain any evidence concerning the working times actually chargeable to the contracts in question.

137 Moreover, the fact that the abovementioned reconstruction of the 'time sheets' lacks any reliability is confirmed by the significant discrepancies between the content of those 'time sheets', as it appears from the summary table of the abovementioned summary sheets which was drawn up by the applicant, in its reply to the Court's written questions, and the statements of certain witnesses recorded in the fraud squad's report of 31 March 2008, produced by the Commission. Consequently, whereas, according to one of the witnesses, a project manager, the time sheets mentioned a total of 685 working hours spent on the Biopal project, that same witness stated, during his examination by the fraud squad, that he had never worked on that project.

138 Furthermore, as regards, more specifically, the advances paid in respect of 2005, it is not apparent, either from the documents in the file or from the parties' written replies to the Court's questions or their oral observations at the hearing, that the applicant sent to the Commission any supporting documents concerning the personnel costs incurred during 2005 in respect of the contracts in question. Nor, indeed, does the applicant claim to have produced any such supporting documents.

139 In those circumstances, the mere absence of properly kept time records with regard to 2003, 2004 and 2005 constitutes an infringement of Article 23(1) of Annex II, which is sufficient for all the personnel costs concerned to be considered ineligible (*Commission* v *Premium*, cited above, paragraph 44).

140 In addition, in view of the scale and gravity of the manifest financial irregularities discovered in the course of the audit and confirmed by the documents from the criminal investigation which have been discussed in this case between the parties, the recovery by the Commission of the whole of the financial contribution paid to the applicant under the contracts in question cannot be regarded as an unfair application of the clauses of Article 3(5) of Annex II. Contrary to the applicant's claims, that recovery is therefore not disproportionate to the objectives pursued by the relevant clauses of the contracts in question (see paragraphs 126 to 128 above).

141 As regards the applicant's claims in the alternative seeking the appointment of an expert, they cannot be accepted, in so far as it is for the applicant, by virtue of its contractual obligations, to adduce proof of its personnel costs in accordance with the specific evidential requirements of Article 23(1) of Annex II (see, to that effect, *Commission* v *IIC*, cited above, paragraph 105).

142 It follows that the present actions must be dismissed as unfounded.

Costs

143 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.

144 Moreover, the first subparagraph of Article 87(3) of the Rules of Procedure provides 'that where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.'

145 In this case, although the applicant has failed in all of its pleas, account must be taken of the fact that, following the seizure of the 'time sheets' by OLAF, it was not in a position to comment with full knowledge of the facts on the existence and gravity of the financial irregularities alleged against it. It was only at the end of the written procedure before the Court that it had access to those documents (see paragraphs 89 and 96 above). Each party must therefore be ordered to bear one half of its own costs and to pay one half of those incurred by the other party.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Dismisses the actions;**

2. **Orders each party to bear one half of its own costs and to pay one half of those incurred by the other party.**

JUDGMENT OF THE COURT (Second Chamber)

10 January 2006 (*)

(State aid – Articles 87 EC and 88 EC – Banks – Banking foundations – Meaning of 'undertaking' – Relief from direct tax on dividends received by banking foundations – Categorisation as State aid – Compatibility with the common market – Commission Decision 2003/146/EC – Determination of validity – Inadmissibility – Articles 12 EC, 43 EC and 56 EC – Principle of non-discrimination – Freedom of establishment – Free movement of capital)

In Case C-222/04,

Reference for a preliminary ruling under Article 234 EC from the Corte suprema di cassazione (Italy), made by decision of 23 March 2004, received at the Court on 28 May 2004, in the proceedings

Ministero dell'Economia e delle Finanze

v

Cassa di Risparmio di Firenze SpA,

Fondazione Cassa di Risparmio di San Miniato,

Cassa di Risparmio di San Miniato SpA,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, R. Silva de Lapuerta and G. Arestis, Judges,

Advocate General: F.G. Jacobs,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 July 2005,

after considering the observations submitted on behalf of:

– Cassa di Risparmio di Firenze SpA, by P. Russo and G. Morbidelli, avvocati,

– Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA, by A. Rossi and G. Roberti, avvocati,

– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

– the Commission of the European Communities, by R. Lyal and V. Di Bucci, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC et seq., 56 EC et seq., 87 EC and 88 EC, as well as the validity of Commission Decision 2003/146/EC of 22 August 2002 on the tax measures for banking foundations implemented by Italy (OJ 2003 L 55, p. 56).

2 The reference was made in the course of proceedings between, on the one hand, Cassa di Risparmio di Firenze SpA (hereinafter 'Cassa di Risparmio di Firenze'), Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA (hereinafter 'Cassa di Risparmio di San Miniato'), established in Italy, and, on the other hand, the Ministero dell'Economia e delle Finanze (Italian Ministry of Economy and Finance) regarding an application by Fondazione Cassa di Risparmio di San Miniato seeking exemption from retention of tax on dividends for the 1998 tax year.

I – National legal framework

3 In Italy, dividends distributed by companies limited by shares are subject to a retention on account of tax due, under Article 1 of Law No 1745 of 29 December 1962 introducing retention on account or tax on dividends distributed by companies and amending the legislation on the mandatory registration of shareholders' names (GURI No 5 of 7 January 1963, p. 61), as amended by Decree-Law No 22 of 21 February 1967, containing new provisions in respect of retention on account or tax on dividends distributed by companies (GURI No 47 of 22 February 1967, p. 1012), converted into a law, with amendments, by Law No 209 of 21 April 1967 (GURI No 101 of 22 April 1967, p. 2099) (hereinafter 'Law No 1745/62').

4 Article 10 of Law No 1745/62 provides that dividends accruing to organisations of persons or entities not subject to corporation tax, since they are excluded from the scope of that tax, and to funds taxable on the basis of their balance sheet, but exempt from corporation tax, are to be subject to a tax retention of 30%, instead of the retention on account under Article 1 of that law.

5 Article 10a of Law No 1745/62 exempts from the retention under Article 10 dividends accruing to legal persons governed by public law or to foundations exempt from corporation tax which pursue exclusively aims of social welfare, education, teaching, and study and scientific research.

6 Article 6 of Decree No 601 of the President of the Republic of 29 September 1973 regulating tax advantages (GURI, Ordinary Supplement, No 268 of 16 October 1973, p. 3, hereinafter 'Decree No 601/73') provides for a reduction by half of the tax on the income of legal persons for social assistance organisations and establishments, mutual aid societies, hospital organisations, social welfare and charitable organisations, educational establishments and non-profit-making establishments for study and experimentation in the public interest, scientific bodies, academies, historical, literary, scientific, experimental and research foundations and associations pursuing exclusively cultural aims, as well as organisations whose aims are assimilated by law to charitable and educational aims.

7 A process of privatisation of the Italian public banking system was undertaken by Law No 218 of 30 July 1990 containing provisions on the capital restructuring and consolidation of credit institutions governed by public law (GURI No 182 of 6 August 1990, p. 8, hereinafter 'Law No 218/90'), and Legislative Decree No 356 of 20 November 1990 containing provisions for the restructuring and regulation of the banking industry (GURI, Ordinary Supplement, No 282 of 3 December 1990, p. 5, hereinafter 'Decree No 356/90').

8 Article 1 of Decree No 356/90 provided, in particular, for the possibility for public banking establishments, including savings banks, to transfer their banking business to a public limited company

formed by them. The transferring organisation, called in practice a ‘banking foundation’ (hereinafter ‘the banking foundation’), became the sole shareholder of the company so formed (hereinafter ‘the banking company’), whose purpose was the carrying on of the banking activity previously carried on by the banking foundation.

9 Article 11 of Decree No 356/90 provided that banking foundations would be governed by that decree and by their statutes, would be endowed with full legal capacity under public and private law and would remain subject to the legal provisions relating to the appointment of their administrative and supervisory boards.

10 Article 12 stated that banking foundations with non-shareholder capital funds would have to pursue socially beneficial aims in the public interest, mainly in the sectors of scientific research, education, art and health and that the original purposes of assistance and protection of disadvantaged social groups could be maintained.

11 The same article added, in particular, that:

– banking foundations could carry out the financial, commercial, real estate and asset operations necessary or opportune for the fulfilment of those aims;

– they were to manage their shareholding in the banking company so long as they continued to own it;

– however, they could neither carry out directly any banking activity nor hold any controlling shareholding in the capital of banking or financial undertakings other than the banking company;

– by contrast, they could acquire or dispose of minority shareholdings in the capital of other banking and financial undertakings;

– on a transitional basis, operational continuity between the banking foundation and the banking company had to be ensured by requirements that the members of the management committee or equivalent body of the banking foundation would be appointed to the board of directors and members of the supervisory body to the banking company’s supervisory committee;

– banking foundations had to transfer a certain portion of the receipts from their shareholdings in the banking companies to a special reserve for subscribing to increases in the capital of those companies;

– that reserve could be invested in securities of companies in which banking foundations held a shareholding or in securities issued or guaranteed by the State;

– banking foundations could contract debts to the banking companies or receive guarantees from the latter within specified limits.

12 Under Article 13 of Decree No 356/90:

– public sales of shares in banking companies had to be effected by means of a public offer for sale;

– within an overall limit of 1% of the banking company’s capital, sales of quoted shares on the stock exchange could be freely transacted;

– recourse to other methods was to be subject to the authorisation of the Minister for the Treasury;

– if, because of sale or any other transaction, the banking foundation were to lose, even temporarily, control of the majority of shares carrying the right to vote at the banking company's ordinary general meetings, the transaction had to be approved by decree of the Minister for the Treasury;

– a banking foundation which had transferred the controlling shareholding could acquire another controlling shareholding in a banking company after obtaining authorisation by decree of the Minister for the Treasury.

13 Article 14 of Decree No 356/90 made banking foundations subject to the supervision of the Treasury, to which they had to transmit their provisional budgets and annual balance-sheets.

14 Under the same provision:

– banking foundations had in addition to transmit to the Treasury and to the Bank of Italy the information, including periodic information, demanded of them; and

– the Treasury could order the carrying out of audits.

15 Article 1(7a) of Decree-Law No 332 of 31 May 1994 providing for acceleration of the procedures for the disposal of the State's and public bodies' shareholdings in joint stock companies (GURI No 126 of 1 June 1994, p. 38), converted into law, with amendments, by Law No 474 of 30 July 1994 (GURI No 177 of 30 July 1994, p. 5), repealed the provisions of Article 13 of Decree No 356/90, referred to in paragraph 12 above, which required the consent of the Minister for the Treasury, on the one hand, for any transaction by which the banking foundation would lose control of the banking company, and, on the other hand, for the acquisition of another controlling shareholding in a banking company.

16 The regime introduced by Law No 218/90 and Decree No 356/90 was implemented in detail by Law No 461 of 23 December 1998 delegating powers to the Government to revise the civil and tax provisions applicable to the transferring entities referred to in Article 11(1) of Legislative Decree No 356 of 20 November 1990, as well as the tax provisions applicable to restructuring operations in the banking sector (GURI No 4 of 7 January 1999, p. 4, hereinafter 'Law No 461/98'), and by Legislative Decree No 153 of 17 May 1999 concerning the civil and tax provisions applicable to the transferring entities referred to in Article 11(1) of Legislative Decree No 356 of 20 November 1990 and the tax provisions applicable to restructuring operations in the banking sector, implemented in accordance with Article 1 of Law No 461 of 23 December 1998 (GURI No 125 of 31 May 1999, p. 4, hereinafter 'Decree No 153/99').

17 Article 30 of Decree No 153/99 repealed, in particular, Articles 11, 12, 13 and 14 of Decree No 356/90.

18 Article 1 of Decree No 153/99, adopting the term which was used in practice, states that 'foundation' must be understood to mean the entity which transferred the banking business for the purposes of Decree No 356/90.

19 Article 2(1) of Decree No 153/99 provides that:

– banking foundations are to be non-profit-making legal persons under private law, endowed with corporate independence and the widest powers of management;

– they are to pursue exclusively socially beneficial aims and the promotion of economic development, in accordance with the provisions of their respective statutes.

20 Article 3 adds that:

– banking foundations are to pursue their aims by all means compatible with their legal nature as defined in Article 2;

– they are to operate in accordance with the principles of operational profitability;

– they may manage only instrumental undertakings which directly serve the fulfilment of their statutory aims and exclusively in the relevant sectors;

– they are not entitled to carry on banking functions;

– they are prohibited from any form of financing, payment or subsidy, direct or indirect, to or of profit-making bodies or for undertakings, whatever their nature, with the exception of instrumental undertakings and social cooperatives.

21 'Relevant sectors' had, pursuant to Article 1 of Decree No 153/99 as originally drafted, to be chosen from among the following sectors: scientific research, education, art, conservation and promotion of cultural heritage and activities and of environmental resources, health and assistance to underprivileged social categories.

22 After the amendment of that provision by Article 11 of Law No 448 of 28 December 2001 laying down rules for drawing up the State's annual and long-term budget (Finance Act 2002) (GURI, Ordinary Supplement, No 301 of 29 December 2001, p. 1, hereinafter 'Law No 448/01'), 'relevant sectors' must now be chosen from among the following: family and related values; growth and development of young people; education, teaching and training, including the acquisition of publications for schools; voluntary and charitable work, philanthropy; religion and spiritual development; assistance to the elderly; civil rights; crime prevention and public safety; food safety and high-quality agriculture; local development and building of social housing at local level; consumer protection; civil defence; public health, preventive and rehabilitative medicine; sport, prevention and treatment of drug addiction; mental and physiological conditions and disorders; scientific and technical research; environmental protection; art, cultural activities and heritage.

23 Article 4(3) of Decree No 153/99, in the original version, provided that the members of the management body could not be appointed members of the board of directors of the banking company.

24 In the version resulting from Law No 350 of 24 December 2003 laying down rules for drawing up the State's annual and long-term budget (Finance Act 2004) (GURI, Ordinary Supplement, No 299 of 27 December 2003, p. 1), the same provision states that:

– individuals who carry out the duties of administration, management or supervision in the banking foundation may not perform administrative, managerial or supervisory duties in the banking company or in companies which it controls or in which it has a shareholding;

– individuals who carry out the duties of strategic planning in the banking foundation may not perform administrative, managerial or supervisory duties in the banking company.

25 The original wording of Article 5(1) of Decree No 153/99 provided that a banking foundation's assets had to be fully committed to the pursuit of its statutory aims and that, in managing their assets, banking foundations were to manage risks by observing prudential standards in order to preserve their value and obtain an adequate return. Article 11 of Law No 448/01 added a requirement that its management must be consistent with the banking foundation's non-profit-making nature operating according to the principles of transparency and morality.

26 Article 6(1) of Decree No 153/99 provides that banking foundations may possess controlling holdings

only in entities and companies having as their exclusive object the management of instrumental undertakings.

27 As regards shareholdings in banking companies, the original version of Article 25(1) and (2) provided that:

– controlling shareholdings in those companies could be kept for a period of four years from the date of the decree's entry into force, for the purposes of their disposal;

– in the absence of a disposal by that deadline, the shareholdings could be kept for an additional period not exceeding two years;

– controlling shareholdings in companies other than banking companies, excluding those held by banking foundations in instrumental undertakings, had to be disposed of within the time-limit fixed by the Supervisory Authority, account being taken of the requirement to preserve the assets' value and, in any event, by the end of the prescribed four-year period.

28 Following amendment of those provisions by Article 11 of Law No 448/01, then by Article 4 of Decree-Law No 143 of 24 June 2003 (GURI No 144 of 24 June 2003), converted into law, with amendments, by Law No 212 of 1 August 2003 (GURI, Ordinary Supplement, No 185 of 11 August 2003) (hereinafter 'Decree-Law No 143/03'):

– the maximum period of four years for keeping controlling shareholdings was replaced by a deadline of 31 December 2005;

– the possibility was introduced of entrusting shareholdings in the banking companies to savings management companies chosen in compliance with the procedures for competitive tendering and required to manage those shareholdings in their own name in accordance with criteria of professionalism and independence, the banking foundation retaining in certain cases the ability to give instructions for the purposes of extraordinary general meetings and as to the disposal of those shareholdings being required to take place, in any event, no later than the expiry of the third year following 31 December 2005;

– the Minister for Economy and Finance and the Bank of Italy are to exercise the powers conferred on them by the provisions applicable in respect of banking and credit;

– controlling shareholdings in companies other than banking companies, excluding those held by banking foundations in instrumental undertakings, must be disposed of within the time-limit fixed by the Supervisory Authority, and, in any event, no later than 31 December 2005.

29 Article 25(3) of Decree No 153/99, prior to its amendment by Law No 448/01, provides that, where banking foundations, after the expiry of the periods fixed for the retention of controlling shareholdings, continue to hold them, the Supervisory Authority is to dispose of them to the extent necessary to terminate the control.

30 With respect to the applicable tax regime, Article 12(1) of Decree No 153/99 states that banking foundations which have adapted their statutes to its provisions are considered to be non-commercial entities, even if they pursue their statutory aims through instrumental undertakings.

31 At the date of the order for reference, Article 12(2) provided that:

– the regime laid down in Article 6 of Decree No 601/73 was applicable to banking foundations

which had adapted their statutes to the provisions of Decree No 153/99 and were operating in 'relevant sectors';

– the same regime applied, until their statutes were adapted to the requirements of Decree No 153/99, to banking foundations not having the nature of commercial entities which had pursued principally socially beneficial aims in the public interest in the sectors listed in Article 12 of Decree No 356/90 and its subsequent amendments.

32 Article 12(3) of Decree No 153/99, as amended by Decree-Law No 143/03, states that banking foundations lose their non-commercial nature and cease to benefit from the tax relief provided for if, after 31 December 2005, they still hold a controlling shareholding in the banking companies.

II – The main proceedings and the questions referred for a preliminary ruling

33 The Fondazione Cassa di Risparmio di San Miniato applied to the Italian tax authorities, on the basis of Article 10a of Law No 1745/62, for exemption from the retention on the dividends accruing to it for the 1998 tax year, which it received on account of its shareholdings in the Cassa di Risparmio di San Miniato and the company Casse Toscane SpA, to whose rights Cassa di Risparmio di Firenze has succeeded.

34 That application was refused on the ground that the management by a banking foundation of its shareholdings in banking companies was to be regarded as a commercial activity which was incompatible with the exemption under Article 10a of Law No 1745/62.

35 Fondazione Cassa di Risparmio di San Miniato, together with Cassa di Risparmio di San Miniato and Cassa di Risparmio di Firenze, challenged that decision before the Commissione tributaria provinciale di Firenze (Florence Provincial Tax Tribunal).

36 Their action was dismissed.

37 The three applicants appealed against the decision of the Commissione tributaria provinciale di Firenze before the Commissione tributaria regionale di Firenze (Tuscany Regional Tax Tribunal) which allowed their appeal.

38 According to the referring court, the Commissione tributaria regionale di Firenze held that the Fondazione Cassa di Risparmio di San Miniato, because of its socially beneficial or public interest aim in specified sectors, must be entitled to the reduction by half of the tax on the income of legal persons under Article 6 of Decree No 601/73 and that that reduction was accompanied by the exemption from the retention under Article 10a of Law No 1745/62, regardless of the fact that a banking foundation may carry on, otherwise than as its main activity, a business activity.

39 Also according to the referring court, the Commissione tributaria regionale di Firenze referred, in that regard, to the new regime arising from Law No 461/98 and Decree No 153/99, which provides expressly that the tax advantage in question applies to banking foundations.

40 It considered that, in the case before it, it had not been shown that the business activity took precedence over the socially beneficial aims.

41 The Ministero dell'Economia e delle Finanze appealed in cassation against the decision given.

42 It relies, in particular, on breach of Article 10a of Law No 1745/62, Article 6 of Decree No 601/73 and Article 14 of the preliminary provisions of the Italian Civil Code, by virtue of which laws which form

exceptions to general rules or to other laws do not apply outside the cases and circumstances for which they provide.

43 In its order for reference, the Corte suprema di cassazione observes that the outcome of the main proceedings on the basis of national law must take into account the question of the compatibility of the tax regime applicable to banking foundations with Community law, in particular with Articles 12 EC, 43 et seq. EC, 56 et seq. EC, and 87 EC and 88 EC. It notes that, according to the Court's settled case-law, the national authorities must apply, if need be of their own motion, the rules of Community law, if necessary not applying national rules contrary thereto.

44 As regards Articles 87 EC and 88 EC, the national court notes that, if the tax measures in question in the main proceedings had to be regarded as amounting to State aid in favour of certain undertakings or certain products, they could not be implemented without a prior decision of the Commission as to their compatibility. Until the adoption of such a decision, the national courts would, as a result of the direct effect of Article 88(3) EC, have to decline to apply them.

45 In that regard, the national court states that Decision 2003/146 examined the tax measures laid down in Article 12(2) of Decree No 153/99 in the light of Articles 87 EC and 88 EC.

46 Under that decision, the measures examined, implemented in favour of banking foundations which do not directly carry on an activity in the sectors listed in Article 1 of that decree, as amended by Law No 448/01, do not amount to State aid within the meaning of Article 87(1) EC on the ground that they are not granted to 'undertakings' within the meaning of that provision.

47 The referring court states that there is disagreement as to whether or not banking foundations are commercial in nature.

48 The Italian tax authorities have steadfastly maintained that banking foundations are commercial in nature, so that they are subject to the normal tax regime.

49 The Italian Government, in the course of the procedure which led to Decision 2003/146, maintained for its part that banking foundations cannot be regarded as 'undertakings' for the purposes of the competition rules.

50 Differences exist even within the referring court. Certain decisions have accepted the non-commercial nature of banking foundations, on the ground that the management of shareholdings in banking undertakings, as well as of shareholdings in undertakings other than the banking company, is merely instrumental in procuring the financial resources essential to the pursuit of the social and cultural objects assigned to the body. Other decisions have been to the contrary effect, accepting that the social and cultural objects were immaterial for the purposes of the tax relief regime, once the entities in question could operate on the banking market and other markets in competition with other undertakings.

51 The referring court points out that Article 12(2) of Decree No 153/99 expressly extends the regime provided for by Article 6 of Decree No 601/73, until their adoption of provisions adapting their statutes to Decree No 153/99, to banking foundations which do not have the nature of commercial entities and which have pursued mainly socially beneficial aims in the public interest.

52 It adds that, according to some national case-law, Article 12(2) of Decree No 153/99 is an aid to construction, so that the tax regime in question applies also to tax years prior to the entry into force of Decree No 153/99.

53 It considers that it is therefore necessary to examine the validity of Decision 2003/146. In that regard,

if banking foundations had to be regarded as undertakings by nature, the decision would be invalid.

54 The national court takes the view that the simultaneous assignment, on the basis of a statutory requirement, to legal entities specially constituted for that purpose, of dominant ownership of a large proportion of banking undertakings and the maintenance of that situation for a considerable period, as well as the use of the proceeds from the disposal of such holdings to acquire and manage substantial holdings in other undertakings, with different corporate objectives, including the economic development of the system, gives rise to an economic activity through which income is obtained, even if that income cannot be distributed and must be used predominately for non-profit-making purposes.

55 The referring court points out that, at the end of the 1995-1996 financial year, the banking foundations had net assets of ITL 50 billion and that, at 31 December 2002, their book value amounted to EUR 37 thousand million, not counting any appreciation in the shareholdings owned, which are normally entered at their historical book value.

56 The referring court notes that the carrying on of non-profit-making activities by the banking foundations cannot hide the characteristic element of the system, that is, that those banking foundations' purpose, both organically and functionally, is to assume the ownership and administration of a large number of banking undertakings by exercising over them powers of control, among which are the appointment and removal of directors.

57 Such a function cannot be regarded as falling outside the competition rules. That function is a vital aspect of the public banking system and, according to the principles of Community law, always constitutes the exercise of an economic activity. It unquestionably represents a potential element of distortion of the market and intra-Community trade, particularly because banking foundations could also acquire shareholdings in other undertakings, including banking undertakings.

58 Banking foundations thus exist in a legal and economic symbiosis with the public banking system, so that they are not alien to that system or the market in question.

59 The national court asks, in addition, whether the tax regime in question in the main proceedings is in breach of the principle of non-discrimination enshrined in Article 12 EC, and, at the same time, in breach of the principles of freedom of establishment and free movement of capital, established in Articles 43 EC and 56 EC respectively.

60 In those circumstances, the Corte suprema di cassazione decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must a group of bodies (namely banking foundations), created on the basis of Law No 218/90 and Legislative Decree No 356/90, as subsequently amended, in order to hold controlling holdings in companies engaged in banking activity and in order to administer those holdings, in relation to a very large number of bodies operating on the market, with the proceeds of the controlled undertakings devolving to the latter, be considered to be subject to the Community rules on competition — even where they are assigned objects of social benefit? With regard to the rules introduced by Legislative Decree No 153/99, does the possibility afforded those entities of using the proceeds of the disposal of such holdings to acquire and manage substantial shareholdings in other undertakings — including banking undertakings — and also controlling shareholdings in non-banking undertakings for different purposes, including the economic development of the system, similarly constitute a commercial activity for the purposes of the application of Community law on competition?

(2) Consequently, are those entities, under the rules contained in Law No 218/90 and Legislative

Decree No 356/90, as subsequently amended, as well as the reform contained in Law No 461/98 and Legislative Decree No 153/99, subject to the Community rules on State aid (Articles 87 EC and 88 EC), in relation to a preferential tax regime which applies to them?

(3) If Question 2 above is answered in the affirmative, does or does not the system of relief from direct tax on dividends received, which is at issue in this case, constitute State aid, within the meaning of Article 87 EC?

(4) Again, if Question 2 above is answered in the affirmative, is [Decision 2003/146], in which the rules on State aid were held to be inapplicable to the foundations of banking origin, valid, having regard to the issues of lawfulness and the lack and/or inadequacy of reasoning …?

(5) Leaving out of consideration the question whether the rules on State aid are applicable, does according more favourable tax treatment to the distribution of the profits of the – exclusively national – assignee banks, controlled by the foundations, and received by the latter, or of those undertakings in which holdings were acquired using the proceeds from the disposal of holdings in assignee banks, constitute discrimination in favour of the undertakings invested in as compared with the other undertakings operating on the market and, at the same time, infringe the principles of freedom of establishment and the free movement of capital, in relation to Articles 12 EC, 43 et seq. EC and Article 56 et seq. EC?'

III – The questions referred

A –Admissibility of the questions

1. The admissibility of the first, second, and third questions

(a) Observations submitted to the Court

61 The defendants in the main proceedings submit that the first three questions are inadmissible on the grounds that:

– contrary to the referring court's statement, the exemption provided for by Article 10a of Law No 1745/62 concerns only a retention on account of tax and not a withholding tax;

– the questions referred raise a purely national point, which is simply to establish whether, in the light of the general rules laid down in Article 10a of Law 1745/62, the banking foundations are entitled to the exemption under that provision.

62 The Italian Government and the Commission do not contest the admissibility of the first three questions referred.

(b) Findings of the Court

63 According to settled case-law, the Court has no power, within the framework of Article 234 EC, to give preliminary rulings on the interpretation of rules pertaining to national law (Case 75/63 *Hoekstra* (*néeUnger)* [1964] ECR 177, 186 and Case C-341/94 *Allain* [1996] ECR I-4631, paragraph 11). The jurisdiction of the Court is confined to considering provisions of Community law only (Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraph 5). It is for the national court to assess the scope of the national provisions and the manner in which they must be applied (Case C-45/94 *Cámara de Comercio, Industria y Navegación de Ceuta* [1995] ECR I-4385, paragraph 26).

64 In the main proceedings, it is thus for the referring court to determine whether the exemption under Article 10a of Law No 1745/62 concerns a retention on account of tax due or a withholding tax.

65 It is also for that court to evaluate whether the defendant banking foundation is entitled to such exemption for the tax year in question, by the effect of the combined application of Article 10a of Law No 1745/62 and Article 6 of Decree No 601/73, and, if necessary, the retrospective application of Article 12(2) of Decree No 153/99.

66 If so, the referring court will have to decide whether the corresponding tax advantage amounts to State aid within the meaning of Article 87(1) EC. If that is the case, that tax advantage cannot, under Article 88(3) EC, be implemented unless it has been notified to the Commission.

67 The question which, if necessary, the national court will have to decide concerns Community law.

68 In those circumstances, the first three questions referred for a preliminary ruling, since they contain that question, are admissible.

2. The admissibility of the fourth question

(a) Observations submitted to the Court

69 The defendants in the main proceedings maintain that the fourth question referred, relating to the validity of Decision 2003/146, is inadmissible on the ground that that decision has become final in respect of the Italian Republic which, having had the opportunity to do so, has not brought proceedings for annulment on the basis of Article 230 EC (Case C-188/92 *TWDTextilwerke Deggendorf* [1994] ECR I-833).

70 The Italian Government submits that the fourth question is irrelevant, since Decision 2003/146 was adopted with respect to the banking foundations' regime as amended by Decree No 153/99.

71 The Commission also submits that that question is inadmissible because the main proceedings cover the situation existing in 1998, whereas Decision 2003/146 examined the tax reliefs accorded to banking foundations by Decree No 153/99, reliefs which, in addition, correspond to tax advantages other than the exemption under Article 10a of Law No 1745/62.

(b) Findings of the Court

72 The question seeking determination of the validity of Decision 2003/146 was not referred at the request of a legal entity which, having had the opportunity to bring proceedings for annulment of that decision, has not done so within the period laid down by Article 230 EC.

73 The question was referred by the national court of it own motion.

74 Consequently, it cannot be declared inadmissible by virtue of the case-law resulting from *TWD Textilwerke Deggendorf*.

75 Nevertheless, it must be recalled that, according to settled case-law, the Court may decide not to give a preliminary ruling determining the validity of a Community act where it is quite obvious that that determination, requested by the national court, bears no relation to the actual facts of the main action or its purpose (Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 16).

76 Decision 2003/146 examines, in the light of Article 87 EC et seq., in particular, Article 12(2) of Decree No 153/99, relating to the grant of the reduction by half of the tax provided for under Article 6 of

Decree No 601/73.

77 That reduction is a tax advantage distinct from the exemption from retention accorded by Article 10a of Law No 1745/62.

78 In paragraph 61 and Article 1 of Decision 2003/146, the Commission concludes that the measure introduced by Article 12(2) of Decree No 153/99 does not constitute State aid in favour of banking foundations which do not directly carry out activities in the sectors listed in Article 1 of that decree, as amended by Law No 448/01 (see paragraph 22 above).

79 It will therefore be for the referring court to decide whether or not Article 12(2) of Decree No 153/99 has, in domestic law, any effect on the application of Article 10a of Law No 1745/62 in the main proceedings (see paragraph 65 above), in relation to the 1998 tax year.

80 If so, that court will have to determine whether the tax advantage in question amounts to State aid within the meaning of Article 87(1) EC.

81 If not, it will have to undertake the same determination if it holds that Article 10a of Law No 1745/62 benefits the defendant in the main proceedings in connection with its application in combination solely with Article 6 of Decree No 601/73.

82 However, its determination cannot in any event be affected by Decision 2003/146.

83 The Commission's conclusion that the measure provided for by Article 12(2) of Decree No 153/99 does not constitute State aid is based on the finding that the banking foundations are not 'undertakings' within the meaning of Article 87(1) EC.

84 That finding is the outcome of the analysis by the Commission of the new regime for banking foundations resulting from Law No 461/98, Decree No 153/99 and Law No 448/01, a regime which entered into effect after the 1998 tax year, which is the one in question in the main proceedings.

85 That new regime differs significantly, as is clear from the account of the national legal framework given in paragraphs 7 to 32 above, from the previous regime, and, apart from Article 12(2) of Decree No 153/99, it is not submitted that it applies retrospectively.

86 On the legal level, the Commission's evaluation as to whether the banking foundations were to be classed as 'undertakings' was therefore based on a regime different to that applicable in the course of the tax year in question in the main proceedings.

87 In that regard, in paragraph 43 of Decision 2003/146, the Commission notes, as important factors, that:

– Decree No 153/99 introduced, as regards the control of commercial undertakings by banking foundations, 'specific safeguards', which are analysed in paragraphs 36 to 39 of that decision;

– Law No 448/01 reinforced the separation between banking foundations and financial institutions, thus helping to allay the concerns expressed on that point in the decision to initiate the procedure.

88 In addition, in the factual area, the Commission took into account in its assessment of whether the banking foundations carried on directly activities in the sectors covered by the applicable provisions the description of a factual situation existing after the 1998 tax year, furnished by the Italian authorities by letter of 16 January 2001.

89 In paragraph 51 of its decision, the Commission observes that the Italian authorities stated in that letter

that ‘for the time being’, none of the foundations was taking advantage of the possibility, provided for by law, of directly carrying out an activity in those sectors, and, in paragraph 54 of that decision, it maintains that that information led it ‘to revise its preliminary view, as expressed in its decision to initiate the procedure, regarding the nature of foundations as undertakings’.

90 In that context, the evaluation by the Commission of the treatment of the banking foundations under their new regime cannot determine the evaluation of their treatment under their previous regime, if necessary in the light of a factual situation which is itself different.

91 Therefore, it is obvious that the referring court’s question relating to the validity of Decision 2003/146 bears no relation to the purpose of the main proceedings, with the result that it is irrelevant to the resolution thereof.

92 It must therefore be declared inadmissible.

3. The admissibility of the fifth question

(a) Observations submitted to the Court

93 The defendants in the main proceedings submit that the fifth question, relating to the existence of discrimination or restrictions on the freedom of establishment and the free movement of capital, is inadmissible because of its vagueness. The national court does not specify which aspects of the national legislation in question might amount to an obstacle to the exercise of the freedoms guaranteed by the EC Treaty. Nor does it state clearly whether it is the banking foundations or the banking companies which benefit from discrimination.

94 The Italian Government and the Commission do not challenge the admissibility of the fifth question.

(b) Findings of the Court

95 Contrary to what the defendants in the main proceedings maintain, the referring court states expressly, in the fifth question, that:

– it is the tax advantage in question in the main proceedings which could give rise to discrimination and to restrictions on the freedom of establishment or the free movement of capital;

– the discrimination and restrictions exist for the benefit of undertakings, whether banking or not, in which the banking foundations own shareholdings.

96 The fifth question is therefore admissible.

B – The interpretation of the relevant provisions of Community law

97 By it first and second questions, which it is convenient to consider together and to read in the light of the considerations set out in paragraphs 84 to 90 of this judgment as regards the irrelevance of the new regime governing banking foundations resulting from Law No 461/98, Decree No 153/99 and Law No 448/01, the national court is asking, in essence, whether a legal person such as that in question in the main proceedings can, on account of the regime applicable at the period concerned, be treated as an ‘undertaking’ within the meaning of Article 87(1) EC, and, as such, subject at that period to the Community rules relating to State aid.

98 By its third question, in order to determine whether the State measure introduced without taking account of the preliminary examination procedure established by Article 88(3) EC should or should not

be made subject to it, the same court is asking, in essence, whether an exemption from retention on dividends such as that in question in the main proceedings can be regarded as State aid within the meaning of Article 87(1) EC.

99 As regards the fifth question, it is appropriate to recall that the general prohibition of all discrimination on grounds of nationality laid down by Article 12 EC applies independently only to situations governed by Community law for which the Treaty lays down no specific rules of non-discrimination (see, in particular, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 38). However, in relation to the right of establishment and the free movement of capital, the principle of non-discrimination was implemented by Articles 43 EC and 56 EC respectively. The fifth question must therefore be read as referring only to the latter provisions.

100 By that question, the national court is asking, in essence, whether a tax advantage such as that in question in the main proceedings constitutes a restriction of the freedom of establishment or of the free movement of capital provided for in Articles 43 EC and 56 EC, for the benefit of undertakings, whether banking or not, in which the banking foundations own shareholdings, compared to other undertakings operating on the market concerned, in which such foundations do not have shareholdings.

1. The first and second questions, relating to the meaning of ‘undertaking’ for the purposes of Article 87(1) EC

(a) Observations submitted to the Court

101 The defendants in the main proceedings submit that banking foundations are not ‘undertakings’ for the purposes of Community competition law. They are therefore not subject to the State aid regime. They merely receive dividends linked to their shareholdings, in the same way as any proprietor of a building receives the rents due under a letting contract.

102 The Italian Government submits that, for the period relevant to the main proceedings, the foundations must be regarded as undertakings for the purposes of competition law. The controlling shareholdings in the banking companies are, in that regard, sufficient indication of the commercial nature of banking foundations and the regime thus applicable to the foundations indicates the existence of an organic and functional link between them and the Italian banking system. The banking foundations must, consequently, be subject to the rules of the Treaty relating to State aid.

103 The Commission argues that the activity of holding and managing assets carried on by the banking foundations does not involve the supply of services on the market. Under the case-law, the ordinary investor who receives dividends or interest on his capital offers neither goods nor services on the market. Consequently, the banking foundations have not carried on an economic activity. They could not therefore have been regarded as ‘undertakings’, in the absence of involvement in the activity of the controlled banking company.

104 As regards activities consisting in paying contributions to non-profit-making bodies in socially beneficial sectors, activities carried on by the foundations, they do not correspond to the activities of an ‘undertaking’.

105 As regards financial, commercial, real estate, and asset operations necessary to or useful for socially beneficial aims in the public interest of banking foundations, activities which they were authorised to pursue under Article 12 of Decree No 356/90, they could, however, have included aspects of the activities of an undertaking in so far as they included a direct offer on the market for goods or services.

106 Finally, bodies such as banking foundations are not ‘undertakings’ within the meaning of Article 87

EC, unless they have offered goods or services directly on the market as part of operations necessary or useful in order to attain their socially beneficial aims in the public interest.

(b) The Court's reply

107 According to settled case-law, in the field of competition law, the concept of 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraph 46).

108 Any activity consisting in offering goods or services on a given market is an economic activity (see, in particular, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75).

109 Usually the economic activity is carried on directly on the market.

110 However, that may be the case both of an operator in direct contact with the market and, indirectly, of another entity controlling that operator as part of an economic unit which they together form.

111 In that regard, it must be pointed out that the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset.

112 On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking.

113 It must therefore itself, in that respect, be regarded as an undertaking within the meaning of Article 87(1) EC.

114 If that is not the case, the simple separation of an undertaking into two different entities, the first of which pursues directly the former economic activity and the second of which controls the first, being fully involved in its management, would be sufficient to deprive the Community rules relating to State aid of their practical effect. It would enable the second entity to benefit from subsidies or other advantages granted by the State or by means of State resources and to use them in whole or in part for the benefit of the former, in the interest, also, of the economic unit formed by the two entities.

115 It must be held that involvement in the management of a banking company by an entity like the banking foundation which is party to the main proceedings can occur in the context of a regime such as that which arose, for the period concerned, from Law No 218/90 and from Decree No 356/90.

116 In the context of that regime:

– a banking foundation controlling the capital of a banking company, while it cannot engage directly in the banking activity, must ensure the 'operational continuity' between itself and the controlled bank;

– to that end, provisions must require that the members of the management committee or the banking foundation's equivalent body are appointed to the board of directors and members of the controlling body to the supervisory committee of the banking company;

– the banking foundation must transfer a defined proportion of the income from the shareholdings in the banking company to a special reserve to be used for subscribing to increases in capital of that banking company;

– it may invest the reserve, in particular, in securities of the controlled banking company.

117 Such rules reveal a function of banking foundations going beyond the simple placing of capital by an investor. They make possible the exercise of functions relating to control, but also to direction and financial support. They illustrate the existence of organic and functional links between the banking foundations and the banking companies, which is confirmed by the maintenance, particularly under a provision like Article 14 of Decree No 356/90, of supervision by the Minister for the Treasury.

118 To see whether the banking foundation which is a defendant in the main proceedings is to be classed as an 'undertaking', it is for the national court to determine whether it not only held controlling shareholdings in a banking company, but, in addition, actually exercised that control by involving itself directly or indirectly in the management of the latter.

119 So far as concerns, moreover, the role entrusted to the banking foundations by the national legislature in the fields of public interest and social assistance, a distinction must be made between the simple payment of contributions to non-profit-making organisations and the activity carried on directly in those fields.

120 Treatment of the banking foundation as an 'undertaking' seems to be excluded in respect of an activity limited to the payment of contributions to non-profit-making organisations.

121 As the Commission observes, that activity is of an exclusively social nature and is not carried on on the market in competition with other operators. As regards that activity, a banking foundation acts as a voluntary body or charitable organisation and not as an undertaking.

122 On the other hand, where a banking foundation, acting itself in the fields of public interest and social assistance, uses the authorisation given it by the national legislature to effect the financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it, it is capable of offering goods or services on the market in competition with other operators, for example in fields like scientific research, education, art or health.

123 On that hypothesis, which is subject to the national court's assessment, the banking foundation must be regarded as an undertaking, in that it engages in an economic activity, notwithstanding the fact that the offer of goods or services is made without profit motive, since that offer will be in competition with that of profit-making operators.

124 Where it is decided that it is to be treated as an undertaking, on account of control of a banking company and involvement in its management or on account of an activity in (inter alia) a social, scientific or cultural field, a banking foundation such as that in question in the main proceedings must, as a result, be subject to the application of the Community rules relating to State aid.

125 The reply to the first and second questions must therefore be that a legal person such as the banking foundation in question in the main proceedings may, after an examination which it is for the national court to conduct taking account of the regime applicable at the material time, be treated as an 'undertaking' within the meaning of Article 87(1) EC and, as such, subject at that time to the Community rules relating to State aid.

2. The third question, relating to the meaning of 'State aid' for the purposes of Article 87(1) EC

(a) Observations submitted to the Court

126 The defendants in the main proceedings submit that a measure such as that provided for by Article 10a of Law No 1745/62 does not amount to State aid within the meaning of Article 87(1) EC. It is not selective. It can benefit, without distinction, all non-commercial entities with the characteristics required by Article 10a of Law No 1745/62. It amounts to a general measure. It does not derogate from the general tax system. The specific characteristics of non-commercial entities justify, for reasons connected to the internal coherence of different systems, the introduction of sectoral legislation restricted to that type of organisation.

127 According to the Italian Government, if the referring court were to hold that the defendant banking foundation in the main proceedings is entitled to the exemption from the retention provided for by Article 10a of Law No 1745/62, combined with the reduction by half of the tax on the income of legal persons under Article 6 of Decree No 601/73, the tax provision in question would have to be categorised as State aid. The undertaking would be put in a privileged competitive position compared to other undertakings operating in the reference market. A reduction by half of the tax due would enable banking foundations to benefit from a tax credit as against the State, since shareholders in a company are entitled to deduct the tax paid upstream by the company in which they are shareholders, and that tax would be greater than what they would be liable to pay after the reduction.

128 The Commission submits that any exemption such as that under Article 10a of Law No 1745/62 can be categorised as State aid. The advantage is financed by the State. It is selective, as being accorded by reference to the legal form of the undertaking and to its activity in certain sectors, and, being intended to benefit organisations regarded as socially deserving, it is not justified by the nature or general scheme of the system of which it forms part. As regards the existence of an effect on trade and of distortion of competition, it would have to be evaluated in each case by the national court.

(b) The Court's reply

129 For the purpose of replying to the third question referred, the national court must be provided with the criteria for interpreting the conditions required by Article 87(1) EC for categorising a national measure as State aid, namely, (i) the financing of that measure by the State or through State resources, (ii) the selectivity of that measure, and (iii) its effect on trade between Member States and the distortion of competition resulting therefrom.

(i) The condition that the measure be financed by the State or through State resources

130 Article 87(1) EC covers 'any aid granted by a Member State or through State resources in any form whatsoever'.

131 According to settled case-law, the definition of aid is more general than that of a subsidy because it includes not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, in particular, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38; Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 90, and the case-law there cited, and Case C-66/02 *Italy* v *Commission* [2005] ECR I-0000, paragraph 77).

132 Consequently, a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 87(1) EC.

Likewise, a measure allowing certain undertakings a tax reduction or to postpone payment of tax normally due can amount to State aid (*Italy* v *Commission*, paragraph 78).

133 It must therefore be held that, whatever may be the national court's answer to the question, still under discussion, whether the exemption under Article 10a of Law No 1745/62 concerns a retention on account of tax due or a withholding tax, a national measure such as that which may be held to apply involves State financing.

(ii) The condition that the measure be selective

134 Article 87(1) EC prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid.

135 A measure such as that in question in the main proceedings does not apply to all economic operators. It cannot therefore be considered to be a general measure of tax or economic policy (*Italy* v *Commission*, paragraph 99, and Case C-148/04 *Unicredito Italiano* [2005] ECR I-0000, paragraph 49).

136 As the Commission correctly maintains, the tax advantage concerned is accorded on account of the undertaking's legal form, a legal person governed by public law or a foundation, and of the sectors in which that undertaking carries on its activities.

137 It derogates from the ordinary tax regime without being justified by the nature or scheme of the tax system of which it forms part. The derogation is not based on the measure's logic or the technique of taxation, but results from the national legislature's objective of financially favouring organisations regarded as socially deserving.

138 Such an advantage is therefore selective.

(iii) The condition that trade between Member States be affected and that competition be distorted

139 Article 87(1) EC prohibits aid which affects trade between Member States and distorts or threatens to distort competition.

140 For the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44; *Italy* v *Commission*, cited in paragraph 131 above, paragraph 111, and *Unicredito Italiano*, paragraph 54).

141 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (*Italy* v *Commission*, cited in paragraph 131 above, paragraph 115, and *Unicredito Italiano*, paragraph 56, and the case-law there cited).

142 In that regard, the fact that an economic sector has been liberalised at Community level may serve to determine that the aid has a real or potential effect on competition and affects trade between Member States (see Case C-409/00 *Spain* v *Commission* [2003] ECR I-1487, paragraph 75; *Italy* v *Commission*, cited in paragraph 131 above, paragraph 116, and *Unicredito Italiano*, paragraph 57).

143 In addition, it not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of

penetrating the market of the Member State concerned. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State (*Italy* v *Commission*, cited in paragraph 131 above, paragraph 117, and *Unicredito Italiano*, paragraph 58).

144 In the main proceedings, it will be for the national court to determine in fact, in the light of the foregoing criteria for interpretation, whether the two requirements examined are satisfied.

145 Without prejudice to that determination, it may be observed that:

– the financial services sector has been involved in an important liberalisation process at Community level, enhancing the competition that may already have resulted from the free movement of capital provided for in the Treaty (*Italy* v *Commission*, cited in paragraph 131 above, paragraph 119, and *Unicredito Italiano*, paragraph 60);

– a tax advantage such as that in question in the main proceedings can strengthen, in terms of financing and/or funding, the position of the economic unit, active in the banking sector, formed by the banking foundation and the banking company;

– it can also strengthen the banking foundation's position in an activity carried on, in particular, in the social, scientific or cultural field.

146 Taking account of all the foregoing matters, the reply to the third question referred must be that an exemption from retention on dividends such as that in question in the main proceedings may, after an examination which it is for the national court to conduct, be categorised as State aid within the meaning of Article 87(1) EC.

3. The fifth question, relating to the definition of 'restrictions on the freedom of establishment' and 'restrictions on the free movement of capital' within the meaning of Articles 43 EC and 56 EC.

(a) Observations submitted to the Court

147 The defendants in the main proceedings deny the existence, suggested by the fifth question, of an obstacle to the freedom of establishment or to the free movement of capital in favour of the banking companies. They submit than an exemption like that under Article 10a of Law No 1745/62 does not favour those companies, which are simply responsible for the recovery of the tax due from the undertakings receiving the income. Those companies gain no advantage from the exemption from the retention on the profits distributed.

148 The Italian Government maintains that, because of the tax advantage in question in the main proceedings, the company in which a banking foundation owns shares may benefit from greater investments by it, which could give rise to an infringement of the freedom of establishment or to an infringement of the free movement of capital capable of creating distortions on the market concerned.

149 The Commission submits that the tax advantage benefits not the banking company, but the banking foundation.

(b) The Court's reply

150 In view of the replies given to the first three questions taking account of the facts and law relevant to the main proceedings, it is not necessary to consider the fifth question, whatever the referring court may decide as regards the treatment of the tax advantage in question in the light of the Community rules relating to State aid.

151 If the referring court categorises the tax advantage as State aid, that advantage will have to be withdrawn, with the result that there will remain no difference in treatment susceptible to analysis in the light of Articles 43 EC and 56 EC.

152 If, on the contrary, it decides not to categorise it as State aid, the question of the existence of restrictions on the freedom of establishment or on the free movement of capital will not arise.

Costs

153 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 (Second Chamber) hereby rules:

1. **A legal person such as that in question in the main proceedings may, after an examination which it is for the national court to conduct taking account of the regime applicable at the material time, be treated as an 'undertaking' within the meaning of Article 87(1) EC, and, as such, subject at that time to the Community rules relating to State aid.**

2. **An exemption from retention on dividends such as that in question in the main proceedings may, after an examination which it is for the national court to conduct, be categorised as State aid within the meaning of Article 87(1) EC.**

[Signatures]

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* Language of the case: Italian.

JUDGMENT OF THE COURT (Second Chamber)

18 July 2007 (*)

(Failure of a Member State to fulfil obligations – Judgment of the Court establishing the failure to fulfil obligations – Non-implementation – Article 228 EC – Measures necessary to comply with the judgment of the Court – Rescission of a contract)

In Case C-503/04,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 7 December 2004,

Commission of the European Communities, represented by B. Schima, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and C. Schulze-Bahr, acting as Agents, and H.-J. Prieß, Rechtsanwalt,

defendant,

supported by

French Republic, represented by G. de Bergues and J.-C. Gracia, acting as Agents, with an address for service in Luxembourg,

Kingdom of the Netherlands, represented by H.G. Sevenster and D.J.M. de Grave, acting as Agents,

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, P. Kūris, K. Schiemann, J. Makarczyk and J.-C. Bonichot, Judges,

Advocate General: V. Trstenjak,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 7 December 2006,

after hearing the Opinion of the Advocate General at the sitting on 28 March 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to adopt all the necessary measures to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609 regarding the conclusion of a contract for the collection of waste water by the municipality of Bockhorn (Germany) and of a contract for waste disposal by the City of Brunswick (Germany), the Federal Republic of Germany has failed to fulfil its obligations under Article 228(1) EC, and to order that Member State to pay to the Commission's own resources account of the European Community a penalty payment of EUR 31 680 for each day of delay in implementing the measures necessary to comply with that judgment in respect of the contract relating to the municipality of Bockhorn and of EUR 126 720 for each day of delay in implementing the measures necessary to comply with the abovementioned judgment in respect of the contract relating to the City of Brunswick, in each case from the date of delivery of that judgment until the measures are implemented.

2 By order of the President of the Court of 6 June 2005, the French Republic, the Kingdom of the Netherlands and the Republic of Finland were granted leave to intervene in support of the forms of order sought by the Federal Republic of Germany.

Legal context

3 Article 2(6) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) provides:

'The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.'

4 Article 3(1) of Directive 89/665 states:

'The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.'

The judgment in *Commission* v *Germany*

5 In paragraphs 1 and 2 of the operative part of the judgment in *Commission* v *Germany*, the Court:

'1. Declare[d] that since the Municipality of Bockhorn (Germany) failed to invite tenders for the award of the contract for the collection of its waste water and failed to publish notice of the results of the procedure for the award of the contract in the Supplement to the *Official Journal of the European Communities*, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Article 15(2) and Article 16(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the

coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1);

2. Declare[d] that since the City of Braunschweig (Germany) awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down in Article 11(3) of Directive 92/50 for an award by privately negotiated procedure without a Community-wide invitation to tender had not been met, the Federal Republic of Germany, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 and Article 11(3)(b) of that directive.'

Pre-litigation procedure

6 By letter of 27 June 2003, the Commission requested the German Government to notify it of the measures taken to comply with the judgment in *Commission* v *Germany*.

7 Since it was not satisfied by the German Government's response of 7 August 2003, on 17 October 2003 the Commission requested the German authorities to submit their observations within two months.

8 In its letter of 23 December 2003, the German Government referred to a letter sent in early December 2003 to the government of the *Land* of Lower Saxony asking it to ensure compliance with the public procurement legislation in force and to notify it of the measures intended to prevent similar infringements in future. In addition, the German Government referred to Paragraph 13 of the German Vergabeverordnung (Public Procurement Regulation) which entered into force on 1 February 2001 and which provides that a contract concluded by a contracting authority is invalid if unsuccessful tenderers have not been informed of the conclusion of that contract at least 14 days before its award. That government also submitted that Community law did not require the rescission of the two contracts at issue in the case which gave rise to the judgment in *Commission* v *Germany*.

9 On 1 April 2004, the Commission sent a reasoned opinion to the Federal Republic of Germany, to which the latter responded on 7 June 2004.

10 Since the Commission considered that the Federal Republic of Germany had failed to comply with the judgment in *Commission* v *Germany*, it decided to bring the present action.

The action

The subject-matter of the action

11 Since the Federal Republic of Germany stated in its defence that on 28 February 2005 the contract for the collection of waste water concluded by the municipality of Bockhorn was to be annulled, the Commission stated in its reply that it was not pursuing either its action or its claim for imposition of a periodic penalty payment in so far as they related to that contract.

12 As the Commission has partly discontinued its action, it is necessary to examine it only in so far as it relates to the contract concluded by the City of Brunswick for waste disposal.

Admissibility

13 The Federal Republic of Germany alleges, firstly, that the Commission has no interest in bringing proceedings because of its failure to submit an application for interpretation within the meaning of Article 102 of the Rules of Procedure. According to that Member State, the dispute relating to the

consequences which follow from the judgment in *Commission* v *Germany* could and should have been resolved by way of an application for interpretation of that judgement and not by way of an action based on Article 228 EC.

14 However, that argument cannot be accepted.

15 In proceedings for failure to fulfil obligations under Article 226 EC, the Court is required to find only that a provision of Community law has been infringed. Pursuant to Article 228(1) EC, the Member State concerned is required to take the measures necessary to comply with the judgment of the Court (see, to that effect, Case C-126/03 *Commission* v *Germany* [2004] ECR I-11197, paragraph 26). Since a question concerning the measures required for the implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC does not form part of the subject-matter of such a judgment, such a question cannot form the subject-matter of an application for interpretation of a judgment (see also, to that effect, order in Joined Cases 146/85 INT and 431/85 INT *Maindiaux and Others* v *ESC and Others* [1988] ECR 2003, paragraph 6).

16 Furthermore, it is precisely at the stage of an action under Article 228(2) EC that it is for the Member State, whose responsibility it is to draw the conclusions to which the judgment establishing the failure to fulfil obligations appears to it to give rise, to justify the validity of those conclusions, should they be criticised by the Commission.

17 Secondly, in its rejoinder, the Federal Republic of Germany, supported by the Kingdom of the Netherlands, requests the Court to close the procedure by application of Article 92(2) of the Rules of Procedure, as the action has become devoid of purpose since, with effect from 10 July 2005, the contract concluded by the City of Brunswick concerning waste disposal has also been rescinded.

18 The Commission responds, in its observations relating to the statements in intervention of the French Republic, the Kingdom of the Netherlands and of the Republic of Finland, that it retains an interest in obtaining from the Court a ruling on whether, on expiry of the period laid down in the reasoned opinion issued under Article 228 EC, the Federal Republic of Germany had already complied with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*. The Commission states, however, that an order for payment of a periodic penalty payment is no longer necessary.

19 In that regard, it should be recalled that, according to settled case-law, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885, paragraph 27, and case-law cited).

20 In the present case, the period referred to in the reasoned opinion which, as is apparent from the receipt stamp, was received by the German authorities on 1 April 2004, was one of two months. The reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is therefore 1 June 2004. At that date, the contract concluded by the City of Brunswick for waste disposal had not yet been terminated.

21 Nor, moreover, is the action inadmissible contrary to the Federal Republic of Germany's submissions at the hearing, on the ground that the Commission is no longer requesting the imposition of a periodic penalty payment.

22 Since the Court has jurisdiction to impose a financial penalty not suggested by the Commission (see, to that effect, Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 90), the action is not inadmissible simply because the Commission takes the view, at a certain stage of the procedure before the Court, that a penalty is no longer necessary.

23 With regard, thirdly, to the plea of inadmissibility based on Article 3 of Directive 89/665, to which the Advocate General refers in point 44 of her Opinion, it is appropriate to note that the particular procedure laid down in that provision constitutes a preventive measure which can neither derogate from nor replace the powers of the Commission under Articles 226 EC and 228 EC (see, to that effect, Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 27, and case-law cited).

24 It follows from all the foregoing that the action is admissible.

Substance

25 The Commission takes the view that the Federal Republic of Germany has not adopted measures sufficient to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, since that Member State did not, before the date of expiry of the period laid down in the reasoned opinion, rescind the contract concluded by the City of Brunswick for waste disposal.

26 The Federal Republic of Germany reiterates the position expressed in the letter from the German Government of 23 December 2003 that rescission of the contracts affected by that judgment was not required and submits that the steps set out in that communication constituted measures sufficient to comply with that judgment.

27 In that regard, it should be recalled that, as is apparent from paragraph 12 of the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, the City of Brunswick and Braunschweigsche Kohlebergwerke ('BKB') concluded a contract under which BKB was made responsible for residual waste disposal by thermal processing for a period of 30 years from June/July 1999.

28 As the Advocate General observes in point 72 of her Opinion, the measures mentioned by the German Government in its letter of 23 December 2003 were intended exclusively to prevent the conclusion of new contracts which would constitute failures to fulfil obligations similar to those found in that judgment. However, they did not prevent the contract concluded by the City of Brunswick from continuing to have full effect on 1 June 2004.

29 Accordingly, since that contract had not been terminated on 1 June 2004, the failure to fulfil obligations continued on that date. The adverse effect on the freedom to provide services arising from the disregard of the provisions of Directive 92/50 subsists throughout the entire performance of the contracts concluded in breach thereof (Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 36). Furthermore, at that date, the failure to fulfil obligations was to continue for decades, given the long period for which the contract in question had been concluded.

30 Having regard to all those facts, the view cannot be taken, in a situation such as that of the present case, that, with regard to the contract concluded by the City of Brunswick, the Federal Republic of Germany had adopted, as at 1 June 2004, measures implementing the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*.

31 However, the Federal Republic of Germany, supported by the French Republic, the Kingdom of the Netherlands and the Republic of Finland, submits that the second subparagraph of Article 2(6) of Directive 89/665, which allows Member States to provide in their legislation that, after the conclusion of a contract following the award of a public contract, the bringing of an action can give rise only to an award of damages and, thus, to exclude any possibility of rescission of that contract, precludes a finding of failure to fulfil obligations within the meaning of Article 226 EC with regard to such a contract entailing the obligation to rescind it. According to those Member States, the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda*, the fundamental right to property, Article 295 EC and the case-law of the Court regarding the limitation in time of the

effects of a judgment also preclude such a result.

32 However, such arguments cannot be upheld.

33 With regard, firstly, to the second subparagraph of Article 2(6) of Directive 89/665, the Court has already held that, although that provision permits the Member States to preserve the effects of contracts concluded in breach of directives relating to the award of public contracts and thus protects the legitimate expectations of the parties thereto, its effect cannot be, unless the scope of the EC Treaty provisions establishing the internal market is to be reduced, that the contracting authority's conduct vis-à-vis third parties is to be regarded as in conformity with Community law following the conclusion of such contracts (Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 39).

34 If the second subparagraph of Article 2(6) of Directive 89/665 does not affect the application of Article 226 EC, nor can it affect the application of Article 228 EC, without, in a situation such as that in the present case, reducing the scope of the Treaty provisions establishing the internal market.

35 Furthermore, the second subparagraph of Article 2(6) of Directive 89/665, which has the objective of guaranteeing the existence, in all Member States, of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures (Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 71), relates, as is apparent from its wording, to the compensation which a person harmed by an infringement committed by a contracting authority may obtain from it. That provision, because of its specific nature, cannot be regarded also as regulating the relations between a Member State and the Community in the context of Articles 226 EC and 228 EC.

36 With regard, secondly, even if it were to be accepted that the principles of legal certainty and of the protection of legitimate expectations, the principle *pacta sunt servanda* and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission, Member States cannot rely thereon to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC and thereby evade their own liability under Community law (see, by analogy, Case C-470/03 *AGM.-COS.MET* [2007] ECR I-0000, paragraph 72).

37 With regard, thirdly, to Article 295 EC, according to which 'this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership', it should be recalled that that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (see Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 67, and case-law cited). The particular features of the system of property ownership in a Member State cannot therefore justify the continuation of a failure to fulfil obligations which consists of an obstacle to the freedom to provide services in disregard of the provisions of Directive 92/50.

38 Moreover, it should be recalled that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under Community law (see *Commission* v *Italy*, paragraph 25, and case-law cited).

39 Fourthly, with regard to the Court's case-law on the limitation in time of the effects of a judgment, it is sufficient to state that, in any event, that case-law does not justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC.

40 Although, with regard to the contract concluded by the City of Brunswick, it must therefore be held that the Federal Republic of Germany had not, as at 1 June 2004, adopted the measures to implement the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, the same is not, however,

true at the date of examination of the facts by the Court. It follows that the imposition of the periodic penalty payment, which the Commission is in fact no longer requesting, is not justified.

41 In the same way, the facts of the present case are such that it does not appear necessary to order payment of a lump sum.

42 Accordingly, it must be held that, by having failed, at the date on which the period laid down in the reasoned opinion issued by the Commission pursuant to Article 228 EC, to adopt all the necessary measures to comply with the judgment in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* regarding the conclusion of a contract for waste disposal by the City of Brunswick, the Federal Republic of Germany has failed to fulfil its obligations under that article.

Costs

43 Under 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. As the Commission has asked that costs be awarded against the Federal Republic of Germany and the latter has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs. The intervening Member States, the French Republic, the Kingdom of the Netherlands and the Republic of Finland, must be ordered to bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

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

1. **Declares that, by having failed, at the date on which the period laid down in the reasoned opinion issued by the Commission of the European Communities pursuant to Article 228 EC, to adopt all the necessary measures to comply with the judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* regarding the conclusion of a contract for waste disposal by the City of Brunswick (Germany), the Federal Republic of Germany has failed to fulfil its obligations under that article;**

2. **Orders the Federal Republic of Germany to pay the costs;**

3. **Orders the French Republic, the Kingdom of the Netherlands and the Republic of Finland to bear their own costs.**

[Signatures]

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* Language of the case: German.

JUDGMENT OF THE COURT (Grand Chamber)
14 December 2004 (1)

(Directive 2001/37/EC – Manufacture, presentation and sale of tobacco products – Article 8 – Prohibition of placing on the market of tobacco products for oral use – Validity – Interpretation of Articles 28 EC to 30 EC – Compatibility of national legislation laying down the same prohibition)

In Case C-210/03,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 17 April 2003, received at the Court on 15 May 2003, in the proceedings

The Queen, on the application of:

Swedish Match AB,

Swedish Match UK Ltd

v

Secretary of State for Health,

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans and K. Lenaerts, Presidents of Chambers, C. Gulmann, J.-P. Puissochet, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar, and subsequently M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 June 2004,

after considering the observations submitted on behalf of:

–
Swedish Match AB and Swedish Match UK Ltd, by G. Barling QC and M. Lester, Barrister, instructed by S. Kon, D. Roy and S. Turnbull, Solicitors,

–
the United Kingdom Government, by C. Jackson, acting as Agent, and N. Paines QC and T. Ward, Barrister,

–
the French Government, by G. de Bergues and R. Loosli-Surrans, acting as Agents,

–
the Irish Government, by D.J. O'Hagan, acting as Agent,

–
the Finnish Government, by T. Pynnä, acting as Agent,

–
the Swedish Government, by A. Kruse, acting as Agent,

–
the European Parliament, by J.L. Rufas Quintana and M. Moore, acting as Agents,

–
the Council of the European Union, by E. Karlsson and J.-P. Hix, acting as Agents,

–
the Commission of the European Communities, by I. Martínez del Peral and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2004,

gives the following

Judgment

1
This reference for a preliminary ruling concerns the validity of Article 8 of Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001 L 194, p. 26), the interpretation of Articles 28 EC to 30 EC, and the compatibility with those provisions and with the general principles of Community law of national legislation prohibiting the placing on the market of tobacco products for oral use.

2
The reference was made in the course of proceedings between Swedish Match AB and Swedish Match UK Ltd (hereinafter referred to together as ‘Swedish Match’) and the Secretary of State for Health concerning the prohibition of the marketing in the United Kingdom of tobacco products for oral use.

Legal background

Community legislation

3
Article 8a of Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1), as amended by Council Directive 92/41/EEC of 15 May 1992 (OJ 1992 L 158, p. 30), (‘Directive 89/622’) provides that the Member States are to prohibit the placing on the market of tobacco for

oral use, defined in Article 2(4) of that directive as ‘all products for oral use, except those intended to be smoked or chewed, made wholly or partly of tobacco, in powder or particulate form or in any combination of these forms – particularly those presented in sachet portions or porous sachets – or in a form resembling a food product’.

4
The 11th recital in the preamble to Directive 92/41 states that ‘it has been proved that smokeless tobacco products are a major risk factor as regards cancer and … they should therefore carry a specific warning of that risk’. According to the 12th recital in that preamble, ‘scientific experts are of the opinion that the addiction caused by tobacco consumption constitutes a danger meriting a specific warning on every tobacco product’.

5
According to the 13th recital in the preamble to Directive 92/41:

‘… new tobacco products for oral use which have appeared on the market in certain Member States are particularly attractive to young people and … the Member States most exposed to this problem have already placed total bans on these new tobacco products or intend so to do’.

6
The 14th recital in that preamble states:

‘… regarding such products, there are differences between the laws, regulations and administrative provisions of the Member States and … these products therefore need to be made subject to common rules’.

7
According to the 15th recital in the preamble:

‘... there is a real risk that the new products for oral use will be used above all by young people, thus leading to nicotine addiction, unless restrictive measures are taken in time’.

8
According to the 16th recital in the preamble:

‘… in accordance with the conclusions of the studies conducted by the International Agency for Research on Cancer, tobacco for oral use contains particularly large quantities of carcinogenic substances; … these new products cause cancer of the mouth in particular’.

9
According to the 17th recital in the preamble to that directive:

‘… the sales bans on such tobacco already adopted by three Member States have a direct impact on the establishment and operation of the internal market; … it is therefore necessary to approximate Member States’ laws, regulations and administrative provisions in this area, taking as a base a high level of health protection; … the only appropriate measure is a total ban; … however, such a ban should not affect traditional tobacco products for oral use, which will remain subject to the provisions of Directive 89/622/EEC, as amended by this Directive, applicable to smokeless tobacco products’.

10
Article 151(1) of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, ‘the Act of Accession’) provides:

‘The Acts listed in Annex XV to this Act shall apply in respect of the new Member States under the conditions laid down in that Annex.’

11
Chapter X, ‘Miscellaneous’, of Annex XV establishing the list provided for in Article 151 of the Act of Accession, provides:

‘(a)

The prohibition in Article 8a of Directive 89/622/EEC, as amended … , concerning the placing on the market of the product defined in Article 2(4) of [the] Directive … shall not apply [in the Kingdom of Sweden …], with the exception of the prohibition to place this product on the market in a form resembling a food product.

(b)

[The Kingdom of Sweden] shall take all measures necessary to ensure that the product referred to in paragraph (a) is not placed on the market in the Member States for which Directives 89/622/EEC and 92/41/EEC are fully applicable.

…’

12
Directive 2001/37 was adopted on the basis of Articles 95 EC and 133 EC and recasts Directive 89/622 and Council Directive 90/239/EEC of 17 May 1990 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes (OJ 1990 L 137, p. 36).

13
According to the 28th recital in the preamble to Directive 2001/37:

‘Directive 89/622/EEC prohibited the sale in the Member States of certain types of tobacco for oral use. Article 151 of the Act of Accession … grants the Kingdom of Sweden a derogation from the provisions of that Directive in this regard.’

14
Article 2 of Directive 2001/37, headed ‘Definitions’, provides:

‘For the purposes of this Directive:

1.

“tobacco products” means products for the purposes of smoking, sniffing, sucking or chewing, inasmuch as they are, even partly, made of tobacco, whether genetically modified or not;

…

4.

“tobacco for oral use” means all products for oral use, except those intended to be smoked or chewed, made wholly or partly of tobacco, in powder or in particulate form or in any combination of those forms, particularly those presented in sachet portions or porous sachets, or in a form resembling a food product;

…’

15

According to Article 5(4) of that directive:

‘Tobacco products for oral use, where their marketing is permitted under Article 8, and smokeless tobacco products shall carry the following warning: “This tobacco product can damage your health and is addictive”.

…’

16
Article 8 of the directive, ‘Tobacco for oral use’, provides:

‘Member States shall prohibit the placing on the market of tobacco for oral use, without prejudice to Article 151 of the Act of Accession …’.

17
Under Article 13(1) of the directive:

‘Member States may not, for considerations relating to the limitation of the tar, nicotine or carbon monoxide yields of cigarettes, to health warnings and other indications or to other requirements of this Directive, prohibit or restrict the import, sale or consumption of tobacco products which comply with this Directive, with the exception of measures taken for the purposes of verifying the data provided under Article 4.’

18
Article 15 of the directive provides inter alia that Directive 89/622 is repealed and that references to it are to be construed as references to Directive 2001/37.

National legislation

19
In the United Kingdom, the prohibition provided for in Article 8a of Directive 89/622 was transposed into domestic law by the Tobacco for Oral Use (Safety) Regulations 1992 (‘the 1992 Regulations’).

The main proceedings and the questions referred for a preliminary ruling

20
Swedish Match wished to market in the United Kingdom ‘snus’, which is finely ground or cut tobacco sold loose or in small sachet portions and intended to be consumed by placing between the gum and the lip.

21
Swedish Match wrote to the United Kingdom Department of Health on 18 March 2002, setting out the reasons why it considered that the prohibition of the placing on the market of tobacco products for oral use laid down by the 1992 Regulations was unlawful. In its reply of 24 April 2002, that department stated that it considered the prohibition to be lawful. Swedish Match brought proceedings for judicial review on 8 May 2002, submitting that the prohibition infringed various provisions of Community law. The High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court), decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1.

Are Articles 28 EC to 30 EC, applied compatibly with the general principles of proportionality, non-discrimination and fundamental rights (in particular the right to property), to be interpreted as precluding national legislation which prohibits any person from supplying, offering or agreeing to supply, exposing for supply or possessing for supply any product made wholly or partly of tobacco which is either in powder or particulate form or any combination of those forms or is presented in a

form resembling a food product and is intended for oral use other than smoking or chewing?

2. Is Article 8 of Directive 2001/37/EC invalid in whole or in part by reason of:

(a) infringement of the principle of non-discrimination;

(b) infringement of Article 28 EC and/or 29 EC;

(c) infringement of the principle of proportionality;

(d) the inadequacy of Article 95 EC and/or Article 133 EC as a legal basis;

(e) infringement of Article 95(3) EC;

(f) misuse of powers;

(g) infringement of Article 253 EC and/or the duty to give reasons;

(h) infringement of the fundamental right to property?

3. In circumstances where:

(a) a national measure implementing Article 8a of Directive 89/622/EEC was adopted in 1992;

(b) the said national measure was adopted pursuant to powers in domestic law which do not depend on the existence of an obligation to implement the directive;

(c) Directive 89/622/EEC (as subsequently amended by the Act of Accession …) is repealed and replaced by Directive 2001/37/EC, Article 8 of which re-enacts Article 8a of Directive 89/622/EEC; and

(d) Article 8 of Directive 2001/37/EC is invalid by reason of the principles referred to in questions 2(a), 2(c) or 2(h),

are those principles to be interpreted as also prohibiting the national measure in question?'

The applications for leave to submit observations in reply to the Opinion of the Advocate General,

in the alternative, for reopening of the oral procedure

22
By act lodged at the Court Registry on 4 October 2004, Swedish Match requested the Court:

– to grant it leave to submit written observations following the Opinion of the Advocate General;

– in the alternative, to order the oral procedure to be reopened, pursuant to Article 61 of the Rules of Procedure.

23
Swedish Match wishes to comment on the Advocate General's suggestions relating to the possibility of maintaining the effects of Directive 2001/37 in the event that the Court declares it invalid.

24
On this point, it must be recalled that the Statute of the Court of Justice and its Rules of Procedure make no provision for the parties to submit observations in response to the Advocate General's Opinion (see the order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 2). The application for leave to submit written observations in reply to the Advocate General's Opinion is therefore dismissed.

25
The Court may also, of its own motion, on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure, in accordance with Article 61 of the Rules of Procedure, if it considers that it lacks sufficient information or that the case should be decided on the basis of an argument which has not been debated between the parties (see Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 42, and Case C-470/00 P *Parliament* v *Ripa di Meana and Others* [2004] ECR I-0000, paragraph 33). In the present case, however, the Court, after hearing the Advocate General, considers that it has all the information necessary for it to answer the questions referred for a preliminary ruling. The application for the oral procedure to be reopened must therefore be dismissed.

The questions referred for a preliminary ruling

Question 2

26
By its second question, which should be examined first, the national court asks whether Article 8 of Directive 2001/37 is invalid in whole or in part by reason of infringement of the EC Treaty or of general principles of Community law, or by reason of misuse of powers.

The choice of Articles 95 EC and 133 EC as legal bases

27
The question is aimed at determining whether Article 95 EC constitutes an appropriate legal basis for Article 8 of Directive 2001/37, and if so whether recourse to Article 133 EC as a second legal basis for that provision is necessary or possible in this case.

28
Article 95(1) EC provides that the Council is to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

29
In this respect, it should be recalled that, while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC (see, to that effect, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraph 84), it is otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (see, to that effect, *Germany* v *Parliament and Council*, paragraph 95, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 60).

30
It also follows from the Court's case-law that, while recourse to Article 95 EC as a legal basis is possible if the aim is to prevent future obstacles to trade resulting from the heterogeneous development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them (see, to that effect, Case C-350/92 *Spain* v *Council* [1995] ECR I-1985, paragraph 35, *Germany* v *Parliament and Council*, paragraph 86, Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, paragraph 15, and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 61).

31
The Court has also held that, where the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62).

32
It should also be noted that the first subparagraph of Article 152(1) EC provides that a high level of protection of human health is to be ensured in the definition and implementation of all Community policies and activities, and that Article 95(3) EC expressly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 62).

33
It follows from the foregoing that, where there are obstacles to trade or it is likely that such obstacles will emerge in future because the Member States have taken or are about to take divergent measures with respect to a product or a class of products such as to ensure different levels of protection and thereby prevent the product or products concerned from moving freely within the Community, Article 95 EC authorises the Community legislature to intervene by adopting appropriate measures, in compliance with Article 95(3) EC and with the legal principles mentioned in the Treaty or identified in the case-law, in particular the principle of proportionality.

34
Depending on the circumstances, those appropriate measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products (see, in the context of Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24), Case C-359/92 *Germany* v *Council* [1994] ECR I-3681, paragraphs 4 and 33).

35
It is in the light of those principles that the Court must ascertain whether the conditions for recourse to Article 95 EC as legal basis were satisfied in the case of Article 8 of Directive 2001/37.

36
It must be pointed out, to begin with, that Article 8 does no more than reproduce the provisions of Article 3a

of Directive 89/622 under which the Member States are to prohibit the placing on the market of tobacco for oral use. That tobacco is defined in Directive 2001/37, and in Directive 89/622, as ‘all products for oral use, except those intended to be smoked or chewed, made wholly or partly of tobacco, in powder or in particulate form or in any combination of those forms, particularly those presented in sachet portions or porous sachets, or in a form resembling a food product’.

37
It is common ground that for those products, as indicated in the 14th recital in the preamble to Directive 92/41, there were differences, at the time of adoption of that directive, between the laws, regulations and administrative provisions of the Member States. Two of them had already prohibited the marketing of such products and a third had adopted provisions which, while not yet in force, had the same object. Those provisions were intended, according to their authors, to stop the expansion of consumption of products harmful to health which were new to the markets of the Member States and were thought to be especially attractive to young people.

38
As the market in tobacco products is one in which trade between Member States represents a relatively large part (see *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 64), those prohibitions of marketing contributed to a heterogeneous development of that market and were therefore such as to constitute obstacles to the free movement of goods.

39
Having regard also to the public’s growing awareness of the dangers to health of the consumption of tobacco products, it was likely that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting that development and intended more effectively to discourage consumption of those products (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 67).

40
Article 8 of Directive 2001/37 was adopted in a context which, from the point of view of obstacles to the free movement of goods existing in the market for tobacco products as a result of the heterogeneous development of conditions of marketing of tobacco products for oral use in the various Member States, was no different from that which existed when Article 8a of Directive 89/622 was adopted. It should be added that the Act of Accession cannot have any bearing on the assessment of that context. That Act not only excluded the Kingdom of Sweden from the scope of Article 8a, it also required that Member State to take all necessary measures to ensure that tobacco products for oral use were not placed on the market in the other Member States.

41
Action by the Community legislature on the basis of Article 95 EC was therefore justified with respect to tobacco products for oral use.

42
It follows from the foregoing that the prohibition in Article 8 of Directive 2001/37 could be adopted on the basis of Article 95 EC. It will have to be examined below whether the adoption of that measure complied with Article 95(3) EC and the legal principles referred to in the national court’s questions.

43
As regards the question whether recourse to Article 133 EC as a second legal basis of Article 8 was necessary or possible in the present case, it suffices to recall that in paragraph 97 of *British American Tobacco (Investments) and Imperial Tobacco* the Court considered that Article 95 EC constituted the only appropriate legal basis for Directive 2001/37 and that it was incorrect for it to cite Article 133 EC as well.

44
However, that incorrect reference to Article 133 EC as a second legal basis for that directive does not of itself mean that the directive is invalid (*British American Tobacco (Investments) and Imperial Tobacco*, paragraph 98). Such an error in the citations of a Community act is no more than a purely formal defect, unless it gave rise to irregularity in the procedure applicable to the adoption of that act (see, to that effect, Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraph 19, and Joined Cases C-184/02 and C-223/02 *Spain and Finland* v *Parliament and Council* [2004] ECR I-0000, paragraph 44). The Court went on to hold, in paragraph 111 of *British American Tobacco (Investments) and Imperial Tobacco*, that recourse to the twofold legal basis of Articles 95 EC and 133 EC did not give rise to irregularity in the procedure for adopting the directive and that the directive was not invalid on that account.

45
Accordingly, Article 8 of Directive 2001/37 is not invalid on account of lack of an appropriate legal basis.

Article 95(3) EC and the principle of proportionality

46
Article 95(3) EC provides that both the Commission and also the Parliament and the Council are to take as a base a high level of protection of human health, taking account in particular of any new development based on scientific facts.

47
It should also be borne in mind that the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions are appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, inter alia, Case 137/85 *Maizena* [1987] ECR 4587, paragraph 15; Case C-339/92 *ADM Ölmühlen* [1993] ECR I-6473, paragraph 15; and Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 59).

48
With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in an area such as that concerned in the present case, which involves political, economic and social choices on its part, and in which it is called on to undertake complex assessments. Only if a measure adopted in this field is manifestly inappropriate in relation to the objective which the competent institutions are seeking to pursue can the lawfulness of such a measure be affected (see, to that effect, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraphs 55 and 56; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 61; and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123).

49
With regard to Article 8a inserted in Directive 89/622 by Directive 92/41, it is apparent from the preamble to the latter directive that the prohibition of the marketing of tobacco products for oral use was the only measure that appeared appropriate to cope with the real danger that those new products would be used by young people, thus leading to nicotine addiction, with those products causing cancer of the mouth in particular.

50
Swedish Match essentially submits that, having regard to the state of the scientific information available to the Community legislature in 2001, when Article 8 of Directive 2001/37 was adopted, on which it moreover relied in amending the rules governing the warning referred to in Article 5(4) of that directive, maintenance of the prohibition of marketing tobacco products for oral use was disproportionate in relation to the objective pursued and did not take account of the development of that scientific information.

51
The answer to that argument must be that, while some experts could from 1999 call into question the assertion that, as the 16th recital in the preamble to Directive 92/41 puts it, ‘these new products cause cancer of the mouth in particular’, all controversy on that point was not eliminated at the time of adoption of Directive 2001/37. Moreover, while part of the scientific community accepted that tobacco products for oral use could be used as substitute products for cigarettes, another part challenged the correctness of such a position. From that situation it must be inferred that the scientific information which could have been available to the Community legislature in 2001 did not allow the conclusion that consumption of the products in question presented no danger to human health.

52
Moreover, like all other tobacco products, those for oral use contain nicotine, which causes addiction and whose toxicity is not disputed.

53
Now, first, it had not been shown at the time of adoption of Directive 2001/37 that the harmful effects of those products were lesser in that regard than those of other tobacco products. Second, it had been shown that they presented serious risks to health, which the Community legislature had to take into account.

54
In those circumstances, it cannot be maintained that, contrary to the provisions of Article 95(3) EC, the prohibition which follows from Article 8 of Directive 2001/37 was laid down without account being taken of the development of scientific information.

55
Moreover, nothing that has been submitted to the Court allows the view to be taken that tobacco products for oral use were not products new to the market of the Member States as it existed at the time of adoption of Directive 92/41.

56
To satisfy its obligation to take as a base a high level of protection in health matters, in accordance with Article 95(3) EC, the Community legislature was thus able, without exceeding the limits of its discretion in the matter, to consider that a prohibition of the marketing of tobacco products for oral use was necessary, and in particular that there was no alternative measure which allowed that objective to be achieved as effectively.

57
As the Advocate General observes in points 116 to 119 of his Opinion, no other measures aimed at imposing technical standards on manufacturers in order to reduce the harmful effects of the product, or at regulating the labelling of packagings of the product and its conditions of sale, in particular to minors, would have the same preventive effect in terms of the protection of health, inasmuch as they would let a product which is in any event harmful gain a place in the market.

58
It follows from the above considerations that, with respect both to the objective of ensuring a high level of protection of human health given to the Community legislature by Article 95(3) EC and to its obligation to comply with the principle of proportionality, the contested prohibition cannot be regarded as manifestly inappropriate.

Article 28 EC and/or Article 29 EC

59
It is settled case-law that the prohibition of quantitative restrictions and measures having equivalent effect

laid down by Articles 28 EC and 29 EC applies not only to national measures but also to measures adopted by the Community institutions (see in particular, to that effect, Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 15; Case C-51/93 *Meyhui* [1994] ECR I-3879, paragraph 11; and Case C-114/96 *Kieffer and Thill* [1997] ECR I-3629, paragraph 27).

60
Nevertheless, as Article 30 EC provides, the provisions of Articles 28 EC and 29 EC do not preclude prohibitions or restrictions on imports, exports or goods in transit justified inter alia on grounds of protection of the health and life of humans.

61
While the prohibition of marketing tobacco products for oral use under Article 8 of Directive 2001/37 constitutes one of the restrictions referred to in Articles 28 EC and 29 EC, it is nevertheless justified, as indicated in paragraph 58 above, on grounds of the protection of human health. It cannot therefore, in any event, be regarded as having been adopted in breach of the provisions of Articles 28 EC and 29 EC.

62
Moreover, the prohibition imposed on the Kingdom of Sweden on placing tobacco products for oral use on the markets of the other Member States derives from the provisions of point (b) of Chapter X of Annex XV to the Act of Accession, not those of Directive 2001/37.

Article 253 EC

63
It must be borne in mind that, while the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, it is not required to go into every relevant point of fact and law (see, inter alia, Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 29).

64
Furthermore, the question whether a statement of reasons satisfies the requirements must be assessed with reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. If the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution (see, in particular, Case C-100/99 *Italy* v *Council and Commission* [2001] ECR I-5217, paragraph 64, and, to that effect, *Spain and Finland* v *Parliament and Council*, paragraph 79).

65
The recitals in the preamble to Directive 92/41 set out clearly the reasons why a measure prohibiting the marketing of tobacco products for oral use was to be introduced in Directive 89/622. In particular, after recalling that scientific experts were of the opinion that all tobacco products entail dangers to health and that it had been proved that smokeless tobacco products were a major risk factor as regards cancer, the preamble further stated that new tobacco products for oral use appearing on the market in certain Member States were particularly attractive to young people, with the risk of their developing an addiction to nicotine if restrictive measures were not taken in time. It was also observed that the Member States most exposed to that problem had already placed total bans on those new products or intended to do so.

66
It should also be stated that the prohibition of marketing tobacco products for oral use laid down in Article 8 of Directive 2001/37 is confined, in the context of the recasting of earlier provisions which constitutes one of the objects of that directive, to confirming the identical measure adopted in 1992. The different treatment

reserved in 1992 for those products as opposed to other smokeless tobacco products was the result of circumstances relating to the novelty on the internal market at the time of the products affected by the prohibition, their attraction for young people, and the existence of national prohibitive measures in certain Member States.

67
Those circumstances remained the same in 2001. Admittedly, it is common ground that the marketing of tobacco products for oral use has a long tradition in Sweden and that those products could not be regarded as new to the market corresponding to the territory of that Member State on its accession in 1995. However, since Article 151 of the Act of Accession precisely excluded the Kingdom of Sweden from the scope of the prohibition adopted in 1992, the territory of that State cannot be taken into account for the determination of the market referred to in Article 8 of Directive 2001/37 or, consequently, for the assessment with respect to that market of the novelty of the products whose marketing is prohibited there in accordance with that article.

68
Since Directive 2001/37 specifies, in the 28th recital in its preamble, that Directive 89/622 prohibited the sale in the Member States of certain types of tobacco for oral use and that Article 151 of the Act of Accession granted the Kingdom of Sweden a derogation from the provisions of the latter directive, it does not appear that the confirmation of that prohibition in Article 8 of Directive 2001/37 required that directive to specify other relevant points of fact and law in order to satisfy the obligation to state reasons under Article 253 EC.

69
Accordingly, Article 8 of Directive 2001/37 complies with the obligation to state reasons set out in Article 253 EC.

The principle of non-discrimination

70
It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, Case C-304/01 *Spain* v *Commission* [2004] ECR I-0000, paragraph 31).

71
Although tobacco products for oral use, as defined in Article 2 of Directive 2001/37, are not fundamentally different in their composition or indeed their intended use from tobacco products intended to be chewed, they were not in the same situation as those products. The tobacco products for oral use which are the subject of the prohibition laid down in Article 8a of Directive 89/622 and repeated in Article 8 of Directive 2001/37 were new to the markets of the Member States referred to in that measure. That particular situation thus authorised a difference in treatment, and it cannot validly be argued that there was a breach of the principle of non-discrimination.

The principle of freedom to pursue a trade or profession and the right to property

72
According to the case-law of the Court, the freedom to pursue a trade or profession, like the right to property, is one of the general principles of Community law. Those principles are not absolute rights, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of the freedom to pursue a trade or profession, as on the exercise of the right to property, provided that the restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed (see, inter alia, Case 265/87 *Schräder* [1989] ECR 2237, paragraph 15; Case C-280/93 *Germany* v

Council [1994] ECR I-4973, paragraph 78; Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 54; Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-0000, paragraph 82, and *Spain and Finland* v *Parliament and Council*, paragraph 52).

73
The prohibition on the marketing of tobacco products for oral use laid down in Article 8 of Directive 2001/37 is indeed capable of restricting the freedom of manufacturers of such products to pursue their trade or profession, assuming that they have envisaged such marketing in the geographical region concerned by that prohibition. However, the operators' right to property is not called into question by the introduction of such a measure. No economic operator can claim a right to property in a market share, even if he held it at a time before the introduction of a measure affecting that market, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances (Case C-280/93 *Germany* v *Council*, paragraph 79). Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power will be maintained (see Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 27).

74
As stated above, Directive 2001/37 pursues an objective in the general interest by ensuring a high level of protection of health in the context of the harmonisation of the provisions applicable to the placing on the market of tobacco products. It does not appear, as indicated in paragraph 58 above, that the prohibition laid down in Article 8 of that directive is inappropriate to that objective. In those circumstances, the obstacle to the freedom to pursue an economic activity constituted by a measure of such a kind cannot be regarded, in relation to the aim pursued, as a disproportionate interference with the exercise of that freedom or with the right to property.

Alleged misuse of powers

75
As the Court has repeatedly held, 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 with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24, and Case C-110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 137).

76
With regard in particular to the express exclusion of any harmonisation of the laws and regulations of the Member States designed to protect and improve human health laid down in the first indent of Article 129(4) of the EC Treaty (now, after amendment, the first subparagraph of Article 152(4) EC), the Court has held that other articles of the Treaty may not be used as a legal basis in order to circumvent that exclusion (Case C-376/98 *Germany* v *Parliament and Council*, paragraph 79). The Court has, however, stated that, provided that the conditions for recourse to Article 95(1) EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that the protection of public health is a decisive factor in the choices to be made (Case C-376/98 *Germany* v *Parliament and Council*, paragraph 88, and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 190).

77
First, the conditions for recourse to Article 95 EC were fulfilled in the case of Article 8 of Directive 2001/37 and, second, it has not been shown that that provision was adopted with the exclusive or main purpose of achieving an objective other than that of eliminating the barriers to trade connected with the heterogeneous development of national laws on tobacco products for oral use.

78
Accordingly, Article 8 of Directive 2001/37 is not invalid by reason of misuse of powers.

The answer to Question 2 taken as a whole

79
The answer to Question 2, taken as a whole, must be that consideration of that question has not disclosed any factor of such a kind as to affect the validity of Article 8 of Directive 2001/37.

Question 1

80
By its first question, the national court essentially asks whether Articles 28 EC and 29 EC must be interpreted as precluding national legislation such as that at issue in the main proceedings.

81
It should be borne in mind that, in a field which has been exhaustively harmonised at Community level, a national measure must be assessed in the light of the provisions of that harmonising measure and not of those of primary law (see Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9, and Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32).

82
Since the marketing of tobacco products for oral use is a question that is regulated in a harmonised manner at Community level, the national legislation at issue in the main proceedings which, duly transposing the Community legislation, prohibits the marketing of those products may thus be assessed with regard only to the provisions of that Community legislation, not to those of Articles 28 EC and 29 EC.

83
In the light of the above considerations, the answer to Question 1 must be that, where a national measure prohibits the marketing of tobacco products for oral use in accordance with the provisions of Article 8 of Directive 2001/37, there is no need to ascertain separately whether that national measure complies with Articles 28 EC and 29 EC.

Question 3

84
By its third question, the national court essentially asks whether, in the event that Article 8 of Directive 2001/37 is invalid, the principles of non-discrimination, proportionality and the protection of the right to property should be interpreted as precluding a national measure prohibiting tobacco products for oral use.

85
There is no need to answer this question, since, as stated in paragraph 79 above, consideration of Question 2 has not disclosed any factor of such a kind as to affect the validity of Article 8 of Directive 2001/37.

Costs

86
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) rules as follows:

1.

Consideration of the second question has not disclosed any factor of such a kind as to affect the validity of Article 8 of Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products.

2.

Where a national measure prohibits the marketing of tobacco products for oral use in accordance with the provisions of Article 8 of Directive 2001/37, there is no need to ascertain separately whether that national measure complies with Articles 28 EC and 29 EC.

Signatures.

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1 –

Language of the case: English.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

17 September 2003 (1)

(Action for annulment - Eurathlon Programme - Community financial assistance - Partial repayment - Obligation to state reasons - Method of calculation - Limitation period - Ineligible expenditure)

In Case T-137/01,

Stadtsportverband Neuss eV, established in Neuss (Germany), represented by H.G. Hüsch and S. Schnelle, lawyers,

applicant,

v

Commission of the European Communities, represented by J. Sack, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 9 April 2001 ordering partial repayment of financial assistance granted to the applicant under the Eurathlon programme,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2003

gives the following

Judgment

Facts

1. Stadtsportverband Neuss eV (the applicant) is a group of sporting associations from the municipality of Neuss. Its purpose is the promotion of sport in the public interest.

2. By letter of 28 February 1994 (the application for a subsidy) the applicant requested a subsidy from the Commission to finance an international sporting event (ISO 94). That event took place in Neuss from 11 to 15 May 1994.

3. By decision of 10 June 1994 (the decision to grant the subsidy) the Commission granted the applicant, under the Eurathlon programme, financial assistance of ECU 20 000 which comes under the

general budget of the European Communities (financial aid charged against Chapter B3, Article 3050,11).

4. The decision to grant the subsidy is worded as follows:

... I am pleased to inform you that the Commission of the European Communities has decided to grant your organisation a subsidy of ECU 20 000.

A form setting out the general obligations which a recipient of a Commission subsidy must fulfil is attached to this letter. Please read it carefully and return it duly completed and signed ... so that I can commence the payment procedure. ...

5. On 28 June 1994, Mr Franssen, chairman of the management committee of the applicant at the time, signed the form setting out the general obligations which the recipient of a Commission subsidy had to fulfil (the declaration by the recipient of the subsidy).

6. Paragraph 1 of the declaration by the recipient of the subsidy states that the applicant undertakes to use Community funds only to carry out the project described in the application of 28 February 1994.

7. According to the fifth indent of paragraph 2 of the declaration by the recipient of the subsidy, as amended by the recipient, the Commission subsidy amounts to 18.4% of the proposed expenditure. In the event that actual expenditure is less, the Commission subsidy will be reduced to that percentage.

8. The sixth indent of paragraph 2 of the declaration states that the financial aid may not in any event result in a profit.

9. According to paragraph 3 of that declaration, the applicant agrees - in accordance with the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities [OJ 1977 L 356, p. 1], as last amended [by Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 (OJ 1990 L 70, p. 1)] - that the use of Community funds should be subject to an audit by the Commission and the Court of Auditors.

10. According to paragraph 4 of the declaration by the recipient of the subsidy, the applicant undertakes to forward to the Commission, within three months of the termination of the subsidised measure and by 15 August 1994 at the latest (under the budget rules, funds granted for such a measure are granted for a limited period), three copies of:

- a report on the use of the above financial aid

- a certified list of the costs drawn up by the recipient of the aid or financial statement accompanied by certified documentation, showing the amount and nature of the expenditure and the corresponding income (including the Commission subsidy)

- where appropriate, the annual report of a trust company.

11.

According to paragraph 5 of the declaration by the recipient of the subsidy, the recipient of the subsidy also undertakes to retain all original documents for five years with a view to a possible audit.

12.

Finally, according to paragraph 7 of that declaration, the recipient of the subsidy declares that, in the event that the use of the whole subsidy is not documented in the list of costs it will repay to the Commission on request sums already paid out use of which is not documented.

13.

In January 1995, the Commission paid the financial assistance of ECU 20 000 to the applicant on the basis of the account drawn up by the applicant on 27 October 1994.

14.

On 12 December 1996, Mr Grahl, sports coordinator with the applicant, sent a letter to the Commission pointing out certain anomalies relating to the payments in connection with ISO 94 and reporting an estimated surplus of DEM 40 000.

15.

As the applicant had also received a subsidy of DEM 20 000 from Kreis Neuss (the district of Neuss), that authority reviewed the expenditure incurred by the applicant in connection with ISO 94 and drew up an auditor's report on 26 November 1997 (the Kreis Neuss audit) on the basis of a provisional audit by the local audit office of 25 July 1997. The Kreis Neuss audit concluded that there was an accounting surplus of at least DEM 19 905.03. Following that audit, under a decision by Kreis Neuss of 19 March 1998, the applicant was requested to repay in full the Kreis Neuss subsidy (the Kreis Neuss repayment decision).

16.

By debit note No 3240010317 of 6 April 1999, the Commission also ordered the repayment in full of the financial aid it had paid, on the ground that it had had no response to its request of 9 February 1999 for all the documents relating to expenditure and income in connection with ISO 94, and that, in any event, it was in possession of information that the applicant had derived a profit from the event which was incompatible with the rules on financial assistance (the decision of 6 April 1999).

17.

By application lodged at the registry of the Court of First Instance on 25 June 1999, registered as Case T-154/99, the applicant brought an action for annulment of the decision of 6 April 1999.

18.

By decision of 6 August 1999 (the decision of 6 August 1999), the Commission withdrew its decision of 6 April 1999.

19.

On 11 August 1999, Mr Hüsch, the applicant's lawyer, sent the Commission the final account of ISO 94, drawn up in August 1999. According to that account, the total expenditure amounted to DEM 242 070.94 and the total income amounted to DEM 225 567.25 including the Community subsidy and to DEM 187 973.73 without the Community subsidy.

20.

Following the decision of 6 August 1999, the Court of First Instance ruled that there was no need to adjudicate by order of 20 October 1999.

21.

On 13 April 2000, the Commission's representatives carried out an audit of the accounts for ISO 94 at the office of the applicant's lawyer.

22.

On 23 May 2000 Mr Hüsch sent the Commission information to clarify certain transactions.

23.

On 15 June 2000 the Commission drew up a report on the audit of 13 April 2000 (the audit report). That report was served on Mr Hüsch in German on 27 October 2000.

24.

In the audit report, the Commission concludes that:

Taking account of all the anomalies recorded, the final account is as follows:

corrected total of eligible expenditure DEM 149 291

corrected total income DEM 181 202 (including Community subsidy)

DEM 143 609 (excluding Community subsidy)

On the basis of the eligible expenditure the maximum Community subsidy is limited to 18.4% which corresponds to a maximum of DEM 27 470. However, the clause of the contract providing that the subsidy may not in any event result in a profit must be applied and the subsidy must be limited to DEM 5 682 to balance expenditure and income in the final account.

25.

On 3 April 2001 the Commission sent Mr Hüsch a letter in reply to the applicant's comments on the audit report (the letter of 3 April 2001).

26.

The letter of 3 April 2001 reads as follows:

... By letter of 23 January 2001, Mr Pettinelli informed you that he had forwarded the file in question to my department for review of the information and observations included in your letter of 28 November 2000. Please find attached a summary of the main conclusions of that review.

Unfortunately, I must observe that the new matters raised do not in any way induce us to dismiss the conclusions of the audit report sent to you on 27 October 2000.

I am thus obliged to ask your client, Stadtsportverband Neuss, to repay the sum of DEM 31 911.11; a notice to that effect will be sent to you shortly ...

27.

On 9 April 2001 the Commission drew up a new debit note No 3240302372 for a sum of DEM 31 911.11, equivalent to EUR 16 315.89, (the contested decision).

28.

The contested decision reads as follows:

...

Repayment of DEM 31 [91]1.11 following an audit of 13 April 2000 at the office of H.G. Hüsch and confirmed in a letter to your lawyer on 3 April 2001 annexed hereto.

...

Procedure and forms of order sought

29. By application lodged at the registry of the Court of First Instance on 19 June 2001, the applicant brought this action.

30. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) opened the oral procedure. By way of measures of organisation of the procedure, the parties were asked to produce certain documents and reply to certain written questions by the Court. They complied partially with those requests.

31. The oral arguments of the parties and their answers to the questions asked by the Court were heard at the hearing of 9 January 2003.

32. The applicant claims that the Court should:

- annul the contested decision;
- order the defendant to pay the costs.

33. The Commission contends that the Court should:

- dismiss the application;
- order the applicant to pay the costs.

Pleas in law and arguments of the parties

34. The applicant essentially relies on five pleas in law in support of its application. The first is that there was no legal basis, the second, that the obligation to state reasons was disregarded, the third, that there was a manifest error of assessment, the fourth, that the action was time-barred and the fifth, that there was a breach of the principle of sound administration and the duty of care. At the hearing the applicant withdrew its plea concerning the alleged error in the serving of the contested decision.

The first plea - no legal basis

Arguments of the parties

35. The applicant disputes that there is in fact any obligation to repay. It submits that the decision to grant the subsidy contains no specific provision concerning possible repayment. Moreover, the declaration by the recipient of the subsidy, signed by Mr Franssen, then chairman of the applicant, cannot be binding on it as, under the rules laid down by the Bürgerliches Gesetzbuch (German Civil

Code) and the applicant's own statutes, it should have been represented jointly by its chairman or deputy chairman and by another member of its management committee. Thus, the signature of the former chairman on its own is not sufficient to impose an obligation on the applicant. However, according to the applicant, the validity of the decision to grant the subsidy is not thereby called into question as it was quite properly addressed to the applicant as a beneficial administrative measure.

36. The applicant also disputes that the alleged surplus from ISO 94 constitutes a profit in the legal sense. As a public interest association, it does not make a profit. If it has surplus funds after organising various events, that surplus is invested in the work of the public interest association. As no profit can arise, there is no legal basis for a decision to repay. The applicant submits that the Commission is confusing the concepts of profit and surplus.

37. The Commission contends, as regards the allegation that Mr Franssen has no authority to represent the applicant, that if he could not bind the applicant legally on his own then the whole of the Commission's grant was made without a legal basis, given that the applicant did not, from the outset, fulfil the conditions for the receipt of aid. Thus, the repayment of the aid in full could be required pursuant to the doctrine of unjust enrichment and the applicant cannot plead its good faith as its chairman must have known that he had no representative authority on his own.

38. As regards the concepts of profit and surplus, the Commission explained at the hearing that, in the present case, it understood profit to mean the surplus created where the income from an event is higher than the expenditure incurred in that connection.

Findings of the Court

39. First, it should be noted that the decision to grant the subsidy expressly refers to the declaration by the recipient of the subsidy attached to that decision. Receipt of the subsidy was subject to the condition that the recipient fill in, sign and return that form to the Commission. Accordingly, that declaration by the recipient of the subsidy, containing the rules governing the grant of the subsidy, is an integral part of the decision to grant the subsidy.

40. In that connection, it must be pointed out that, according to the declaration by the recipient of the subsidy, the applicant undertook to use Community funds only to carry out the project described in the application of 28 February 1994, that is to say the ISO 94 event.

41. Moreover, the declaration by the recipient of the subsidy contains a clause stipulating that the financial assistance may not in any event result in a profit.

42. The applicant also agreed, in accordance with the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, that the use of Community funds should be subject to an audit by the Commission and the Court of Auditors

43. Moreover, the applicant undertook to provide the Commission with a report on the use of the financial assistance and a certified list of the costs drawn up by it or financial statement accompanied

by certified documentation, showing the amount and nature of the expenditure and the corresponding income.

44. Finally, the applicant undertook to repay to the Commission on request, in the event that the use of the whole subsidy is not documented in the list of costs, sums already paid out use of which is not documented.

45. Accordingly, the declaration by the recipient of the subsidy clearly conferred on the Commission the right to monitor the use of the subsidy and to order its repayment if necessary. In that connection, it must be borne in mind that the Commission is bound, under Article 274 EC, by an obligation of sound financial management of Community funds. Therefore, in the system of granting Community financial assistance, the use of that assistance is subject to rules which may require the partial or full repayment of assistance already granted.

46. Accordingly, the applicant cannot claim that there was no obligation to repay incumbent upon it. In the event of breach of the rules contained in the declaration by the recipient of the subsidy, the Commission was entitled to require the partial or full repayment of the financial assistance granted. According to settled case-law, the beneficiary of financial assistance for which the application was approved by the Commission does not thereby acquire any definitive right to full payment of the assistance if he does not satisfy the conditions to which the aid was subject (Case T-81/95 *Interhotel* v *Commission* [1997] ECR II-1265, paragraph 62, and Case T-126/97 *Sonasa* v *Commission* [1999] ECR II-2793, paragraph 59).

47. Second, as regards the applicant's argument that the fact that the declaration by the recipient of the subsidy was not signed by a person authorised to do so precluded any obligation on its part, suffice it to observe that it is irrelevant. The receipt and use of the financial assistance by the applicant constitute the ratification of all the undertakings given by its chairman in relation to the rules governing the grant of that assistance. Moreover, if that were not the case, it would have to be concluded that the applicant ought to repay the financial assistance at issue in full.

48. Third, as regards the applicant's argument that the alleged surplus from ISO 94 did not constitute a profit in the legal sense of the term, consideration must be given to what should be understood by profit in the present case. In the context of Community financial assistance, assistance must be limited to the amount necessary to balance the account for the project. Accordingly, the term profit which appears in the declaration by the recipient of the subsidy, must here be understood to mean surplus, that is to say, the fact that income is higher than expenditure. The applicant, as a public interest association, cannot, in fact, make a profit as such. However, that fact did not prevent it from acquiring a surplus for ISO 94, *inter alia* as a result of the various subsidies it received, in particular from the Commission. As the Court of First Instance has held above, the applicant had accepted its obligation to repay in the event that it obtain more income than the expenditure it incurred on ISO 94. It cannot escape that obligation simply by relying on the inconsistency between its status as a public interest association and the making of profits.

49. Accordingly, the first plea must be rejected.

The second plea - breach of the obligation to state reasons 372

Arguments of the parties

50. The applicant submits that the contested decision does not make the grounds for the demand for repayment clear at all. It argues that the grounds for the decision should be stated in the contested decision itself as the audit report sent to it cannot serve as a statement of reasons for such purposes, given that such a report cannot constitute an act adversely affecting a person, nor can it replace such an act or serve as a basis for one. At the hearing, the applicant confirmed that, in its view, the letter of 3 April 2001 attached to the contested decision stated no grounds, whereas the audit report explained exactly how the amount, repayment of which was required, was arrived at. None the less the applicant stated at the hearing that, if the audit report were regarded as the documentation supporting the contested decision, it would accept it should the Court of First Instance take the view that grounds for that decision were given in the audit report itself.

51. The Commission contends that the audit report explains better than any supplementary statement of reasons in the debit note the reasons why it demands repayment of part of the subsidy. Moreover, it points out that it is expressly stated in the contested decision that the demand for repayment is based on the existence of a surplus of income over expenditure.

Findings of the Court

52. It must be observed that it is settled case-law that the purpose of the obligation to state the reasons for an individual decision is to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested, and to enable the Community judicature to review the lawfulness of the decision. The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted (Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 140; Joined Cases T-46/98 and T-151/98 *CEMR* v *Commission* [2000] ECR II-167, paragraph 46, and Case T-80/00 *Associação Comercial de Aveiro* v *Commission* [2002] ECR II-2465, paragraph 35).

53. According to the case-law, since a decision reducing the amount of Community financial assistance has serious consequences for the recipient of the assistance, that decision must show clearly the grounds which justify the reduction in the assistance initially authorised (*CEMR* v *Commission*, cited above, paragraph 48, and *Associação Comercial de Aveiro* v *Commission*, cited above, paragraph 36).

54. The question as to whether the statement of reasons for a decision satisfies those requirements must be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (*Associação Comercial de Aveiro* v *Commission*, paragraph 37).

55. The content of the contested decision should first be examined. The contested decision refers to the audit, carried out on 13 April 2000, at the offices of the applicant's lawyer. It also refers to a letter sent to the applicant's lawyer on 3 April 2001 and attached to the contested decision.

56. As to the reference to the audit of 13 April 2000 in the wording of the contested decision, the case-law allows it to be considered that sufficient grounds have been given for a decision where it refers to

an audit report sent to the applicant (see, to that effect, *Pesqueras Campos and Others* v *Commission*, cited above, paragraphs 142 to 144). The applicant acknowledges that it received the audit report in French and, on 27 October 2000, in German. Moreover, in its covering letter of 27 October 2000, the Commission had expressly asked the applicant to give its opinion on that report within one month. As the applicant itself accepted at the hearing, the audit report contains sufficient information to allow it to know the reasons why the repayment of part of the financial assistance was required. The fact that the contested decision referred to the audit of 13 April 2000 and not to the audit report as such cannot but be irrelevant to the settlement of the dispute, as the applicant was in a position to understand the connection between the audit of 13 April 2000 and the report which followed.

57.

Moreover, according to the case-law, where reference is made to a document attached to a decision and thus contained in that decision, the obligation to state reasons can be fulfilled by such a document (see, to that effect, Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 51). In the present case, the letter of 3 April 2001, attached to the contested decision, answers the applicant's concerns regarding the audit report and also states the reasons put forward by the Commission in support of its demand for repayment. It is worth quoting the concluding part of that letter, according to which the statements by the contractor's lawyer are not supported by any fresh evidence. There is no reason to set again the amount which must be repaid according to the audit report. The applicant was informed in that letter of the reasons why the Commission did not consider it appropriate to dismiss the conclusions of the audit report. Accordingly, that letter gives further reasons, in addition to those in the audit report.

58.

Accordingly, given that the Commission refers, in the contested decision, to the audit carried out at the offices of the applicant's lawyer, and to the letter of 3 April 2001 attached to that decision, it must be held that, in the light of the case-law cited, sufficient reasons were given for the contested decision.

59.

In those circumstances, the second plea must be rejected.

The third plea - a manifest error of assessment

60.

The third plea is divided into two parts. The first part concerns the erroneous assessment of the facts made by the Commission and the second the erroneous method of calculation it used.

First part: erroneous assessment of the facts

- Arguments of the parties

61.

The applicant disputes that certain payments were ineligible, arguing that the Commission's assessment of that expenditure is erroneous.

62.

First, the audit report is incorrect in stating that the applicant granted an amount of DEM 20 000 to Kreis Neuss. That transaction was nothing to do with the subsidy granted by the Commission. Moreover, the repayment to Kreis Neuss was made on the basis of a misassessment of the overall transaction by the management committee of the applicant from which the Commission cannot draw any inference in law.

63. The applicant also submits that the assessment by the Commission in the audit report is erroneous as regards the payment of a sum of DEM 15 000 to the town of Neuss from the applicant's accounts for ISO 94. That receipt of DEM 15 000 appearing in the applicant's accounts was a subsidy from a third party intended for sporting activities for young people in Neuss and the applicant credited the ISO 94 account with that sum in error. In fact it was general assistance granted to the applicant without any particular reason being given and without any connection with ISO 94. The applicant did not use that money for ISO 94, but first of all as an accounting aid and subsequently for the benefit of the town of Neuss for another football tournament for young people. However, if that transaction were to be considered as a subsidy in the final accounts for ISO 94, it would be an own resource of the applicant and not a receipt requiring entry in the accounts under ISO 94. In that connection the applicant cites a letter from the town of Neuss, dated 4 May 2000, in support of its argument.

64. Next, the applicant submits that ISO 94 is not an event with a legal personality distinct from that of the applicant. Consequently, the entry in the accounts of the applicant's own resources for the arrangement of ISO 94 should not be considered as a receipt in the legal sense of the term. Thus, the transfer of DEM 10 000 made by the applicant to the ISO 94 account was a mere cash advance, which was to be repaid to it, and not a subsidy by a third party. If it were none the less to be considered a payment intended for ISO 94, it would thereby constitute the use of an own resource by the applicant. It points out in that connection that the decision to grant the subsidy does not oblige the applicant to use its own resources.

65. Moreover, the applicant disputes the assessment made by the Commission in the audit report of transactions relating to ISO 93, that is to say, receipts of DEM 24 364.96 and expenditure of DEM 25 593.56, in the light of which the Commission refused to take those transactions into account in setting the amount of the subsidy for ISO 94. According to the applicant, they are, rather, a constituent part of the preparations for ISO 94 and reflect the intention, in connection with ISO 94, to gain knowledge of the event, its organisation and its requirements.

66. The applicant also submits that the audit report is incorrect in contesting the entry in the accounts of an amount paid to Mr Donalek of DEM 1 584.57. It claims that Kreis Neuss has already checked that item.

67. Moreover, the applicant disputes the Commission's finding that an expense of DEM 10 000 is ineligible. The applicant points out that it received a subsidy in kind worth DEM 10 000 from the Hülser and Brüster advertising agency. German tax law allows such gifts, as long as it can be proved that the benefit in kind was actually provided and that a certificate of gift was issued in respect of it, as it allegedly was by the Sports office of the town of Neuss in the present case. Hülser and Brüster provided benefits in kind *inter alia* in the form of printed matter. That benefit in kind also featured in the Kreis Neuss audit report. The applicant regrets that no invoice was subsequently drawn up because of the bankruptcy of Hülser and Brüster. At the hearing, the applicant made clear that that invoice for DEM 10 000, the full amount of which was paid, should be distinguished from another invoice for DEM 6 799, which covered a payment of DEM 1 799 and a gift to the value of the remaining DEM 5 000.

68. Moreover, the applicant submits that the Commission failed to take account of the fact that the town of Neuss also provided significant benefits in kind for the purposes of the organisation of ISO 94,

which was held mainly in municipal facilities. According to the letter from the town of Neuss of 11 May 2000, those benefits in kind were worth DEM 92 450. The applicant submits that those benefits in kind could be considered as expenditure and entered in the accounts in respect of gifts in kind.

69. Next the applicant disputes the ineligibility of several expenses which, the Commission alleged, were incurred without documentary evidence or other explanation, and often without their basis being known. It submits that the Commission is incorrect in alleging that it did not put forward any documentary evidence of those expenses in the letter of 23 May 2000 and therefore considering those expenses ineligible.

70. First, according to the applicant, the Commission should have allowed the expense consisting of the lump sum of DEM 4 000 paid to Mr Franssen. That sum covered Mr Franssen's out-of-pocket expenses in connection with the preparation, organisation and running of ISO 94, *inter alia*, travel expenses, telephone, correspondence and services provided after ISO 94. Although detailed documentary evidence relating to those expenses was not available, their reimbursement appeared appropriate, according to the applicant, in the light of the long period of preparation, and the scale and duration of ISO 94. According to the applicant, it was entitled to reimburse a lump sum which was less than the total expenses incurred.

71. Next, the applicant takes issue with the fact that the Commission did not accept the payment of an amount of DEM 1 300 to a group of dancers directed by Mrs Beyen. That payment was made on 2 August 1994 from the applicant's account, as the ISO 94 account was mistakenly not used for that transaction. The fact that the payment was made is, however, not disputed, since the group of dancers appeared in accordance with the terms of their contract at the closing ceremony of ISO 94. As the applicant is the organiser of ISO 94 a payment made from its own account for ISO 94 must thus be considered a deductible expense.

72. The applicant also submits that the Commission was wrong to exclude an expense of DEM 1 093.81 for a payment made to the Gesellschaft zur Wahrung von Urheberrechten (copyright protection company, GEMA). It explains that that payment, relating to music played at the closing ceremony of ISO 94, falling within the remit of GEMA, was made from its current account and then reimbursed by payment from the ISO 94 account to its account. Moreover, the applicant claims that the two Commission investigators instructed to audit its accounts, did not have sufficient knowledge of either the German legal system or the German language to understand German copyright law and the role of the GEMA.

73. Further, the applicant takes issue with the fact that the Commission did not agree to take account of the payments for reimbursement of costs amounting to DEM 5 117.82 and DEM 4 430 made to Mr Grahl. Those payments were made from the ISO 94 account and the transfer documents were shown to the defendant. According to the applicant, those transfers are based on expenses invoiced by Mr Grahl for ISO 94 which he paid upfront.

74. The Commission contends, as regards the assistance of DEM 15 000 given to the town of Neuss, that, even if it was general assistance granted to the applicant by a third party, that sum was correctly imputed to ISO 94 and could not be transferred after the event to a third party (in this case, the town of Neuss) to prevent a surplus. According to the Commission, this is therefore a transaction intended to

conceal a surplus. The crucial point, in that respect, is that the contested sum had first been used for ISO 94. Moreover, the letter from the town of Neuss of 4 May 2000, confirming the existence of a cash payment made to its account nearly three years after ISO 94 took place and clearly anonymous, tends to indicate that there was subterfuge, particularly as no receipt was drawn up on that occasion.

75. As to the expenses relating to ISO 93, the Commission takes issue with the argument that they constituted preparation for ISO 94 on the ground that Mr Franssen had received a special allowance for his travel and other activities in preparation for ISO 94. It took the view, in that regard, that the arguments put forward by the applicant did not demonstrate any link whatsoever between those expenses and ISO 94.

76. As regards the payment to Mr Donalek, the Commission contends that it is not documented and its use remains obscure.

77. As regards the subsidy from Hülser and Brüster, the Commission contends that, if it was a gift from that company, whether in cash or in kind, the applicant was not entitled to declare a payment of the same amount to that company by way of expenses. As the certificates at issue demonstrate, it was in fact a gift of DEM 10 000, of which no subsequent reimbursement was envisaged.

78. As regards the benefit in kind from the town of Neuss, the Commission contends that, as such benefits were not invoiced, they cannot be entered in the accounts as expenses.

79. As regards the payment of a lump sum of DEM 4 000 to Mr Franssen, the Commission explains that it could not be allowed as eligible expenditure given that it has not been possible to prove how the funds were used.

80. As regards the payments made to the group of dancers and the GEMA, the Commission contends that they cannot be linked to ISO 94 and that it was thus not possible to take them into account. It was for the applicant to ensure that they could be clearly linked to ISO 94. As for the alleged lack of knowledge of the German language and the German legal system of the officials responsible for the audit, the Commission points out that the applicant has not been able to prove the extent to which the alleged difficulties of expression and understanding of those officials led to errors, misunderstandings or inaccuracies.

81. As regards the payments to Mr Grahl, the Commission submits that the applicant did not produce the bank documents to which it refers or provide any sort of explanation demonstrating the nature of those expenses. The Commission contends that it was for the applicant to adduce evidence that the expenses in question were linked to ISO 94 and explain their nature.

- Findings of the Court

82. It is clear from the case-law laid down by the judgments in *Interhotel* v *Commission*, cited above, paragraph 46, and *CEMR* v *Commission*, cited above, paragraph 68, that grant of financial assistance is subject not only to compliance with the conditions laid down by the Commission in the decision

granting assistance but also to compliance with the terms of the application for assistance in respect of which that decision was given. The same is true, in the present case, of the declaration by the recipient of the subsidy, as that declaration is an integral part of the body of rules governing the grant of Community financial assistance.

83. It must be pointed out that the applicant was bound, under paragraph 1 of the declaration by the recipient of the subsidy, to use the Community aid only to organise ISO 94 and that it accepted, in paragraph 3 of that declaration, that the use of the Community financial assistance could be subject to an audit by the Commission and the Court of Auditors. According to paragraph 4 of the declaration, the applicant also had to forward to the Commission a report on the use of the financial aid and a certified list of the costs or financial statement with certified documentation, showing the amount and nature of the expenditure and the corresponding income. Finally, according to paragraph 7 of that declaration, in the event that the use of the whole subsidy is not documented in the list of costs it undertook to repay to the Commission on request sums already paid out use of which is not documented. Accordingly, it was for the applicant to prove the eligibility of all the expenses it incurred.

84. It is also clear from *Interhotel* v *Commission*, paragraph 47, that it is incumbent on the beneficiary of financial assistance to prove that the expenses were actually incurred and were linked with the measures approved. It is in the best position to do so and must establish that the receipt of resources from public funds is justified.

85. It should be pointed out that, where Community financial assistance has not been used in conformity with the conditions laid down in the approving decision, the Commission may suspend, reduce or withdraw that assistance, which may render it necessary for the Commission to undertake an evaluation of complex facts and accounts. When undertaking such an evaluation, the Commission must therefore enjoy a considerable measure of latitude. Consequently, the Court of First Instance must confine itself to examining whether the Commission committed a manifest error in assessing the information in question (*Associacão Comercial de Aveiro* v *Commission*, paragraph 50).

86. Accordingly, if the applicant is not able to provide either supporting documents or any other evidence to establish that the information and findings relied on by the Commission were incorrect, the Commission cannot be accused of making a manifest error of appreciation (see, to that effect, *Interhotel* v *Commission*, paragraph 47).

87. Accordingly, the contested payments must be examined one by one.

88. In that connection, it must be observed that, according to settled case-law, the legality of a Community measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87, and Joined cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 119). If the Court were to examine contested measures in the light of evidence which was not available at the time the measure was taken, it would be assuming the role of the institution which enacted the measure at issue. It is not for the Court of First Instance to assume the role assigned to the institutions (see Case T-19/90 *Von Hoessle* v *Court of Auditors* [1991] ECR II-615, paragraph 30). Accordingly, only matters of which the Commission could be aware during the administrative procedure are to be taken into

consideration.

89. First, as regards the subsidy of DEM 20 000 allocated by Kreis Neuss, it must be observed that, in the audit report, the Commission noted that it had been paid back in full by the applicant. The Commission therefore corrected the applicant's accounts symmetrically, reducing expenses and receipts by DEM 20 000 each. The final account for ISO 94 shows clearly that the reimbursement was actually made, three payments of DEM 13 260.58, DEM 3 500 and DEM 3 239.42 respectively having been made by the applicant to Kreis Neuss. It is also clear from the Kreis Neuss repayment decision that that repayment was demanded from the applicant in connection with ISO 94.

90. It must, accordingly, be considered that, as the Community subsidy is based on actual expenditure, the Commission was entitled to reduce expenses and receipts by DEM 20 000, given that the Kreis Neuss subsidy was entirely reimbursed. Therefore, the applicant could not increase either its expenses or its receipts.

91. As regards, next, the payment of a sum of DEM 15 000 to the town of Neuss, it must be observed that that sum was entered in the final account for ISO 94 as an expense. It is clear from the audit report that the payment of DEM 15 000 to the town of Neuss was made in March 1997, in other words nearly three years after ISO 94, that it was made in cash and coincided with the closure of the applicant's bank account opened for that event. In his letter of 23 May 2000, the applicant's lawyer had, moreover, stated that the payment in question had nothing to do with ISO 94.

92. However, the applicant has by no means proved that the gift of DEM 15 000, an amount which was actually credited to the ISO 94 account, had no connection with that event.

93. Against that background, the Commission was entitled to take the view that the payment of DEM 15 000 to the town of Neuss was not an expense supported by evidence falling within ISO 94, and, accordingly, to neutralise the applicant's accounts by reducing both income and expenditure symmetrically by the amount at issue and then entering the amount of DEM 15 000 again under income.

94. It must be observed that the applicant puts forward no argument against the contested decision as regards the transfer of DEM 10 000 made by the applicant to the ISO 94 account. What is more, it is clear from the audit report that the Commission did not correct the final account in that respect. Therefore, it must be held that that argument of the applicant is unfounded.

95. As regards the transactions relating to ISO 93, it must be observed that, as the parties confirmed at the hearing, the application for assistance related to ISO 94. Therefore, the assistance was granted solely for that event. Accordingly, it must be considered that the transactions relating to ISO 93 do not fall within the purpose of the decision to grant the subsidy nor that of the application for a subsidy. In fact that application was made long after ISO 93 and the applicant has by no means proved that the application made regarding ISO 94 could have included certain expenditure relating to the holding of the previous year's event. Therefore, the Commission was entitled to exclude those transactions from the final account for ISO 94.

96.

As regards the payment to Mr Donalek of DEM 1 584.57, the Commission notes in the audit report, without being contradicted on that point, that that payment, made in January 1995, also related to the reimbursement of expenses relating to ISO 93. Accordingly, and for the reasons set out in paragraph 95 above, the Commission was entitled to exclude that transaction from the final account for ISO 94.

97.

As regards the expense of DEM 10 000 paid to the Hülser and Brüster advertising agency, the Commission recorded in its audit report that that payment was made on the basis of a document headed confirmation of order, without an invoice in the proper form. That expense appeared in the account drawn up in October 1994 but it was entirely offset by the two receipts of DEM 5 000 each received from that same company. The [Kreis Neuss] audit report confirms that those two amounts were received and the town of Neuss issued certificates confirming them ... . The table of August 1999 only includes the expense of DEM 10 000, the corresponding receipts are not mentioned. ... Mr Hüsch states that the certificates [regarding gifts] were drawn up on the basis of additional costs borne by that company and that there was thus no cash contribution. However, he does not put forward any documentary evidence in support of that statement. Given that the expense is not based on an invoice in the proper form and that there are clear indications that the amount was repaid (in the form of donations) [to the applicant] the expense of DEM 10 000 must be considered ineligible.

98.

In that connection, the applicant acknowledges that there were two certificates of gift, each for DEM 5 000, but none the less maintains that the contested expense of DEM 10 000 must be considered eligible for subsidy. As the Commission pointed out at the hearing, it entered the receipts of DEM 10 000, for which there were certificates of gift, in the accounts and offset them with expenditure of DEM 10 000.

99.

It must be held that, if an undertaking makes a gift, whether in cash or in kind, there is not supposed to be any reimbursement. Accordingly, a party who receives such a gift cannot enter it in the accounts as expenditure.

100.

In the present case, it cannot be disputed that, first, a payment of DEM 10 000 was made to Hülser and Brüster and, second, as the applicant itself admits, that it received a benefit in kind worth at least DEM 10 000 from that agency. Against that background, it must be held that the Commission was entitled to cite that DEM 10 000 gift to challenge the reality of that expenditure of DEM 10 000 and, therefore, to consider that expenditure ineligible. As regards the invoice of DEM 6 799, mentioned by the applicant for the first time at the hearing, suffice it to observe that, as that invoice was not considered beforehand by the Commission or cited previously by the applicant, it cannot rely on it to any purpose.

101.

As regards the benefits in kind from the town of Neuss, it must be observed that the applicant itself describes them as gifts in kind. In fact they consisted in the provision of municipal facilities free of charge. Suffice it to observe, therefore, that, in any event, such benefits in kind cannot be considered as an expense in accounting terms.

102.

Next, as regards the ineligibility of several expenses which, the Commission alleged, were incurred without documentary evidence or explanation, and often without their basis being known, it must be held that proof of payment is not sufficient to confirm the legality and eligibility of an expense. A

payment must be made on the basis of an invoice or other documentary evidence showing the reason for the payment and the amount due, and that documentary evidence must be produced to the Commission. Consequently, all those expenses must be examined.

103.

As regards the payment of a lump sum of DEM 4 000 to Mr Franssen, the applicant claims that an invoice for DEM 6 750 was submitted, covering all the expenses and all the payments which Mr Franssen incurred in various places, for small amounts. However, the management committee decided to pay him only a lump sum of DEM 4 000 to reimburse those expenses.

104.

It must be accepted that, at the time of a given event its organisers may incur various expenses. However the recipient of assistance must be able to provide an explanation of the relation such expenses bear to the subsidised event. In the present case, the applicant has given no explanation other than that set out in paragraph 103 above regarding the various expenses making up the total of DEM 4 000. Accordingly, the Commission could not, in the light of its obligation of sound management of Community resources, agree to take account of a lump sum without any information relating to the expenses in question or documentary evidence. Therefore, the Commission was entitled to refuse to take account of the lump sum of DEM 4 000.

105.

Next, as regards the payment of a sum of DEM 1 300 to a group of dancers, directed by Mrs Beyen, it must be observed that, at the hearing, the applicant relied on a letter from Mrs Beyen which the Commission stated it had never seen before, which the applicant did not dispute. It must, therefore, be held that that letter was produced out of time and that the applicant cannot rely on it. As observed above in paragraph 88 the Court of First Instance cannot take account of documents which are not available to the Commission at the time of adoption of the contested decision. Accordingly, it must be considered that the Commission did not have sufficient information to establish any link between the amount in question and ISO 94 at the time the contested decision was adopted. Therefore, it was entitled to reject the expenditure of DEM 1 300 in the absence of sufficient documentary evidence.

106.

As regards the payment of DEM 1 093.81 allegedly to GEMA, suffice it to observe that the applicant provided no invoice to the Commission, as it itself acknowledged at the hearing. Producing a statement of account cannot be considered sufficient, given that that document makes no mention of the event to which the payment relates. Nor can the Commission's investigators be criticised for their alleged lack of knowledge of the German legal system or the German language, given that the applicant did not produce sufficient documentary evidence to establish the connection between the expenditure in question and ISO 94. Therefore, the Commission was entitled to refuse to take account of the payment made to GEMA.

107.

As regards, finally, the reimbursement of expenses of DEM 5 117.82 and DEM 4 430 respectively, paid to Mr Grahl, it must be held that the applicant has not furnished documentary evidence of their connection with ISO 94. Accordingly, the Commission was entitled to reject those expenses.

108.

In the circumstances, the Commission was entitled to refuse to allow the eligibility of the contested expenditure.

109.

Consequently, and without it being necessary for the Court to hear witnesses, the first part of the

third plea must be rejected.

Second part: erroneous method of calculation

- Arguments of the parties

110. The applicant takes issue with the method of calculation used by the Commission. It argues that the Commission was entitled to 18.4% of the surplus and not the whole of the surplus.

111. The Commission contends that, under the conditions for granting the aid, no financial surplus may be created and, therefore, the repayment of the whole of the surplus created was demanded.

- Findings of the Court

112. It must be recalled that the Commission granted the applicant a subsidy of ECU 20 000, equivalent to DEM 37 593.52, exclusive of bank charges. In that regard, under the rules governing the grant of the subsidy set out at paragraphs 6 to 12 above, that subsidy, first, can be used solely for the project described in the application for the subsidy, second, is limited to 18.4% of actual expenditure and, third, may not in any circumstances result in a profit.

113. Having learnt, through the Kreis Neuss audit report, that the account drawn up in October 1994, which was a provisional account as 37% of the expenditure was projected expenditure which had not yet been incurred, was not a true reflection of the position, the Commission made checks on the basis of the final account for ISO 94 drawn up in August 1999 and described in paragraph 19 above.

114. In its audit report, the Commission contended that several items of expenditure were ineligible for subsidy and that certain payments could not be taken into account in the final calculation of expenditure and income.

115. The Commission obtained a corrected total of eligible expenditure of DEM 149 291 and a corrected total income of DEM 181 202, including the Community subsidy. Thus, the corrected account shows a positive balance of DEM 31 911 (DEM 181 202 - DEM 149 291). The Community subsidy included in the income amounts to DEM 37 593.52, as pointed out in paragraph 112 above. However, as the declaration by the recipient of the subsidy provided that the subsidy could in no circumstances result in a profit, the Commission limited that subsidy to DEM 5 682 (DEM 37 593 - DEM 31 911). Therefore, it demanded the repayment of DEM 31 911, that is to say, the whole of the surplus.

116. It is clear from the declaration by the recipient of the subsidy that that subsidy may, in fact, be less than 18.4% of actual expenditure in the event that it results in a surplus, and particularly in the event that that surplus is used for purposes other than carrying out the ISO 94 project. As is clear from the facts considered in connection with the first part of this plea, and as the Court of First Instance held in paragraph 108 above, the Commission was entitled to refuse to accept that the expenditure at issue was eligible. Consequently, the existence of a surplus, as determined by the Commission, cannot be disputed in the present case. Accordingly, the third condition mentioned in paragraph 8 above is not fulfilled. Moreover, as is clear from the above facts, the surplus in question was used for other

purposes. Therefore, the first condition mentioned in paragraph 6 above is not fulfilled either.

117. It must then be noted that the Community subsidy is of a subsidiary nature, as the Commission pointed out at the hearing. Accordingly, the Commission only participates in the financing of events where the other financial resources are not sufficient to finance something fully.

118. Moreover, as the Commission stated at the hearing, in the case of multiple subsidies, repayment must be pro rata, that is to say each body which granted a subsidy can only require repayment up to the amount that has been paid. In the present case, Kreis Neuss had already recovered its subsidy in full. Therefore, having first taken account of that fact in its calculations, the Commission was entitled to demand the surplus in full.

119. In the circumstances, the second part of the third plea must be rejected.

The fourth plea, based on limitation of action

Arguments of the parties

120. The applicant relies on limitation of the Commission's rights of action. It observes that, even if a right to repayment arose during 1994, when ISO 94 took place, the contested decision is dated 9 April 2001, in other words more than six years after the alleged claim arose. The applicant, which accepts that Community law does not expressly provide for a limitation period for repayment of subsidies, none the less submits that the Court of First Instance has upheld the application of provisions laying down shorter limitation periods than those which might apply in the present case. The applicant cites paragraph 48 et seq. of the Verwaltungsverfahrensgesetz (German law on administrative procedure), according to which the administration's power to annul a positive measure is time-barred one year after the administration's becoming aware of circumstances justifying repayment. According to the applicant, the Commission became aware of such circumstances for the first time on receipt of the letter from the applicant's sports coordinator, Mr Grahl, of 12 December 1996. Moreover, the audit report of the Kreis Neuss audit office, on which the Commission bases its claim, is dated 25 July 1997 and was received by the Commission that year. At the hearing the applicant also relied on the clause of the declaration by the recipient of the subsidy according to which it was only obliged to keep documents relating to ISO 94 for five years.

121. The Commission disputes the alleged limitation period, as the Verwaltungsverfahrensgesetz is not applicable to the legal measures it enacts. In any event, it contends that it was necessary to make the calculations to determine the amount to be repaid if necessary and, by not producing the documents required despite the request made by the Commission, the applicant prevented it from making those calculations for a long time. Moreover, it was only at the start of 1999 that the Commission was reliably informed that there had been a surplus. The repayment decision by Kreis Neuss was not, furthermore, made until 19 March 1998 and was not forwarded to the Commission but brought to its attention by a third party. Finally, it contends that actions based on the doctrine of unjust enrichment have a limitation period of 30 years in German law.

Findings of the Court

122.

First, as regards the application of German law, suffice it to note that the applicant is not entitled to rely, *vis-à-vis* a Community administrative procedure, on German legislation on limitation periods, as such legislation is not applicable in the context of financial assistance granted by the Commission from Community resources, management of which is subject to Community law. Moreover, as the applicant itself accepts, Community law contains no express provisions on limitation periods in respect of the repayment of subsidies.

123.

It must be recalled that, in order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance by the Community legislature (see, for example, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 19 and 20; Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 47 and 48, and Case T-26/89 *De Compte* v *Parliament* [1991] ECR II-781, paragraph 68, and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 67). The fixing of their duration and the detailed rules for their applications come within the powers of the Community legislature (*ACF Chemiefarma* v *Commission*, cited above, paragraph 20). Moreover, as regards limitation periods, legislative provisions unconnected with the case in point cannot be applied by analogy (*BFM and EFIM* v *Commission*, cited above, paragraph 68).

124.

In that connection, it must be observed that there are no legislative provisions laying down a limitation period which would be applicable in this case. In particular, although paragraph 5 of the declaration by the recipient of the subsidy, cited by the applicant, provides for an undertaking by the recipient of the subsidy to retain all original documents for five years with a view to a possible audit, it does not lay down any limitation period for Commission actions to suspend, reduce or cancel the subsidy.

125.

Second, if the applicant's plea is to be understood as relying on failure to comply with a reasonable time-limit, it must be observed that the question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, its context, the various procedural stages followed, the complexity of the case and its importance for the various parties involved (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 57).

126.

The period to be taken into account in assessing whether this plea is well founded must therefore be determined. The period begins to run when the Commission became aware of the irregularities in connection with the ISO 94 account.

127.

The applicant submits that that was the moment when the Commission received the letter dated 12 December 1996 from the applicant's sports coordinator, Mr Grahl. It is indeed clear from that letter that Mr Grahl alerted the Commission to certain anomalies, for example, the fact that the applicant had not settled certain payments, although those payments were presented to the Commission as expenditure. Moreover, Mr Grahl pointed out that there was a surplus of DEM 40 000.

128.

However, given the imprecise nature of that letter, it must be considered that it did not allow the Commission, at that stage, to be aware in detail of the irregularities it criticised. Therefore, the applicant cannot criticise the Commission for not acting on the basis of that letter.

129.

Therefore, what is important is to know when the Commission had sight of the Kreis Neuss audit report, drawn up on 26 November 1997, pointing out the existence of an accounting surplus and referring to the audit report of the audit office of 25 July 1997, or the repayment decision of Kreis Neuss of 19 March 1998. In its reply to a written question by the Court of First Instance, the Commission confirmed that it was informed of the Kreis Neuss repayment decision by letter from Kreis Neuss of 11 August 1998, received on 21 August 1998, and that it received the Kreis Neuss audit report with covering letter dated 17 February 1999 on 25 February 1999. At the hearing the applicant confirmed that it did not dispute those dates.

130.

Accordingly, it must be held that the period to be taken into account began to run on 21 August 1998, the date on which the Commission was informed of the Kreis Neuss repayment decision, on the basis of which it was able to ascertain, for the first time in a serious manner, that there were irregularities relating to the ISO 94 account.

131.

It is clear from the order of the Court of First Instance of 20 October 1999 mentioned in paragraph 20 above that the Commission first, on 9 February 1999, asked the applicant to produce all the documents concerning expenditure and income in connection with ISO 94 and, subsequently, by decision of 6 April 1999, ordered the repayment in full of the subsidy paid on the ground that its request had not been complied with and that, in any event, it had information according to which the applicant had derived a profit from the event which was incompatible with the rules on financial assistance. Accordingly, it is demonstrated that, until 6 April 1999, if not later, the Commission did not have evidence of the use of the funds in question.

132.

The Commission withdrew the first repayment decision of 6 April 1999 on 6 August 1999. It was not until 11 August 1999 that Mr Hüsch, the applicant's lawyer, sent the Commission the final account for ISO 94 drawn up in August 1999. The Commission's representatives carried out an audit at the office of the applicant's lawyer on 13 April 2000. On 23 May 2000, Mr Hüsch sent the Commission certain information to clarify various transactions. On 15 June 2000, the Commission drew up the audit report and, on 9 April 2001, it issued a new debit notice, that is to say, the contested decision.

133.

In the light of all those circumstances it is clear that the Commission did not remain inactive after becoming aware of the irregularities on 21 August 1998. The first repayment decision was adopted seven and a half months after that date. Subsequently, that decision was withdrawn and the contested decision was adopted on 9 April 2001, that is to say, 20 months after the first decision was withdrawn. It must therefore be held that those periods did not exceed a reasonable length.

134.

Accordingly, in the circumstances, the fourth plea should be rejected.

The fifth plea - breach of the principle of sound administration and the duty of care

Arguments of the parties

135.

In its reply, the applicant submits that the Commission breached the principle of due process. According to that principle, the Commission is obliged, in Community administrative law, to undertake a specific examination of the case in hand and may not confine itself to abstract considerations or assessments (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, 306). The Commission did

not assess the evidence put before it or take up the offers of evidence made to it. In particular, witnesses should have been heard regarding the various accounting transactions. As there was no use of evidence, the principle of due process was breached.

136. The Commission contends that the applicant is ignoring the obligation under paragraph 7 of the declaration by the recipient of the subsidy, according to which the applicant is bound to certify the proper use of the subsidy and, failing that, is required to reimburse it. According to the Commission, it explained fully in the audit report why it considered that such a certificate was not submitted or considered the documentary evidence presented by the applicant irrelevant. Moreover, the applicant had, even at that stage, still not taken a specific position on the objections raised by the Commission.

Findings of the Court

137. Given that the applicant did not raise this plea until the stage of the reply, it must be held that it is a new plea in law within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance which may not be introduced in the course of proceedings. This plea must, therefore, be declared inadmissible.

138. In the light of all the foregoing observations, the application must be dismissed.

Costs

139. Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 applicant has been unsuccessful, it must, in accordance with the form of order sought by the defendant, be ordered to pay all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. Dismisses the application.

2. Orders the applicant to pay the costs.

Tiili

Mengozzi
Vilaras

Delivered in open court in Luxembourg on 17 September 2003.

H. Jung

JUDGMENT OF THE COURT

20 September 2001 (1)

(Article 85 of the EC Treaty (now Article 81 EC) - Beer tie - Leasing of public houses - Restrictive agreement - Right to damages of a party to the contract)

In Case C-453/99,

REFERENCE to the Court under Article 234 EC by the Court of Appeal (England amd Wales) (Civil Division) for a preliminary ruling in the proceedings pending before that court between

Courage Ltd

and

Bernard Crehan

and between

Bernard Crehan

and

Courage Ltd and Others,

on the interpretation of Article 85 of the EC Treaty (now Article 81 EC) and other provisions of Community law,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet (Rapporteur) and V. Skouris (Presidents of Chambers), D.A.O. Edward, P. Jann, L. Sevón, F. Macken and N. Colneric, J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Courage Ltd, by N. Green QC, instructed by A. Molyneux, Solicitor,
- Bernard Crehan, by D. Vaughan QC and M. Brealey, Barrister, instructed by R. Croft, solicitor,
- the United Kingdom Government, by J.E. Collins, acting as Agent, and K. Parker QC,
- the French Government, by K. Rispal-Bellanger et R. Loosli-Surrans, acting as Agents,
- the Italian Government, by U. Leanza, acting as Agent,
- the Swedish Government, by L. Nordling and I. Simfors, acting as Agents,

- the Commission of the European Communities, by K. Wiedner, acting as Agent, and N. Khan, Barrister,

having regard to the Report for the Hearing,

after hearing the oral observations of Courage Ltd, represented by N. Green and M. Gray, Barrister, of Bernard Crehan, represented by D. Vaughan and M. Brealey, of the United Kingdom Government, represented by J.E. Collins and K. Parker, and of the Commission, represented by K. Wiedner and N. Khan, at the hearing on 6 February 2001,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2001,

gives the following

Judgment

1. By order of 16 July 1999, received at the Court on 30 November 1999, the Court of Appeal (England and Wales) (Civil Division) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 85 of the EC Treaty (now Article 81 EC) and other provisions of Community law.

2. The four questions have been raised in proceedings between Courage Ltd (hereinafter Courage) and Bernard Crehan, a publican, concerning unpaid supplies of beer.

Facts of the case and the questions referred for a preliminary ruling

3. In 1990, Courage, a brewery holding a 19% share of the United Kingdom market in sales of beer, and Grand Metropolitan plc (hereinafter Grand Met), a company with a range of catering and hotel interests, agreed to merge their leased public houses (hereinafter pubs). To this end, their respective pubs were transferred to Inntrepreneur Estates Ltd (hereinafter IEL), a company owned in equal shares by Courage and Grand Met. An agreement concluded between IEL and Courage provided that all IEL tenants had to buy their beer exclusively from Courage. Courage was to supply the quantities of beer ordered at the prices specified in the price lists applicable to the pubs leased by IEL.

4. IEL issued a standard form lease agreement to its tenants. While the level of rent could be the subject of negotiation with a prospective tenant, the exclusive purchase obligation (beer tie) and the other clauses of the contract were not negotiable.

5. In 1991, Mr Crehan concluded two 20-year leases with IEL imposing an obligation to purchase from Courage. The rent, subject to a five-year upward-only rent review, was to be the higher of the rent for the immediately preceding period or the best open market rent obtainable for the residue of the term on the other terms of the lease. The tenant had to purchase a fixed minimum quantity of specified beers and IEL agreed to procure the supply of specified beer to the tenant by Courage at the prices shown in the latter's price list.

6. In 1993, Courage, the plaintiff in the main proceedings, brought an action for the recovery from Mr Crehan of the sum of GBP 15 266 for unpaid deliveries of beer. Mr Crehan contested the action on its

merits, contending that the beer tie was contrary to Article 85 of the Treaty. He also counter-claimed for damages.

7.

Mr Crehan contended that Courage sold its beers to independent tenants of pubs at substantially lower prices than those in the price list imposed on IEL tenants subject to a beer tie. He contended that this price difference reduced the profitability of tied tenants, driving them out of business.

8.

The standard form lease agreement used by Courage, Grand Met and their subsidiaries was notified to the Commission in 1992. In 1993, the Commission published a notice under Article 19(3) of Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, 1959-1962, p. 87), stating its intention to grant an exemption under Article 85(3) of the Treaty.

9.

That notification was withdrawn in October 1997 following the introduction by IEL of a new standard form lease agreement, which was also notified to the Commission. The new lease is, however, not at issue in the main proceedings, as the actions brought concern the operation of the beer tie under the old lease.

10.

The considerations which led the Court of Appeal to refer questions to the Court of Justice for a preliminary ruling were as follows.

11.

According to the referring court, English law does not allow a party to an illegal agreement to claim damages from the other party. So, even if Mr Crehan's defence, that the lease into which he entered infringes Article 85 of the Treaty, were upheld, English law would bar his claim for damages.

12.

Moreover, in a judgment which predated the present order for reference, the Court of Appeal had held, without considering it necessary to seek a ruling from the Court of Justice on the point, that Article 85(1) of the EC Treaty was intended to protect third parties, whether competitors or consumers, and not parties to the prohibited agreement. It was held that they were the cause, not the victims, of the restriction of competition.

13.

The Court of Appeal points out that the Supreme Court of the United States of America held, in its decision in *Perma Life Mufflers Inc.* v *International Parts Corp*. 392 U.S. 134 (1968), that where a party to an anticompetitive agreement is in an economically weaker position he may sue the other contracting party for damages.

14.

The Court of Appeal therefore raises the question of the compatibility with Community law of the bar in English law to Mr Crehan's claims set out at paragraph 6 above.

15.

If Community law confers on a party to a contract liable to restrict or distort competition legal protection comparable to that offered by the law of the United States of America, the Court of Appeal points out that there might be tension between the principle of procedural autonomy and that of the uniform application of Community law.

16. In those circumstances, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Is Article 81 EC (ex Article 85) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?

2. If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Article 81?

3. Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with Community law;

4. If the answer to Question 3 is that, in some circumstances, such a rule may be inconsistent with Community law, what circumstances should the national court take into consideration?

The questions

17. By its first, second and third questions, which should be considered together, the referring court is asking essentially whether a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that provision before a national court to obtain relief from the other contracting party. In particular, it asks whether that party can obtain compensation for loss which he alleges to result from his being subject to a contractual clause contrary to Article 85 and whether, therefore, Community law precludes a rule of national law which denies a person the right to rely on his own illegal actions to obtain damages.

18. If Community law precludes a national rule of that sort, the national court wishes to know, by its fourth question, what factors must be taken into consideration in assessing the merits of such a claim for damages.

19. It should be borne in mind, first of all, that the Treaty has created its own legal order, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal order are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1, Case 6/64 *Costa* [1964] ECR 585 and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 31).

20. Secondly, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market (judgment in Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 36).

21. Indeed, the importance of such a provision led the framers of the Treaty to provide expressly, in

Article 85(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void (judgment in *Eco Swiss*, cited above, paragraph 36).

22. That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 85(1) are met and so long as the agreement concerned does not justify the grant of an exemption under Article 85(3) of the Treaty (on the latter point, see *inter alia* Case 10/69 *Portelange* [1969] ECR 309, paragraph 10). Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties (see the judgment in Case 22/71 *Béguelin* [1971] ECR 949, paragraph 29). Moreover, it is capable of having a bearing on all the effects, either past or future, of the agreement or decision concerned (see the judgment in Case 48/72 *Brasserie de Haecht II* [1973] ECR 77, paragraph 26).

23. Thirdly, it should be borne in mind that the Court has held that Article 85(1) of the Treaty and Article 86 of the EC Treaty (now Article 82 EC) produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard (judgments in Case 127/73 *BRT and SABAM* [1974] ECR 51, paragraph 16, (*BRT I*) and Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 39).

24. It follows from the foregoing considerations that any individual can rely on a breach of Article 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

25. As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see *inter alia* the judgments in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16, and in Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19).

26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.

28. There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

29. However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down

the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27).

30. In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 14, Case 68/79 *Just* [1980] ECR 501, paragraph 26, and Joined Cases C-441/98 and C-442/98 *Michaïlidis* [2000] ECR I-7145, paragraph 31).

31. Similarly, provided that the principles of equivalence and effectiveness are respected (see *Palmisani*, cited above, paragraph 27), Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 10), a litigant should not profit from his own unlawful conduct, where this is proven.

32. In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.

33. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.

34. Referring to the judgments in Case 23/67 *Brasserie de Haecht* [1967] ECR 127 and Case C-234/89 *Delimitis* [1991] ECR I-935, paragraphs 14 to 26, the Commission and the United Kingdom Government also rightly point out that a contract might prove to be contrary to Article 85(1) of the Treaty for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition. In such a case, the party contracting with the person controlling the network cannot bear significant responsibility for the breach of Article 85, particularly where in practice the terms of the contract were imposed on him by the party controlling the network.

35. Contrary to the submission of Courage, making a distinction as to the extent of the parties' liability does not conflict with the case-law of the Court to the effect that it does not matter, for the purposes of the application of Article 85 of the Treaty, whether the parties to an agreement are on an equal footing as regards their economic position and function (see *inter alia* Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 382). That case-law concerns the conditions for application of Article 85 of the Treaty while the questions put before the Court in the present case concern certain consequences in civil law of a breach of that provision.

36. Having regard to all the foregoing considerations, the questions referred are to be answered as follows:

- a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that article to obtain relief from the other contracting party;

- Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract;

- Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.

Costs

37. The costs incurred by the United Kingdom, French, Italian and Swedish 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 proceedings, 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 Court of Appeal (England and Wales) (Civil Division) by order of 16 July 1999, hereby rules:

1. A party to a contract liable to restrict or distort competition within the meaning of Article 85 of the EC Treaty (now Article 81 EC) can rely on the breach of that provision to obtain relief from the other contracting party.

2. Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract.

3. Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.

Rodríguez Iglesias

Gulmann

Wathelet

Skouris

JUDGMENT OF THE COURT (Sixth Chamber)

7 December 2000 (1)

(Public service contracts - Directive 92/50/EEC - Public service contracts in the telecommunications sector - Directive 93/38/EEC - Public service concession)

In Case C-324/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Bundesvergabeamt, Austria, for a preliminary ruling in the proceedings pending before that court between

Telaustria Verlags GmbH,

Telefonadress GmbH

and

Telekom Austria AG, formerly Post & Telekom Austria AG,

joined party:

Herold Business Data AG,

on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84),

THE COURT (Sixth Chamber),

composed of: V. Skouris (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, J.-P. Puissochet and F. Macken, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Telaustria Verlags GmbH, by F.J. Heidinger, Rechtsanwalt, Vienna,

- Telekom Austria AG, by C. Kerres and G. Diwok, Rechtsanwälte, Vienna,

- the Austrian Government, by W. Okresek, Sektionschef in the Federal Chancellor's Office, acting as Agent,

- the Danish Government, by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. Bréville-Viéville, Chargé de Mission in the same directorate, acting

as Agents,

- the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by M. Nolin and J. Schieferer, of its Legal Service, acting as Agents, assisted by R. Roniger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Telaustria Verlags GmbH, represented by F.J. Heidinger; of Telekom Austria AG, represented by C. Kerres, P. Asenbauer, and M. Gregory, Director of Commercial Law in the office of the Legal Service of Telekom Austria AG, acting as Agent; of Herold Business Data AG, represented by T. Schirmer, Rechtsanwalt, Vienna; of the Austrian Government, represented by M. Fruhmann, of the Federal Chancellor's Office, acting as Agent; of the French Government, represented by S. Pailler, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; and of the Commission, represented by M. Nolin, assisted by R. Roniger, at the hearing on 23 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2000,

gives the following

Judgment

1. By order of 23 April 1998, received at the Court on 26 August 1998, the Bundesvergabeamt (Federal Procurement Office) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) seven questions on the interpretation of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) and of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84).

2. Those questions have been raised in proceedings between Telaustria Verlags GmbH ('Telaustria) and Telefonadress GmbH ('Telefonadress), on the one hand, and Telekom Austria AG ('Telekom Austria), on the other, concerning the conclusion by Telekom Austria of a concession contract with Herold Business Data AG ('Herold) for the production and publication of printed and electronically accessible lists of telephone subscribers (telephone directories).

Legislative framework

Community legislation

Directive 92/50

3. Article 1 of Directive 92/50 states:

'For the purposes of this directive:

(a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

....

4. The eighth recital in the preamble to Directive 92/50 states:

'... the provision of services is covered by this directive only in so far as it is based on contracts; ... the provision of services on other bases, such as law or regulations, or employment contracts, is not covered.

5. Furthermore, the 17th recital in the preamble to Directive 92/50 states:

'... the rules concerning service contracts as contained in Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [OJ 1990 L 297, p. 1] should remain unaffected by this directive.

Directive 93/38

6. Under Article 45(3) of Directive 93/38, Directive 90/531 is to cease to have effect as from the date on which Directive 93/38 is applied. Article 45(4) states, moreover, that references to Directive 90/531 are to be construed as referring to Directive 93/38.

7. Under the 24th recital in the preamble to Directive 93/38:

'... the provision of services is covered by this directive only in so far as it is based on contracts; ... the provision of services on other bases, such as law, regulations or administrative provisions or employment contracts, is not covered.

8. Article 1(2) of Directive 93/38 defines 'public undertaking as 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital ....

9. Article 1(4) of Directive 93/38 defines 'supply, works and service contracts as 'contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, having as their object:

(a) in the case of supply contracts ...

(b) in the case of works contracts ...

(c) in the case of service contracts, any object other than those referred to in (a) and (b) and to the exclusion of:

....

10. The last indent of Article 1(4) thereof states:

'Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract.

11. Furthermore, Article 1(15) of Directive 93/38 defines 'public telecommunications services and 'telecommunications services as follows:

'public telecommunications services shall mean telecommunications services the provision of which the Member States have specifically assigned notably to one or more telecommunications entities;

telecommunications services shall mean services the provision of which consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio-broadcasting and television.

12. Article 2(1) and (2) of Directive 93/38 states:

'1. This directive shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2;

...

2. Relevant activities for the purposes of this directive shall be:

...

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

The national legislation

13. The Telekommunikationsgesetz (Telecommunications Law, BGBl. I No 100/1997), which entered into force on 1 August 1997, determines, in particular, the obligations of providers, concessionaires and operators of a voice telephony service.

14. Under Paragraph 19 of the Telekommunikationsgesetz, every provider of a public voice telephony service must maintain an up-to-date list of subscribers, maintain an information service about subscribers' numbers, provide for calls free of charge to emergency services, and make telephone directories available at least weekly in electronically readable form on request to the regulatory authority free of charge and to other providers for an appropriate charge, for the purposes of giving information or publishing directories.

15. Under Paragraph 26(1) of the Telekommunikationsgesetz, the regulatory authority is to ensure that a comprehensive directory of all subscribers to public voice telephony services is available. Concessionaires who offer a public voice telephony service via a fixed or mobile network are obliged

to transmit subscriber data to the regulatory authority, against payment, for that purpose.

16. Furthermore, under Paragraph 96(1) of that Law, the operator of a public telecommunications service must produce a directory of telephone subscribers. This may take the form of a printed document or a telephone information service, 'Bildschirmtext (videotex system), electronic data support or any other technical form of communication. Paragraph 96 further regulates the minimum requirements for the data and the structure of those directories and the communication of subscriber data to the regulatory authority or to third parties.

The main proceedings and the questions referred for a preliminary ruling

17. Telekom Austria, founded under the Telekommunikationsgesetz, is a limited company in which the Republic of Austria holds all the shares. It is the successor to the former Post & Telegraphenverwaltung (Post and Telegraph Administration; 'the PTV) and carries out the former functions of the PTV, including the obligation to ensure that a directory of all subscribers to public voice telephony services is available.

18. Whereas until 1992 the PTV fulfilled by its own means its obligation to publish, in particular, an official telephone directory known as 'the White Pages, in 1992, because of the high cost of printing and distributing that directory, it decided to seek a partner and concluded a contract with a private undertaking for the publication of that directory.

19. Since that contract was to expire on 31 December 1997, on 15 May 1997, Telekom Austria, which had replaced the PTV, published in the *Amtsblatt zur Wiener Zeitung* (bulletin annexed to the Austrian Official Journal) an invitation 'to submit tenders for a public service concession for the production and publication of printed andelectronically accessible lists of telephone subscribers (telephone directories) commencing with the 1998/99 edition and then for an indefinite period.

20. Since Telaustria and Telefonadress took the view that the procedures prescribed by Community and national law for the award of public contracts should have been applied to the contract which would be concluded as a result of the abovementioned invitation to submit tenders, on 12 and 17 June 1997 respectively, they made applications to the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission) for an arbitration procedure to be initiated under Paragraph 109 of the Bundesvergabegesetz 1997 (Federal Procurement Law, BGBl. I No 56/1997; 'the BVergG).

21. After having joined those two applications, the Bundes-Vergabekontrollkommission issued a reasoned recommendation in favour of the applicants, concluding on 20 June 1997 that the provisions of the BVergG applied to the planned contract.

22. Since Telekom Austria had continued negotiations on the conclusion of that contract, on 24 June 1997, Telaustria made an application to the Bundesvergabeamt for a re-examination procedure to be initiated, combined with an application for an interim order. By application of 4 July 1997, Telefonadress applied to be joined in those proceedings. On 8 July 1997, Herold, which is the company with which Telekom Austria was negotiating, also joined in the proceedings as a third party in support of the forms of order sought by Telekom Austria.

23. Before the Bundesvergabeamt, Telekom Austria submitted that the contract to be concluded fell outside the scope of the directives on the award of public service contracts on the grounds, first, that the contract was not for pecuniary interest and, second, that the case concerned a 'public service concession excluded from the scope of Directives 92/50 and 93/38.

24. Having first adopted an interim order in favour of the applicants, on 10 July 1997, the Bundesvergabeamt replaced that order with a new order giving provisional permission for the conclusion of the contract between Telekom Austria and Herold, on condition that provision be made for the possibility for that contract to be terminated in order to resume a proper procurement procedure if it transpired that the planned contract fell within the scope of the Community and national rules on public procurement.

25. On 1 December 1997, Herold, to which the concession was to be granted shortly thereafter, passed into the ownership of the undertaking GTE which, on 3 December 1997, ceded to Telekom Austria a holding of 26% in the capital of Herold, which thus became a joint subsidiary of GTE and Telekom Austria. On 15 December 1997, the contract at issue in the main proceedings was formally concluded between Herold and its minority shareholder, namely Telekom Austria.

26. In the grounds of its order for reference, the Bundesvergabeamt observes that that contract, consisting of several, partly interlocking contracts, concerns the production of printed telephone directories and provides, in particular, for the provision of the following services on the part of Herold: collecting, processing and arranging subscriber data, production of telephone directories and certain advertising services. As regards the payment of the other contracting party, the contract stipulates that Herold is not to be directly remunerated for providing the services, but that it may exploit them commercially.

27. In view of all those facts, and in particular of the method by which the service provider is to be remunerated, such as to result in the classification of that contract as one of 'service concession, and in view of its own considerations, the Bundesvergabeamt, being uncertain as to the interpretation of Directives 92/50 and 93/38, decided to stay proceedings and to refer the following questions to the Court of Justice.

'Principal question:

Can it be inferred from the legislative history of Directive 92/50/EEC, in particular the proposal of the Commission (COM (90) 372 final, OJ 1991 C 23, p. 1), or from the definition of the term public service contract in Article 1(a) of Directive 92/50/EEC, that certain categories of contracts concluded by contracting authorities subject to that directive with undertakings which provide services are to be excluded a priori from the scope of the directive, solely on the basis of certain common characteristics as specified in that proposal of the Commission, without the need to rely on Article 1(a)(i) to (viii) or Articles 4 to 6 of Directive 92/50/EEC?

If the principal question is answered in the affirmative:

Do such categories of contracts also exist, having regard in particular to the 24th recital in the preamble to Directive 93/38/EEC, within the scope of Directive 93/38/EEC?

If the second question is answered in the affirmative:

May those categories of contracts excluded from the scope of Directive 93/38/EEC be adequately described, by analogy with Commission Proposal COM (90) 372 final, as having as their essential feature that a contracting entity which falls within the scope *ratione personae* of Directive 93/38/EEC cedes a service for which it is responsible to an undertaking of its choice in return for the right to operate the service concerned for financial gain?

Supplementary to the first three questions:

Is a contracting entity which falls within the scope *ratione personae* of Directive 93/38/EEC obliged, where a contract concluded by it contains elements of a servicecontract within the meaning of Article 1(4)(a) of Directive 93/38/EEC together with elements of a different contractual nature which are not within the scope of that directive, to sever the part of the overall contract which is subject to Directive 93/38/EEC, in so far as that is technically possible and economically reasonable, and make that part the subject of a procurement procedure under Article 1(7) of that directive, as the Court of Justice held in Case C-3/88 before the entry into force of Directive 92/50/EEC with respect to a contract which was not subject as a whole to Directive 77/62/EEC?

If that question is answered in the affirmative,

Is the contractual concession of the exclusive right to operate a service for financial gain, which will give the service provider an income which cannot be determined but which in the light of general experience will not be inconsiderable and may be expected to exceed the costs of providing the service, to be regarded as payment for the provision of the service, as the Court of Justice held in Case C-272/91 in connection with a supply contract and a right ceded by the public authorities in lieu of payment?

Supplementary to the above questions:

Are the provisions of Article 1(4)(a) and (c) of Directive 93/38/EEC to be interpreted as meaning that a contract which provides for the provision of services within the meaning of Annex XVI A, category 15, loses the nature of a service contract and becomes a supply contract if the result of the service is the production of a large number of identical tangible objects which have an economic value and thus constitute goods within the meaning of Articles 9 and 30 of the EC Treaty?

If that question is answered in the affirmative,

Is the judgment of the Court of Justice in Case C-3/88 to be interpreted as meaning that such a supply contract is to be severed from the other components of the service contract and made the subject of a procurement procedure under Article 1(7) of Directive 93/38/EEC, in so far as this is technically possible and economically reasonable?

The first and second questions

28. By the first and second questions, which can be examined together, the national court raises essentially two issues.

29. The first is whether a contract for pecuniary interest is covered, by reason of the contracting parties and its specific object, by Directives 92/50 or 93/38 where under that contract, which was concluded in writing between, on the one hand, anundertaking which is specifically responsible under the legislation

of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories).

30. By the second issue raised, the national court seeks essentially to ascertain whether such a contract, whose specific object is the services mentioned in the preceding paragraph, although it is covered by one of those directives, is excluded, as Community law stands at present, from the scope of the directive which covers it, because, in particular, the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

31. In order to deal with the first issue raised, it should be noted at the outset that, as is clear from the 17th recital in the preamble to Directive 92/50, the provisions of that directive must not affect those of Directive 90/531 which, since it preceded Directive 93/38, also applied, like that directive, to procurement procedures in the water, energy, transport and telecommunications sectors.

32. Since Directive 90/531 was replaced by Directive 93/38, as is clear from Article 45(3) of that directive, and since the references to Directive 90/531 are to be construed, according to Article 45(4) of Directive 93/38, as referring to Directive 93/38, it must be concluded, as under the regime applicable when the sectoral Directive 90/531 was in force, that the provisions of Directive 92/50 must not affect those of Directive 93/38.

33. Consequently, where a contract is covered by Directive 93/38 governing a specific sector of services, the provisions of Directive 92/50, which are intended to apply to services in general, are not applicable.

34. In those circumstances, it is necessary only to examine whether the contract at issue in the main proceedings can be covered, by reason of the contracting parties and its specific object, by Directive 93/38.

35. In this respect, it is necessary to determine, first, whether an undertaking, such as Telekom Austria, falls within the scope *ratione personae* of Directive 93/38 and, second, whether a contract, whose object is the services mentioned in paragraph 26 above, comes within the material scope of that directive.

36. As regards the scope *ratione personae* of Directive 93/38, it is common ground, as is clear from the order for reference, that Telekom Austria, whose capital belongs entirely to the Austrian public authorities, constitutes a public undertaking over which those authorities may, by virtue of the fact that the Republic of Austria holds the entire capital, exercise a dominant influence. It follows that Telekom Austria must be regarded as a public undertaking for the purpose of Article 1(2) of that directive.

37. Furthermore, it is common ground that, under the Telekommunikationsgesetz under which it was founded, that public undertaking carries on the activity which consists in the provision of public telecommunications services. It follows that Telekom Austria constitutes a contracting entity for the purpose of Article 2(1)(a) of Directive 93/38 in conjunction with Article 2(2)(d) thereof.

38.

Moreover, since it is also common ground that the aforementioned contract provides for the performance of services which are Telekom Austria's responsibility under the Telekommunikationsgesetz and consist in the provision of public telecommunications services, it is sufficient, in order to determine whether the contract at issue in the main proceedings comes within the material scope of Directive 93/38, to determine whether the specific object of that contract is covered by the provisions of Directive 93/38.

39.

In this respect, it should be noted, as in the order for reference, that the services which are Herold's responsibility include:

- collecting, processing and arranging of subscriber data, in order to make them technically accessible, operations which require data gathering, data processing and tabulation, and services of data banks, which are in category 7, entitled 'Computer and related services, of Annex XVI A to Directive 93/38;

- production of printed telephone directories, which comes under category 15 of Annex XVI A to that directive, a category covering 'Publishing and printing services on a fee or contract basis;

- advertising services, which come under category 13 of Annex XVI A to Directive 93/38.

40.

Since those services are directly linked to an activity relating to the provision of public telecommunications services, it must be concluded that the contract at issue in the main proceedings, whose specific object is the services referred to in the preceding paragraph, is covered by Directive 93/38.

41.

In answering the second issue raised by the national court, it must be noted at the outset that the court links its questions to Proposal 91/C 23/01 of 13 December 1990 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 23, p. 1; 'the proposal of 13 December 1990) and adopts the definition of public service concession proposed in that document by the Commission.

42.

In that regard, it is necessary to state that the Court is in a position to deal with the second issue raised without its being necessary for it to adopt the definition of public service concession referred to in Article 1(h) of the proposal of 13 December 1990.

43.

It should be noted at the outset that Article 1(4) of Directive 93/38 refers to contracts for pecuniary interest concluded in writing and, without making express reference to public service concessions, provides only indications about the contracting parties and about the object of the contract, defining them in particular in the light of the method of remunerating the service provider and without drawing any distinction between contracts in which the consideration is fixed and those in which the consideration consists in a right of exploitation.

44.

Telaustria proposes that Directive 93/38 be interpreted as meaning that a contract under which the consideration consists in a right of exploitation also comes within its scope. In its submission, in order for Directive 93/38 to apply to such a contract, it is sufficient, in accordance with Article 1(4) of that

directive, for the contract to be for pecuniary interest and concluded in writing. It would therefore be unjustified to infer that such contracts are excluded from the scope of Directive 93/38 simply because that directive is silent about the method by which the service provider is to be remunerated. Telaustria adds that the fact that the Commission did not propose to include provisions about that type of contract within the scope of the Directive indicates that it considered that the Directive covers any contract for the provision of services, regardless of the arrangements for remunerating the provider.

45.

Since Telekom Austria, the Member States which have submitted observations and the Commission dispute that interpretation, it is necessary to assess its merits in the light of the history of the relevant directives, in particular in the field of public service contracts.

46.

In that regard, it should be recalled that both in its proposal of 13 December 1990 and in its amended proposal 91/C 250/05 of 28 August 1991 for a Council Directive relating to the coordination of procedures on the award of public service contracts (OJ 1991 C 250, p. 4; 'the proposal of 28 August 1991), which resulted in the adoption of Directive 92/50 which covers public service contracts in general, the Commission had expressly proposed that 'public service concessions be included within the scope of that directive.

47.

Since that inclusion was justified by the intention 'to ensure coherent award procedures, the Commission stated, in the 10th recital in the preamble to the proposal of 13 December 1990, that 'public service concessions should be covered by this directive in the same way as Directive 71/305/EEC applies to public works concessions. Although the reference to Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682) was withdrawn from the 10th recital in the preamble to the proposal of 28 August 1991, that proposal none the less expressly maintained the purpose of ensuring 'coherent award procedures in that recital.

48.

However, during the legislative process, the Council eliminated all references to public service concessions, in particular because of the differences between the Member States as regards the delegation of the management of public services and modes ofdelegation, which could create a situation of very great imbalance in the opening-up of the public concession contracts (see point 6 of document No 4444/92 ADD 1 of 25 February 1992, entitled 'Statement of reasons of the Council and annexed to the common position of the same date).

49.

The outcome was the same for the Commission's position expressed in its amended proposal 89/C 264/02 of 18 July 1989 for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1989 C 264, p. 22), which resulted in the adoption of Directive 90/531, which was the first directive in those sectors on the award of public contracts and preceded Directive 93/38, in which the Commission had also proposed for those sectors certain provisions designed to govern public service concessions.

50.

None the less, as is clear from point 10 of document No 5250/90 ADD 1 of 22 March 1990, entitled 'Statement of reasons of the Council and annexed to the Council's common position of the same date on the amended proposal for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, the Council did not act on that Commission proposal to include in Directive 90/531 rules on public service concessions, on the ground

that such concessions existed in only one Member State and that it was inappropriate to proceed with their regulation in the absence of a detailed study of the various forms of public service concessions granted in the Member States in those sectors.

51. In view of those circumstances, the Commission did not propose the inclusion of public service concessions in its proposal 91/C 337/01 of 27 September 1991 for a Council Directive amending Directive 90/531 (OJ 1991 C 337, p. 1), which subsequently resulted in the adoption of Directive 93/38.

52. That finding is also supported by the way in which the scope of the directives on public works contracts evolved.

53. Article 3(1) of Directive 71/305, which was the first directive on the subject, expressly excluded concession contracts from its scope.

54. None the less, Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305 (OJ 1989 L 210, p. 1) inserted in Directive 71/305 Article 1b which expressly addressed public works concessions by making the advertising rules laid down in Articles 12(3), (6), (7), (9) to (13) and 15a thereof applicable to them.

55. Subsequently, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which replaced Directive 71/305 as amended, expressly refers to public works concessions among the contracts within its scope.

56. On the other hand, Directive 93/38, adopted on the same day as Directive 93/37, provided for no rule on public service concessions. It follows that the Community legislature decided not to include such concessions within the scope of Directive 93/38. If it had wished to, it would have done so expressly, as it did when adopting Directive 93/37.

57. Since public service concession contracts do not therefore come within the scope of Directive 93/38, it must be concluded that, contrary to the interpretation proposed by Telaustria, such contracts are not included in the concept of 'contracts for pecuniary interest concluded in writing appearing in Article 1(4) of that directive.

58. The answers to the first and second questions must therefore be that:

- Directive 93/38 covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories);

- although it is covered by Directive 93/38, such a contract is excluded, under Community law as it

stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

59. However, the fact that such a contract does not fall within the scope of Directive 93/38 does not preclude the Court from helping the national court which has sent it a series of questions for a preliminary ruling. To that end, the Court may take into consideration other factors in making an interpretation which may assist the determination of the main proceedings.

60. In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular.

61. As the Court held in Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31, that principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

62. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

63. It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

The third and fifth questions

64. In view of the answers given to the first and second questions, it is not necessary to answer the third, since it was raised only in the event that the Court answered the second question in the affirmative.

65. Furthermore, since the fifth question was referred to the Court for the purpose of clarification on the third question, it is not necessary to answer that question either.

The fourth, sixth and seventh questions

66. In view of the answers given to the first and second questions, it is likewise unnecessary to answer the fourth, sixth or seventh questions, since they were raised only in the event that the Court declared that Directive 93/38 was applicable to the contract at issue in the main proceedings.

Costs

67. The costs incurred by the Austrian, Danish, French and Netherlands 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 proceedings, a step in the action pending before the national

court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesvergabeamt by order of 23 April 1998, hereby rules:

1. - Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy,transport and telecommunications sectors covers a contract for pecuniary interest concluded in writing between, on the one hand, an undertaking which is specifically responsible under the legislation of a Member State for operating a telecommunications service and whose capital is wholly held by the public authorities of that State and, on the other, a private undertaking, where under that contract the first undertaking entrusts the second with the production and publication, for the purpose of distribution to the public, of printed and electronically accessible lists of telephone subscribers (telephone directories);

- although it is covered by Directive 93/38, such a contract is excluded, under Community law as it stands at present, from the scope of that directive by reason of the fact, in particular, that the consideration provided by the first undertaking to the second consists in the second obtaining the right to exploit for payment its own service.

2. Notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular, that principle implying, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with.

3. That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

4. It is for the national court to rule on the question whether that obligation was complied with in the case in the main proceedings and also to assess the materiality of the evidence produced to that effect.

Skouris
Puissochet
Macken

Delivered in open court in Luxembourg on 7 December 2000.

R. Grass

C. Gulmann

Registrar

JUDGMENT OF THE COURT (Sixth Chamber)

22 April 1999 (1)

(Failure by a Member State to fulfil its obligations Reasoned opinion Principle of collegiality Directive 90/605/EEC amending the scope ofDirectives 78/660/EEC and 83/349/EEC Annual accounts and consolidatedaccounts)

In Case C-272/97,

Commission of the European Communities, represented by António Caeiro andJürgen Grunwald, Legal Advisers, acting as Agents, with an address for service inLuxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, WagnerCentre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in theFederal Ministry of the Economy, and Alfred Dittrich, Ministerialrat in the FederalMinistry of Justice, acting as Agents, Postfach 13 08, D-53003 Bonn,

defendant,

APPLICATION for a declaration that, by failing to implement within theprescribed period all measures necessary to comply with Council Directive

90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annualaccounts and Directive 83/349/EEC on consolidated accounts as regards the scopeof those Directives (OJ 1990 L 317, p. 60), the Federal Republic of Germany hasfailed to fulfil its obligations under the EC Treaty,

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch, G.F. Mancini,H. Ragnemalm (Rapporteur) and R. Schintgen, Judges,

Advocate General: G. Cosmas,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 December1998,

gives the following

Judgment

1. By application lodged at the Registry of the Court on 28 July 1997, the Commissionof the European Communities commenced proceedings under Article 169 of theEC Treaty for a declaration that, by

failing to implement within the prescribedperiod all measures necessary to comply with Council Directive 90/605/EEC of 8November 1990 amending Directive 78/660/EEC on annual accounts and Directive83/349/EEC on consolidated accounts as regards the scope of those Directives (OJ1990 L 317, p. 60), the Federal Republic of Germany has failed to fulfil itsobligations under that Treaty.

Directive 90/605

2. The purpose of Directive 90/605 is to amend the scope of Fourth Council Directive78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annualaccounts of certain types of companies (OJ 1978 L 222, p. 11) and of SeventhCouncil Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of theTreaty on consolidated accounts (OJ 1983 L 193, p. 1).

3. Directives 78/660 and 83/349 prescribe measures to coordinate national provisionsconcerning the annual accounts and consolidated accounts respectively ofcompanies with share capital. They apply, as regards Germany, to the followingforms of company: the *Aktiengesellschaft* (public limited company), the*Kommanditgesellschaft auf Aktien* (company limited by shares, but having one ormore general partners) and the *Gesellschaft mit beschränkter Haftung* (limitedliability company).

4. Directive 90/605 extends the scope of Directives 78/660 and 83/349 to includecertain categories of partnership whose members are constituted as certain typesof company.

5. Articles 1 and 2 of Directive 90/605 extend the coordination measures prescribedby Directives 78/660 and 83/349, in Germany, to two types of company, the *offeneHandelsgesellschaft* (commercial partnership) and the *Kommanditgesellschaft*(limited partnership), where all members having unlimited liability are companiesof the types referred to in paragraph 3 of this judgment or companies which arenot governed by the laws of a Member State but have a legal form comparable tothose referred to in First Council Directive 68/151/EEC of 9 March 1968 oncoordination of safeguards which, for the protection of the interests of membersand others, are required by Member States of companies within the meaning of thesecond paragraph of Article 58 of the Treaty, with a view to making suchsafeguards equivalent throughout the Community (OJ, English Special Edition 1968(I), p. 41).

6. Directive 90/605 also extends the coordination measures to include the types ofcompany referred to in paragraph 5 of this judgment where all members havingunlimited liability are constituted as one of the types of company referred to inparagraph 3 or paragraph 5 of this judgment.

7. Article 3(1) of Directive 90/605 provides that the Member States are to bring intoforce the laws, regulations and administrative provisions necessary for them tocomply with the directive by 1 January 1993 and forthwith inform the Commissionthereof.

Pre-litigation procedure and forms of order sought by the parties

8. On the expiry of the time-limit provided for in Article 3(1) of Directive 90/605, theCommission had received no communication or any other information regardingimplementing measures; consequently, on 12 March 1993, it addressed a letter offormal notice to the German Government.

9. On 2 June 1993 the German Government replied that Directive 90/605 was in theprocess of being transposed.

10. Since the Commission subsequently received no communication to indicate thatDirective 90/605 had been transposed, it addressed to the Federal Republic ofGermany a reasoned opinion on 13 June 1994 concluding that, by failing to adoptthe laws, regulations and administrative provisions necessary to comply withDirective 90/605, that Member State had failed to fulfil its obligations under thedirective, and inviting it to adopt the measures necessary to comply with thereasoned opinion within two months.

11. Having received no reply from the German Government, the Commissioncommenced the present action in which it asks the Court to declare that theFederal Republic of Germany has failed to fulfil its obligations and to order it topay the costs.

12. The German Government asks the Court to dismiss the action as inadmissible or,in the alternative, as unfounded, and to order the Commission to pay the costs.

Admissibility

13. The German Government contends, principally, that the action is inadmissiblebecause the reasoned opinion of 13 June 1994 was drawn up in breach of theprinciple of collegiality laid down in Article 163 of the EC Treaty and Article 16of the Commission's Rules of Procedure.

14. In its view, the principle of collegiality requires decisions to be the subject ofcollective deliberation, which presupposes that the members of the college ofCommissioners are aware, at their meeting, of both the operative part of thedecision envisaged and the statement of reasons. The German Governmentconsiders that those requirements were not complied with in this case.

15. The Commission states that the reasoned opinion was adopted by the institutionacting in college. It took the decision without having the full text of the draftreasoned opinion before it, but relied on a document presented in the form of atable and containing much detailed information together with a statement ofreasons relating to the procedural measure proposed. The Commission thereforeconsiders that it validly adopted a decision of principle which was thenimplemented by the competent departments under the supervision of theCommissioner responsible for the area concerned.

16. In Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449 the Court examinedthe conditions governing the adoption of reasoned opinions by the Commission.

17. At paragraphs 36 and 41 of that judgment the Court stated that the decision of theCommission to issue a reasoned opinion is subject to the principle of collegialitybut that the formal requirements for effective compliance with that principle varyaccording to the nature and legal effects of the acts adopted by that institution.

18.

At paragraph 44 of that judgment the Court observed that the issue of a reasonedopinion constitutes a preliminary procedure, which does not have any binding legaleffect for the addressee. It is merely a pre-litigation stage of a procedure whichmay lead to an action before the Court.

19.

The Court therefore held, at paragraph 48, that the Commission's decision to issuea reasoned opinion must be the subject of collective deliberation by the college ofCommissioners, which implies that the information on which those decisions arebased must be available to the members of the college. It is not necessary, however,for the college itself formally to decide on the wording of the acts which give effectto those decisions and put them in final form.

20.

At paragraphs 49 and 50 of the judgment the Court pointed out that it was notdisputed that the members of the college had available to them all the informationthey considered would assist them for the purposes of adopting the decision whenthe college had decided to issue the reasoned opinion, and held that in thosecircumstances the rules relating to the principle of collegiality had been compliedwith.

21.

In this case there is no reason to draw any conclusions different from those reachedby the Court in Case C-191/95 *Commission* v *Germany*, cited above, as regards theavailability of the information that the members of the college considered wouldassist them for the purposes of adopting the decision to issue the reasoned opinionand, consequently, as regards compliance with the principle of collegiality.

22.

Accordingly the plea of inadmissibility must be rejected as unfounded.

Substance

23.

The German Government acknowledges that it has not adopted specific measuresto transpose Directive 90/605. It maintains, nevertheless, that the Germanlegislation complies with large parts of the directive.

24.

Thus the provisions of Section I of Book III of the Handelsgesetzbuch (GermanCommercial Code, hereinafter the 'HGB) which applies to all partnerships,corresponds to Articles 2(1) and (2), 7, 14, 15(1) and (2), 18 to 21, 31, 35, 37(2),38, 39 (with the exception of paragraph (1)(d)), 40(1), 41 and 42 of Directive78/660.

25.

Furthermore, the provisions of the Gesetz über die Rechnungslegung vonbestimmten Unternehmen und Konzernen of 15 August 1969 (Law on the Accountsto be disclosed by certain Undertakings and Groups, BGBl. I 1969, p. 1189,hereinafter 'the Publizitätsgesetz (Disclosure Law)), which require partnershipsof a certain size to draw up annual accounts and consolidated accounts, are based

almost entirely on the provisions of Directives 78/660 and 83/349. ThePublizitätsgesetz also requires auditing and disclosure of the annual accounts andconsolidated accounts of partnerships of a certain size.

26.

Moreover, the German Government contends that transposing Directive 90/605 hasproved difficult because of divergent opinions in the sectors involved in Germanyconcerning the measures necessary to

achieve it.

27. The Court has consistently held, first, that a Member State cannot rely onprovisions, practices or situations arising in its own internal legal order to justify itsfailure to respect the obligations and time-limits laid down by a directive (see, inparticular, Case C-8/97 *Commission* v *Greece* [1998] ECR I-823, paragraph 8).

28. Secondly, although the provisions in Section I of Book III of the HGB relied uponby the German Government are applicable to all traders, and consequently to allpartnerships, it is not disputed that they constitute only partial transposition of therules contained in Directive 78/660.

29. In so far as the provisions in Section II of Book III of the HGB complete thetransposition of Directive 78/660, it must be noted that, according to theCommission's allegations in its reply, which have not been contested by the GermanGovernment, the provisions of that latter section, entitled 'Supplementaryprovisions for companies with share capital (public limited companies, companieslimited by shares but having one or more general partners and limited liabilitycompanies), do not apply to partnerships and, accordingly, the German legislaturehas omitted to make them applicable, in accordance with the rules introduced bythe Directive in question, to that type of company.

30. It is common ground that the provisions of the *Publizitätsgesetz* which were alsorelied upon by the German Government apply only to certain large companies andare therefore not capable of constituting transposition of Directive 90/605.

31. Consequently, it must be held that, by failing to adopt within the prescribed periodall the laws, regulations and administrative provisions necessary to comply withDirective 90/605, the Federal Republic of Germany has failed to fulfil itsobligations under that directive.

Costs

32. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to beordered to pay the costs if they have been applied for in the successful party'spleadings. Since the Commission applied for an order that the Federal Republicor Germany pay the costs and the latter has been unsuccessful in its defence, itmust be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. Declares that, by failing to adopt within the prescribed period all the laws,regulations and administrative provisions necessary to comply with CouncilDirective 90/605/EEC of 8 November 1990 amending Directive 78/660/EECon annual accounts and Directive 83/349/EEC on consolidated accounts asregards the scope of those Directives, the Federal Republic of Germany hasfailed to fulfil its obligations under that directive;

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
19 February 1997 *

In Case T-117/96,

Intertronic F. Cornelis GmbH, a company incorporated under German law, established at Emden (Germany), represented by Detlef Schumacher, Professor in Bremen, and Wilhelm Wiltfang, of the Aurich Bar,

applicant,

v

Commission of the European Communities, represented by Klaus Wiedner, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission has failed to fulfil its obligations under Article 175 of the EC Treaty,

* Language of the case: German.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: B. Vesterdorf, President, C. P. Briët and A. Potocki, Judges,

Registrar: H. Jung,

makes the following

Order

Background to the dispute

1 The German company Intertronic F. Cornelis GmbH (hereinafter 'Intertronic') uses fax as a means of advertising in order to generate orders.

2 In its judgment of 25 October 1995, the Bundesgerichtshof (German Supreme Federal Court of Justice) held that it was contrary to Article 1 of the Gesetz gegen den unlauteren Wettbewerb (Law on Unfair Competition, hereinafter 'the UWG') to send advertising by fax to a trader, if that trader had not expressly or impliedly consented to the receipt of such communications.

3 Intertronic submits that, as a result of this judgment, proceedings have been commenced against it in a number of national courts by associations for the promotion of commercial interests in order to oblige it to stop advertising by fax.

4 Intertronic considered that the judgment of the Bundesgerichtshof and the subsequent actions by the associations for the promotion of commercial interests were contrary to Community law and sent two virtually identical letters to the Commission, dated 28 March 1996 and 2 May 1996, asking it to take the necessary steps to put an end to the alleged infringement.

5 In the letters, Intertronic claimed that the judgment of the Bundesgerichtshof and the conduct of the associations were contrary to the principle of the establishment of a common market enshrined in Article 2 of the EC Treaty, to the task entrusted to the Commission and the Member States by Articles 2 and 3(g) of the EC Treaty of establishing a system ensuring that competition in the internal market is not distorted and so preventing the introduction of protectionist restrictions on competition by the Member States or the national courts and to the prohibition on restrictive agreements set out in Article 85 of the EC Treaty.

6 In the letters it also requested the Commission to declare, with respect to the Federal Republic of Germany, that the use of Article 1 of the UWG as the legal basis for a prohibition on advertising by fax was contrary to Community law and that the prohibition could therefore not be enforced. Secondly, it requested the Commission to prohibit three private associations (Bund internationaler Detektive, Verband Wirtschaft und Wettbewerb, Zentrale zur Bekämpfung unlauteren Wettbewerbs) from continuing to rely on coercive measures to enforce the prohibition on advertising by fax.

7 Both letters refer to Article 3 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17').

Procedure and form of order sought

8 Those are the circumstances in which the applicant brought the present action, which was registered at the Registry of the Court of First Instance on 29 July 1996.

9 In a separate document lodged at the Registry of the Court of First Instance on 4 September 1996, the Commission raised a preliminary plea of inadmissibility under Article 114(1) of the Rules of Procedure. The applicant lodged its observations on that preliminary plea on 25 October 1996.

10 In its application, the applicant claims that the Court should:

— declare that the Commission failed to act in so far as it did not find that the implementation, by the enforcement authorities of the Federal Republic of Germany and by the associations for the promotion of commercial interests, of the prohibition on advertising by fax constitutes a breach of the provisions prohibiting restrictive agreements;

— order the Commission to pay the costs.

11 In its preliminary plea of inadmissibility, the Commission contends that the Court should:

— declare the action inadmissible;

— order the applicant to pay the costs.

12 In its observations on the preliminary plea of inadmissibility, the applicant claims that the Court should:

— dismiss the application on a preliminary issue.

Admissibility

13 Article 114 of the Rules of Procedure provides that if a party applies to the Court for a decision on admissibility which does not go to the substance of the case, the remainder of the proceedings relating to the question of admissibility are to be oral unless the Court decides otherwise.

14 Article 111 of the Rules of Procedure provides that where the action is manifestly inadmissible, the Court may, by reasoned order, and without taking further steps in the proceedings, give a decision on the action. In the current proceedings, the Court of First Instance (Third Chamber) considers there to be sufficient information in the file and holds that it is not necessary to take further steps in the proceedings.

Arguments of the parties

15 The Commission considers that the action is manifestly inadmissible.

16 Firstly, the Commission claims that there has been a breach of the essential procedural requirements set out in Article 175 of the Treaty in so far as it was not called upon to act, contrary to the second paragraph of that article.

17 In support of that argument, the Commission submits that it must be called upon, with express reference to Article 175 of the Treaty, to take the requisite measures and that an institution which is so called upon to act should be able to avoid proceedings for a declaration of failure to act by defining its position in an appropriate manner (Case 13/83 *Parliament* v *Council* [1985] ECR 1513, and the Opinion of Advocate General Lenz in that case, p. 1515).

18 The Commission also observes that the second letter sent to it by the applicant merely reproduced the first, apart from requesting acknowledgment of receipt and a rapid response. The Commission stresses that neither letter refers to Article 175 of the Treaty or to the two-month time-limit set out in that article.

19 Secondly, the Commission claims that the measures the legality of which is challenged by the applicant (Article 1 of the UWG and the case-law of the Bundesgerichtshof which prohibits solicitation of customers by fax on the basis of that Law) are State measures. Therefore, the only way in which these measures could be challenged would be for the Commission to bring an action for failure to fulfil obligations under Article 169 of the Treaty, which it cannot be obliged

to do because it has a discretion in this respect (see, in particular, the orders in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555 and Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863).

20 The applicant considers that it did call upon the Commission to act by submitting an application within the meaning of Article 3(2)(b) of Regulation No 17, and argues that the use of specific wording and a reference to Article 175 of the Treaty are not essential procedural requirements.

21 It also claims that Case C-13/83 is not relevant to this case.

22 Finally, the applicant points out that it is asking the Commission to take concrete action with regard to the Federal Republic of Germany and the three associations, and maintains that the proper legal basis for such action is Article 85 of the Treaty.

Findings of the Court

23 As a preliminary point, the Court notes that the applicant merely referred to Article 3 of Regulation No 17, without further observation, in its letters to the Commission, so demonstrating that it intended to rely on the provisions of that regulation. However, the Court considers that, when considering the admissibility

of proceedings for failure to act brought by an individual, it is not bound by the legal basis on which the applicant formally based its complaint against the institution in question.

24 In this respect, the Court considers that it should not be possible to circumvent the applicable rules by seeking to remove a procedure from the ambit of Article 169 of the Treaty by artificially subjecting it to the principles set out in Regulation No 17, which put the plaintiff in a better procedural position than Article 169 (Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraph 52).

25 In this case, the fact that both letters sent to the Commission by the applicant refer to Article 3 of Regulation No 17 suggests that the complaint was intended to request the Commission to find an infringement of Article 85 of the Treaty.

26 However, in so far as the nature of the complaint must be determined with reference to its purpose and not only, a priori, with regard to its form, the Court considers that it is apparent from the two letters that the purpose of the complaint was to obtain a declaration that the Federal Republic of Germany had failed to fulfil its obligations under certain provisions of the Treaty, namely Articles 2 and 3(g) of the Treaty, as stated in the complaint.

27 It should be noted that, according to the explanations given by the applicant, which were provided only in the application and therefore not in either letter, the alleged infringement of Article 85 of the Treaty, which was also raised in the com-

plaint, consists in the fact that 'the legal argument of the Bundesgerichtshof and the reliance placed on it by the various associations for the promotion of commercial interests favours (...) the printed press, radio and television as regards marketing at European level'. The applicant considers that it is thus 'being prevented from disposing of its products within the common market because as a small company it does not have the resources necessary to advertise in the press or on the radio' and is 'at the same time being pushed out of the market'. The applicant claims, without substantiating this view, that the restriction of competition is the result of agreements or concerted practices between the associations for the promotion of commercial interests, for the purpose of bringing proceedings before the national courts in order to have the prohibition laid down in the judgment of the Bundesgerichtshof applied.

28 The Court observes, however, that the alleged restriction on competition results directly and manifestly from the judgment of the Bundesgerichtshof and not from the conduct of the associations, which are merely relying on that judgment. This view is supported by the wording of the application, in which Intertronic claims that it 'can request the Commission to find that reliance on the prohibition on advertising by fax by the associations for the promotion of commercial interests constitutes an infringement of the prohibition on agreements (Article 3(2)(b) of Regulation No 17). This is also the case in respect of the Federal Republic of Germany, where the enforcement authorities are committing the infringement.'

29 In the light of these arguments relating to an alleged infringement of Article 85 of the Treaty, which were only developed in the application, the Court considers that, if the applicant did formally call upon the Commission to find an infringement of Article 85 of the Treaty, this aspect of the complaint, like the others, suggests that it actually intended to call upon the Commission to find that the Federal Republic of Germany failed to fulfil its obligations by virtue of case-law developed by its courts, and that the applicant consequently suffered damage.

30 As a result, the Court considers that the true purpose of the complaint is to call upon the Commission to find that the Federal Republic of Germany failed to fulfil its obligations under certain provisions of the Treaty within the meaning of Article 169.

31 Therefore, the Court considers that the purpose of the present action for a declaration for failure to act was to seek a declaration that, by not initiating the procedure set out in Article 169 of the Treaty against the Federal Republic of Germany, the Commission failed to fulfil its obligations under Article 175 of the Treaty.

32 The Court has consistently held that an action brought by a natural or legal person for a declaration that, in infringement of the Treaty, the Commission failed to act by not initiating proceedings for failure to fulfil Treaty obligations with regard to a Member State is inadmissible (see, for example, Case C-247/87 *Star Fruit* v *Commission* [1989] ECR 291). In fact, natural and legal persons may only rely on the third paragraph of Article 175 in order to challenge the Commission's failure to adopt measures of which they are potential addressees. In the context of an action for failure to fulfil obligations under Article 169 of the Treaty, the only measures which the Commission may adopt are measures addressed to Member States (orders in Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115 and *Dumez* v *Commission*, cited above). Moreover, it is apparent from the scheme of Article 169 that the Commission is not bound to initiate the procedure provided for therein but has a discretion in this regard which excludes the right for individuals to require that institution to adopt a specific position (order in *Bernardi* v *Commission*, cited above; judgment in *Star Fruit* v *Commission*, cited above; order in *Emrich* v *Commission*, cited above).

33 It follows from the above that, without its being necessary to consider whether the Commission was duly called upon to act within the meaning of the second paragraph of Article 175 of the Treaty, the action must be declared inadmissible in its entirety.

Costs

34 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant is ordered to pay the costs.

Luxembourg, 19 February 1997.

H. Jung — Registrar

B. Vesterdorf — President

JUDGMENT OF THE COURT (First Chamber)
12 December 1996 *

In Case C-241/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the High Court of Justice (Queen's Bench Division) for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Intervention Board for Agricultural Produce,

ex parte: **Accrington Beef Co. Ltd and Others,**

on the validity of Articles 1(2) and 2(2) of Commission Regulation (EC) No 214/94 of 31 January 1994 laying down detailed rules for the application of Council Regulation (EC) No 130/94 with regard to the import arrangements for frozen beef falling within CN code 0202 and products falling within CN code 0206 29 91 (OJ 1994 L 27, p. 46),

* Language of the case: English.

THE COURT (First Chamber),

composed of: L. Sevón, President of the Chamber, D. A. O. Edward and M. Wathelet (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Accrington Beef Co. Ltd and Others, by John Ratliff, Barrister, instructed by Ramsbottom and Co., Solicitors,

— the Government of the United Kingdom, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent, assisted by David Anderson, Barrister,

— the Commission of the European Communities, by James Macdonald Flett, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Accrington Beef Co. Ltd and Others, represented by John Ratliff; the Government of the United Kingdom, represented by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, assisted by David Anderson; and the Commission, represented by James Macdonald Flett, at the hearing on 12 September 1996,

after hearing the Opinion of the Advocate General at the sitting on 17 October 1996,

gives the following

Judgment

1 By order of 20 June 1995, received at the Court on 10 July 1995, the High Court of Justice (Queen's Bench Division) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the validity of Articles 1(2) and 2(2) of Commission Regulation (EC) No 214/94 of 31 January 1994 laying down detailed rules for the application of Council Regulation (EC) No 130/94 with regard to the import arrangements for frozen beef falling within CN code 0202 and products falling within CN code 0206 29 91 (OJ 1994 L 27, p. 46).

2 The questions were raised in proceedings between Accrington Beef Co. Ltd and Others (the applicants in the main action, hereinafter 'the applicants') and the Intervention Board for Agricultural Produce ('the Intervention Board'), the authority responsible in the United Kingdom for administration of the common agricultural policy, concerning the conditions of eligibility for the Community tariff quota opened for certain kinds of frozen beef and other products by Article 1 of Council Regulation (EC) No 130/94 opening and providing for the administration of a Community tariff quota for frozen meat of bovine animals falling within CN code 0202 and products falling within CN code 0206 29 91 (1994) (OJ 1994 L 22, p. 3).

3 The quota was fixed at 53 000 tonnes, expressed in weight of boned or boneless meat. The Common Customs Tariff and the levy applicable to the quota are 20% and 0% respectively.

Article 2 of Regulation No 130/94 provides that the quota is to be divided into two parts as follows:

'(a) the first, equal to 80% or 42 400 tonnes, shall be apportioned between importers who can prove they have imported frozen meat falling within CN code 0202 and products falling within CN code 0206 29 91 to which these import arrangements apply during the last three years' (hereinafter 'traditional importers');

'(b) the second, equal to 20% or 10 600 tonnes, shall be apportioned between operators who can prove that they have engaged in trade with third countries involving a minimum quantity and for a period to be determined, in beef and veal other than that to which these import arrangements apply and excluding meat which is the subject of inward or outward processing traffic' (hereinafter 'newcomers').

Detailed rules for application of the regulation, in particular for allocating the quantities available between traditional importers and newcomers, are to be adopted pursuant to Article 4 by the Commission in accordance with the procedure laid down in Article 27 of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187), which involves consultation of a management committee.

In accordance with that procedure the Commission adopted Regulation No 214/94, Article 1(1) and (2) of which restates the criteria for allocation of the two parts of the quota referred to in Article 2 of Regulation No 130/94 and provides that the second part is to be reserved for operators who can furnish proof of having 'imported at least 50 tonnes in 1992 and 80 tonnes in 1993 of beef not subject to the quota' or 'exported at least 110 tonnes in 1992 and 150 tonnes in 1993 of beef to third countries'.

7 The export thresholds fixed for the 1994 quota were higher than those set for the 1992 and 1993 quotas, which were 110 tonnes for each of the two reference years [see Commission Regulation (EEC) No 3701/91 of 18 December 1991 laying down detailed rules for the application of the import arrangements provided for in Council Regulation (EEC) No 3667/91 for frozen meat of bovine animals covered by CN code 0202 and products covered by CN code 0206 29 91 (OJ 1991 L 350, p. 34) and Commission Regulation (EEC) No 3771/92 of 22 December 1992 laying down detailed rules for the application of the import arrangements provided for in Council Regulation (EEC) No 3392/92 for frozen beef covered by CN code 0202 and products covered by CN code 0206 29 91 (OJ 1992 L 383, p. 36)].

8 It is provided in Article 1(3) and (4) and Article 3(3), third subparagraph, of Regulation No 214/94 that 'the 42 400 tonnes shall be allocated between the various (traditional) importers in proportion to their imports during the reference years' whereas 'the 10 600 tonnes shall be allocated in proportion to the quantities applied for by eligible (newcomers)' with a maximum of 50 tonnes per application. However, pursuant to Article 4(2), second subparagraph, lots are to be drawn if the number of applications is so high that otherwise each operator would be allocated less than 5 tonnes of the quota.

9 Article 2(2) of Regulation No 214/94 provides in addition that companies arising from mergers where each constituent has the rights reserved to traditional importers pursuant to Article 1(1) are to enjoy the same rights as the companies from which they are formed. In an information note addressed to all the Member States on 5 February 1992 the Commission stated with regard to the corresponding article in Regulation No 3701/91 that those provisions did not apply to applications made by newcomers.

10 The 27 applicant companies are meat producers, wholesalers and traders based in Lancashire. All of them belong to the Slinger group except Red Rose Meat Packers Ltd, which is controlled by the Slinger family.

11 In 1994, 13 of them qualified for the traditional quota and were allocated 2 508 kg each, by virtue of their imports of newcomers' quota beef in 1993. By contrast, the applications of the 27 companies for newcomers' quota in 1994 were all rejected by the Intervention Board, by letters of 8 March and 5 May 1994, on the ground that they did not fulfil the tonnage requirements laid down by Regulation No 214/94; in particular, they had not exported at least 150 tonnes of beef in 1993. They were also informed by the Intervention Board, by letter of 11 February 1994 referring to the Commission's information note of 5 February 1992 mentioned above, that they were not entitled to add together their individual results in order to qualify for newcomers' quota.

12 In the High Court the applicants challenged the validity of Article 1(2) of Regulation No 214/94 fixing the reference quantities for eligibility for the newcomers' quota, in particular with regard to exports, and of Article 2(2) of the regulation in so far as it deprived companies arising from mergers of the right to add together the results achieved by each separately so as to qualify for the same quota in 1994.

13 The High Court decided that it had no jurisdiction to rule unassisted on the validity of those provisions and that it was necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 1(2) of Commission Regulation (EC) No 214/94 invalid and contrary to EC law to the extent that it required operators seeking to qualify for 1994 quota referred to in that sub-article on the basis of their past beef exports to have exported at least 150 tonnes in the previous year, rather than

110 tonnes as had been required in 1993? In particular, is Article 1(2) invalid and contrary to EC law as:

(a) exceeding the powers conferred upon the Commission by Council Regulation No 130/94;

(b) infringing the principle of proportionality;

(c) infringing the principle of legitimate expectations;

(d) infringing the duty to give adequate reasons pursuant to Article 190 of the EC Treaty; and/or

(e) having been adopted without proper consultation of the Beef Management Committee, contrary to Article 4 of Regulation No 130/94 and Article 27 of Regulation No 805/68?

2. Is Article 2(2) of Commission Regulation (EC) No 214/94 invalid and contrary to EC law, to the extent that it excludes companies arising from mergers where each part has rights pursuant to Article 1(2) of that regulation from the opportunity to cumulate their past trading performance? In particular, does Article 2(2) violate:

(a) the principle of non-discrimination, in so far as companies deriving their rights from Article 1(1) of that regulation can merge and cumulate their past trading performance for the purpose of obtaining quota, whereas companies deriving their rights from Article 1(2) cannot; and/or

(b) the guarantee referred to in the second recital to Council Regulation (EC) No 130/94 of continuing access to quota by all interested operators within the Community?'

Admissibility of the plea of illegality

14 The Government of the United Kingdom raises the question whether in the light of the judgment in Case C-188/92 *TWD Textilwerke Deggendorf* v *Germany* [1994] ECR I-833 the applicants' indirect challenge before the High Court of Articles 1(2) and 2(2) of Commission Regulation No 214/94 is out of time because they failed to bring an action for annulment of those provisions within the time-limit provided for in Article 173 of the EC Treaty, as they were entitled to.

15 It is sufficient, on that point, to note that, since the contested provisions are contained in a Community regulation and are addressed in general terms to categories of persons defined in the abstract and to situations determined objectively, it is not obvious that an action by the applicants challenging that regulation under Article 173 of the Treaty would have been admissible.

16 The reference to *TWD* (*Textilwerke Deggendorf*), which concerned a company which was undoubtedly entitled, and which had been informed that it was entitled, to bring an action for annulment of the Community act whose validity it was indirectly challenging before a national court, is therefore irrelevant.

The first question

17 The first question asks the Court to rule on the validity of Article 1(2) of Regulation No 214/94 in so far as it reserves the newcomers' part of the quota to applicants who can prove that they exported to third countries at least 110 tonnes of beef in 1992 and 150 tonnes in 1993.

18 Before the High Court it was claimed that Article 1(2) of Regulation No 214/94 was deficient in a number of respects.

19 In the first place, the applicants claim that the Commission exceeded the powers conferred on it by the Council by failing to take into account when fixing the export thresholds the genuine nature of their activities and the representative nature of their trade with third countries, as provided for in the third recital in the preamble to Council Regulation No 130/94, or the need to guarantee equal and continued access to the quota for all traders concerned. They go on to argue that the Commission was in fact pursuing unlawful aims, seeking both to restrict the number of applications for newcomers' quota in order to avoid having to arrange a ballot despite the fact that balloting is provided for by the Community regulations, and to ensure that the quota was not allocated to 'paper companies', that is to say, companies created solely in order to enable the group to which they belong to exploit the way in which the newcomers' quota is allocated.

20 It must be remembered, however, that in the sphere of the common agricultural policy the Council may find it necessary to confer on the Commission wide implementing powers, since the Commission alone is able to monitor continually and closely trends on the agricultural markets and to act speedily if the situation requires. Wide powers of implementation are all the more justified in the present case in so far as they must be exercised in accordance with the 'management committee' procedure, which allows the Council to reserve its right to intervene

(Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 22).

21 In this case it is common ground that the Commission had the power, under Article 4 of Regulation No 130/94, to determine by the management committee procedure the eligibility criteria for the newcomers' quota, that is to say, the minimum quantities and the reference period provided for in Article 2(b) of the regulation.

22 Accordingly, it is necessary to consider whether the measures adopted by the Commission reflect the purpose of the basic regulation.

23 The second recital in the preamble to Regulation No 130/94 indicates that the Council was seeking 'a guarantee of ... equal and continuing access by all interested operators within the Community to the quota'. The third recital states that 'the arrangements consist of the allocation by the Commission of the quantities available to traditional operators and to operators engaging in trade in beef and veal' and that 'in order to ensure that the activities of the latter operators are genuine, only quantities of a certain size representative of trade with third countries should be considered'.

24 The last qualification, however, does not mean that the Council intended to establish a direct link between the amounts and quantities to be fixed by the Commission and trends in trade with third countries, but merely that the eligibility criteria were to be such as to ensure equal and continuing access to the quota only for traders who had achieved a significant level of imports or exports.

25 As the Commission and the United Kingdom Government have observed, the proliferation of 'paper companies', reflecting the artificial fragmentation by certain traders of their economic structure, is liable to disrupt the scheme and prejudice the aim of ensuring equal and continuing access to the quota for all operators regardless of their size. Breaking up large operators into smaller units increases the number of applications for quota, thereby reducing the quantities available for genuine small operators, who thus risk being excluded from the quota altogether.

26 The first plea, alleging that the Commission exceeded its powers, must therefore be rejected.

27 Secondly, the applicants argue that the Commission also infringed the principle of proportionality because raising the export threshold meant that small or medium-sized traders were excluded from the quota. The increase was also disproportionate to the changes which had occurred in the volume of trade concerned and, if it was in fact intended to exclude paper companies, it wholly fails in its purpose.

28 The Commission fixed higher export thresholds for the 1994 quota than for the 1992 and 1993 quotas: the latter had been 110 tonnes in each of the two reference years (1990 to 1991 and 1991 to 1992), whereas the thresholds at issue in this case were 110 tonnes for 1992 and 150 tonnes for 1993 in order to qualify for the 1994 quota.

29 Since the aim was to guarantee equal and continuing access to the quota for all interested Community traders, it was reasonable that the effect of the change be to deprive of the right to participate in the quota a large number of undertakings created artificially for the sole purpose of obtaining a large share of the quota, there being no proof that the increase prevented a large number of genuinely small

operators from obtaining a share of the quota. Consequently, the Commission did not manifestly exceed the bounds of its wide powers of discretion when it increased the thresholds.

30 As observed in paragraph 24 of this judgment, moreover, neither the stated purpose nor the terms of the Council's basic regulation require the Commission to establish a direct link between export thresholds and changes in the volume of trade with third countries.

31 Consequently, the plea of infringement of the principle of proportionality must be rejected.

32 Thirdly, the applicants claim that the Commission infringed the principle of the protection of legitimate expectations by raising the thresholds for exports to third countries without first notifying or consulting the traders concerned.

33 The Court has consistently held that traders cannot claim a legitimate expectation that an existing situation capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained, and that that applies particularly in an area such as the common organization of the markets whose purpose involves constant adjustments to meet changes in the economic situation (see, in particular, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33).

34 The Commission argues that the tariff quota is administered on an annual basis and that there was nothing in Regulations Nos 214/94 and 130/94 to suggest that the eligibility criteria would remain unchanged. The criteria are always fixed before applications are lodged for the current year, but after the relevant reference period, in order to deter speculation and ensure the smooth running of the scheme.

35 The United Kingdom Government agrees with that analysis.

36 The view taken by the Commission and the United Kingdom Government must be accepted. Any prudent and diligent trader must know that the export thresholds may be altered whenever a new annual quota is adopted. Premature announcement of the new eligibility criteria would encourage the creation of 'paper companies' precisely to meet the new thresholds, thus enabling large groups to obtain the maximum advantage of the quota. As emphasized in paragraph 25 of this judgment, the fragmentation of large undertakings is liable to disrupt the smooth running of the scheme.

37 The plea of infringement of the principle of the protection of legitimate expectations must therefore be rejected.

38 Fourthly, the applicants consider that the Commission has failed to fulfil its duty to state reasons under Article 190 of the EC Treaty. They refer in particular to the recitals in the preamble to Regulation No 214/94 which, they maintain, merely reproduce the stereotype wording contained in the regulations of previous years without any reference to the raising of the export thresholds.

39 The Court has consistently held that the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact or of law dealt with in the regulations, provided that the latter fall within the general scheme of the body of measures of which they form part, and that in order to satisfy the requirements of Article 190 of the Treaty it is sufficient that the statement of reasons is appropriate to the nature of the measure in question. The reasoning of the institution which adopted the measure must be stated clearly and unequivocally, so as to inform persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review (see, in particular, Case 250/84 *Eridania and Others* v *Cassa Conguaglio Zucchero* [1986] ECR 117, paragraphs 37 and 38, and *France and Ireland* v *Commission*, cited above, paragraph 72).

40 In this case, as the Commission has pointed out, Regulation No 214/94 refers expressly to Regulation No 130/94, which states the purpose of the scheme and the general principles on which the tariff quota is to be administered. Furthermore, the second recital in the preamble to Regulation No 214/94 underlines the need to ensure smooth transition from the arrangements based on national administration to those administered by the Community, bearing in mind the special aspects of trade in the products in question and the need to restrict access to the second part of the quota to traders able to prove that their business is genuine and that they deal in significant quantities. The fifth recital refers to the need for effective management and the prevention of fraud.

41 The Commission's reasons for changing the eligibility criteria for the newcomers' quota are thus indicated clearly and unequivocally in the recitals in the preamble to Regulation No 130/94, to which Regulation No 214/94 refers, as well as in the recitals in the preamble to the latter regulation.

42 The plea of lack of an adequate statement of reasons must therefore be rejected.

43 Fifthly, the applicants claim that Regulation No 214/94 was not adopted in accordance with the procedure provided for in Article 4 of Regulation No 130/94, because consultation of the management committee was arranged as late as possible so that the committee members were not given the opportunity to reflect on the matter or to consult traders in the beef sector.

44 It is sufficient to note in that regard that the Management Committee was consulted on the Commission's proposal for a regulation and gave a favourable opinion.

45 In any event, as the Advocate General pointed out in paragraph 71 of his Opinion, Regulation No 805/68, to which Article 4 of Regulation No 130/94 refers, does not restrict the time permitted to elapse between referral to the management committee and the issue of its opinion. Article 27(2) merely states that it is to deliver its opinion within a time-limit to be set by the Chairman.

46 Accordingly, consideration of Article 1(2) of Regulation No 214/94 has disclosed no factor capable of affecting its validity.

The second question

47 The second question seeks a ruling on the validity of Article 2(2) of Regulation No 214/94 in so far as it deprives companies arising from mergers and wishing to obtain a share of the newcomers' quota of the possibility of combining their past trading performance.

48 The applicants claim that by depriving them of that option, which is open only to companies deriving rights from Article 1(1) of Regulation No 214/94, the Commission has not only violated the principle of non-discrimination but disregarded the aim of ensuring equal and continuing access to the quota for all interested Community traders. They add that Article 2(2) of Regulation No 214/94 is also unlawful because it contains no statement of the reasons for permitting cumulation only in the case of performance taken into consideration in allocating the traditional quota.

49 The Court has consistently held that the prohibition of discrimination set out in Article 40(3) of the EC Treaty is merely a specific expression of the general principle of equal treatment in Community law, according to which comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see, in particular, Case 106/83 *Sermide* v *Cassa Conguaglio Zucchero and Others* [1984] ECR 4209, paragraph 28).

50 As the Commission and the United Kingdom Government have observed, the traditional quota and the newcomers' quota are allocated in different ways.

51 Article 1(3) of Regulation No 214/94 provides that the traditional quota is to be allocated in proportion to their imports between eligible operators, that is to say, those able to prove that within the quota they have imported frozen beef and other products during the last three years.

52 The newcomers' quota, however, is allocated, in accordance with Article 1(4) of Regulation No 214/94, in proportion not to imports or exports, but to the quantities applied for, provided that the application is for a quantity not exceeding 50 tonnes of frozen meat, in accordance with Article 3(3), third subparagraph.

53 The difference in the way in which the quota is allocated, depending on whether it is for traditional importers or for newcomers, must be borne in mind when considering the scope of Article 2(2) of Regulation No 214/94.

54 The effect of that provision is that traditional importers who already fulfil the eligibility requirements may, in the event of merger, cumulate the rights to a share of the quota which each holds.

55 It is thus apparent that the purpose of permitting cumulation of rights to a share of the traditional quota, as provided for in Article 2(2) of Regulation No 214/94, is not to determine the eligibility for the quota of companies arising from mergers which would otherwise not be eligible, but to permit them to cumulate quota shares already held separately by the undertakings involved in the merger.

56 That being so, extending the right to rely on Article 2(2) to undertakings which have merged but which are not eligible for the newcomers' quota in order to make them so eligible would extend the purpose of the provision.

57 Furthermore, if the undertakings involved in the merger were already eligible for newcomers' quota, extending to them the option of cumulating their performance under Article 2(2) would be of no practical value because any subsequent allocation would be based not on the volume of trade already achieved but on the application for a share in the quota — not exceeding 50 tonnes — made by the company resulting from the merger.

58 It is thus evident that the situation of newcomers is not comparable to that of traditional importers as regards eligibility for, and the allocation of, the quota. Consequently, the plea of infringement of the principle of non-discrimination must be rejected.

59 Next, as regards the plea of failure to observe the aim of ensuring equal and continuing access to the quota for all interested Community traders, one can only endorse the Commission's view that the achievement of that aim would be largely compromised were the approach favoured by the applicants to be adopted. The result would be to enable commercial groups to spread their activities artificially over a large number of separate companies in the knowledge that if the thresholds were unexpectedly raised they could continue, by making the necessary mergers after publication of those thresholds, to make multiple applications for a share of the newcomers' quota.

60 Finally, as regards the plea that no statement of reasons was given in support of Article 2(2) of Regulation No 214/94, it must be stated that as indicated in the case-law cited in paragraph 39 of this judgment the reasons for restricting cumulation to traditional importers who are already eligible derive clearly and unequivocally from the conditions for access to the quota and its allocation between the eligible traders, as described above.

61 Consequently, consideration of Article 2(2) of Regulation No 214/94 has not disclosed any factor capable of affecting its validity.

Costs

62 The costs incurred by the United Kingdom Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the High Court of Justice (Queen's Bench Division), by order of 20 June 1995, hereby rules:

Consideration in the light of the grounds stated in the order for reference of Articles 1(2) and 2(2) of Commission Regulation (EC) No 214/94 of 31 January 1994 laying down detailed rules for the application of Council Regulation (EC) No 130/94 with regard to the import arrangements for frozen beef falling within CN code 0202 and products falling within CN code 0206 29 91 has disclosed no factor capable of affecting their validity.

Sevón Edward Wathelet

Delivered in open court in Luxembourg on 12 December 1996.

R. Grass

Registrar

L. Sevón

President of the First Chamber

JUDGMENT OF THE COURT
9 March 1994 *

In Case C-188/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for North Rhine-Westphalia, Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

TWD Textilwerke Deggendorf GmbH

and

Federal Republic of Germany, represented by the Federal Minister for Economic Affairs,

on the definitive nature of Commission Decision 86/509/EEC of 21 May 1986, on aid granted by the Federal Republic of Germany and the Land of Bavaria to a producer of polyamide and polyester yarn situated in Deggendorf (Official Journal 1986 L 300, p. 34), vis-à-vis the recipient of the aid to which it relates, after the

* Language of the case: German.

expiry of the time-limit prescribed by the third paragraph of Article 173 of the EEC Treaty for bringing an action, and on the validity of that decision,

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida and Díez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias (Rapporteur), F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— TWD Textilwerke Deggendorf GmbH, by Walter Forstner, Rechtsanwalt, Deggendorf, assisted by Professor Michael Schweitzer,

— the German Government, by Ernst Röder and Claus-Dieter Quassowski, respectively Ministerialrat and Regierungsdirektor at the Federal Ministry of Economic Affairs, acting as Agents,

— the French Government, by Philippe Pouzoulet and Jean-Louis Falconi, respectively Deputy Director and Secretary of Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agents,

— the Commission of the European Communities, by Antonino Abate, Principal Legal Adviser, and Claus Michael Happe, civil servant seconded to the Commission under the scheme for exchanging national civil servants, acting as Agents, assisted by Professor Meinhard Hilf, University of Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of TWD Textilwerke Deggendorf GmbH, represented by Karl-Heinz Schupp, Rechtsanwalt, Deggendorf, and of the Commission, represented by Antonino Abate, assisted by Bernd Langeheine, a member of the Legal Service, acting as Agents, at the hearing on 29 June 1993,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1993,

gives the following

Judgment

1 By order of 18 March 1992, which was received at the Court on 12 May 1992, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for North Rhine-Westphalia, Federal Republic of Germany) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the definitive nature of Commission Decision 86/509/EEC of 21 May 1986, on aid granted by the Federal Republic of Germany and the Land of Bavaria to a producer of polyamide and polyester yarn situated in Deggendorf (Official Journal 1986 L 300, p. 34), vis-à-vis the recipient of the aid to which it relates, after the expiry of the time-limit prescribed by the third paragraph of Article 173 of the EEC Treaty for bringing an action, and on the validity of that decision.

2 Those questions were raised in the course of proceedings between the German undertaking TWD Textilwerke Deggendorf GmbH (hereinafter 'TWD') and the German Minister for Economic Affairs. From 1981 to 1983 that undertaking, a manufacturer of polyamide and polyester yarn, received from the Federal Republic of Germany, under the regional aid programme run jointly by the Federal Government and the *Länder* and under the Bavarian regional aid programme, aid including a subsidy of DM 6.12 million. That subsidy was granted on the basis of certificates issued by decisions of the Federal Minister for Economic Affairs taken pursuant to Article 2 of the German Law on Investment Grants.

3 In 1985 the Commission, not having been notified by the Federal Republic of Germany of any of those measures, initiated the procedure under the first paragraph of Article 93 (2) of the EEC Treaty, as a result of which it adopted the abovementioned Decision 86/509. By that decision, addressed to the Federal Republic of Germany, the Commission declared that the aid granted to a producer of polyamide and polyester yarn situated in Deggendorf — which was in fact TWD — had been granted in contravention of Article 93 (3) of the Treaty and was consequently unlawful. It declared that that aid was also incompatible with the common market by virtue of Article 92 of the EEC Treaty. It accordingly requested the Federal Republic of Germany to recover the aid.

4 By letter of 1 September 1986 the Federal Minister for Economic Affairs forwarded to TWD for information a copy of Decision 86/509 and pointed out that it could bring an action against that decision under Article 173 of the Treaty. Neither the Federal Republic of Germany nor TWD challenged the decision before the Court of Justice.

5 By decision of 19 March 1987 the Federal Minister for Economic Affairs revoked the certificates issued under Article 2 of the Law on Investment Grants, which

were the legal basis of the Federal aid, on the ground that they were unlawful and were to be returned in accordance with the decision of the Commission.

6 On 16 April 1987 TWD appealed against that decision to the Verwaltungsgericht (Administrative Court) Cologne, which dismissed its application by judgment of 21 December 1989.

7 TWD appealed against that judgment to the Oberverwaltungsgericht für das Land Nordrhein-Westfalen on 21 February 1990. It argued in particular that the investment grants obtained from 1981 to 1983 were partially compatible with the common market so that Commission Decision 86/509 was at least partially unlawful. In the view of TWD, the unlawfulness of the decision could be pleaded even after the expiry of the time-limit laid down in the third paragraph of Article 173 of the Treaty.

8 It is in that context that the national court referred the following questions to the Court:

'1. Is a national court bound by a decision of the EEC Commission adopted pursuant to Article 93 (2) of the EEC Treaty when hearing an appeal regarding the implementation of that decision by the national authorities brought by the recipient of the aid and addressee of the implementation measures on the ground that the decision of the EEC Commission is unlawful in circumstances where the recipient of the aid did not institute proceedings under the second paragraph of Article 173 of the EEC Treaty, or did not do so in good time, even though it was informed of the Commission's decision in writing by the Member State?

2. In the event that the answer to Question 1 is in the negative:

Is Commission Decision 86/509/EEC of 21 May 1986 (Official Journal L 300, p. 34) entirely or partly invalid because, contrary to the view of the Commission, the aid granted is entirely or partially compatible with the common market?'

9 In its order for reference the national court notes that the question whether the application before it is well founded depends on the validity of the abovementioned decision of the Commission but that the question of validity arises only if the national court were able to consider the unlawfulness of the decision, notwithstanding the expiry of the time-limit laid down in the third paragraph of Article 173 of the Treaty. The second question is therefore submitted only in the event that the first question, which is preliminary in nature, is answered in the negative.

The first question

10 The issue before the national court is whether or not, in the factual and legal circumstances of the main proceedings, the applicant is time-barred from pleading the unlawfulness of the Commission's decision in support of an action brought against the administrative act by which the national authority, in implementation of the Commission's decision, revoked the certificates which formed the legal basis for the aid which it had received.

11 The national court emphasizes that the Commission's decision was not challenged by the applicant in the main proceedings, the recipient of the aid with which the decision was concerned, although a copy of that decision had been sent to it by the

Federal Ministry of Economic Affairs and that Ministry had explicitly informed it that it could bring an action against that decision before the Court of Justice.

12 The question submitted to the Court must be answered in the light of those circumstances.

13 It is settled law that a decision which has not been challenged by the addressee within the time-limit laid down by Article 173 of the Treaty becomes definitive as against him (see in the first place the judgment in Case 20/65 *Collotti* v *Court of Justice* [1965] ECR 847).

14 The undertaking in receipt of individual aid which is the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty has the right to bring an action for annulment under the second paragraph of Article 173 of the Treaty even if the decision is addressed to a Member State (judgment in Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671). By virtue of the third paragraph of that article, the expiry of the time-limit laid down in that provision has the same time-barring effect vis-à-vis such an undertaking as it does vis-à-vis the Member State which is the addressee of the decision.

15 It is settled law that a Member State may no longer call in question the validity of a decision addressed to it on the basis of Article 93 (2) of the Treaty once the time-limit laid down in the third paragraph of Article 173 of the Treaty has expired (see the judgments in Case 156/77 *Commission* v *Belgium* [1978] ECR 1881 and Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131).

16 That case-law, according to which it is impossible for a Member State which is the addressee of a decision taken under the first paragraph of Article 93 (2) of the Treaty to call in question the validity of the decision in the proceedings for non-compliance provided for in the second paragraph of that provision, is based in particular on the consideration that the periods within which applications must be lodged are intended to safeguard legal certainty by preventing Community measures which involve legal effects from being called in question indefinitely.

17 It follows from the same requirements of legal certainty that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty, who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of Article 173 of the Treaty to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision.

18 To accept that in such circumstances the person concerned could challenge the implementation of the decision in proceedings before the national court on the ground that the decision was unlawful would in effect enable the person concerned to overcome the definitive nature which the decision assumes as against that person once the time-limit for bringing an action has expired.

19 It is true that in its judgment in Joined Cases 133 to 136/85 *Rau* v *BALM* [1987] ECR 2289, on which the French Government relies in its observations, the Court held that the possibility of bringing a direct action under the second paragraph of Article 173 of the EEC Treaty against a decision adopted by a Community institution did not preclude the possibility of bringing an action in a national court against a measure adopted by a national authority for the implementation of that decision, on the ground that the latter decision was unlawful.

20 However, as is clear from the Report for the Hearing in those cases, each of the plaintiffs in the main proceedings had brought an action before the Court of Justice for the annulment of the decision in question. The Court did not therefore rule, and did not have to rule, in that judgment on the time-barring effects of the expiry of time-limits. It is precisely that issue with which the question referred by the national court in this case is concerned.

21 This case is also distinguishable from Case 216/82 *Universität Hamburg* v *Hauptzollamt Hamburg-Kehrwieder* [1983] ECR 2771.

22 In the judgment in that case the Court held that a plaintiff whose application for duty-free admission had been rejected by a decision of a national authority taken on the basis of a decision of the Commission addressed to all the Member States had to be able to plead, in proceedings brought under national law against the rejection of his application, the illegality of the Commission's decision on which the national decision adopted in his regard was based.

23 In that judgment the Court took into account the fact that the rejection of the application by the national authority was the only measure directly addressed to the person concerned of which it had necessarily been informed in good time and which it could challenge in the courts without encountering any difficulty in demonstrating its interest in bringing proceedings. It held that in those circumstances the possibility of pleading the unlawfulness of the Commission's decision derived from a general principle of law which found its expression in Article 184 of the EEC Treaty, namely the principle which confers upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if

that party was not entitled under Article 173 of the Treaty to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (see the judgment in Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777).

24 In the present case, it is common ground that the applicant in the main proceedings was fully aware of the Commission's decision and of the fact that it could without any doubt have challenged it under Article 173 of the Treaty.

25 It follows from the foregoing that, in factual and legal circumstances such as those of the main proceedings in this case, the definitive nature of the decision taken by the Commission pursuant to Article 93 of the Treaty vis-à-vis the undertaking in receipt of the aid binds the national court by virtue of the principle of legal certainty.

26 The reply to be given to the first question must therefore be that the national court is bound by a Commission decision adopted under Article 93 (2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission's decision, did not bring an action against that decision under the second paragraph of Article 173 of the Treaty, or did not do so within the period prescribed.

The second question

27 Since the second question was submitted by the national court only in the event that the first question is answered in the negative, there is no need to reply to it.

Costs

28 The costs incurred by the German and the French Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 Oberverwaltungsgericht für das Land Nordrhein-Westfalen, by order of 18 March 1992, hereby rules:

The national court is bound by a Commission decision adopted under Article 93 (2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads

the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission's decision, did not bring an action against that decision under the second paragraph of Article 173 of the Treaty, or did not do so within the period prescribed.

Due Moitinho de Almeida Díez de Velasco Kakouris

Joliet Schockweiler Rodríguez Iglesias

Grévisse Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 9 March 1994.

R. Grass O. Due

Registrar President

JUDGMENT OF THE COURT
16 May 1991 *

In Case C-96/89,

Commission of the European Communities, represented by Robert C. Fischer, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Department, Centre Wagner, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by J. W. de Zwaan and M. A. Fierstra, Assistant Legal Advisers at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Embassy of the Netherlands, 5, Rue C. M. Spoo,

defendant,

APPLICATION for a declaration that, by admitting into free circulation in 1983, at the reduced levy of 6% *ad valorem*, some 60 000 tonnes of manioc exported from Thailand without an export certificate, the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, G. C. Rodríguez Iglesias, M. Díez de Velasco, Presidents of Chambers, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler, and P. J. G. Kapteyn, Judges,

Advocate General: M. Darmon
Registrar: J. A. Pompe, Assistant Registrar

* Language of the case: Dutch.

having regard to the Report for the Hearing,

after hearing the oral observations of the parties at the hearing on 20 September 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 6 November 1990,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 March 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by admitting into free circulation in 1983, at the reduced levy of 6% *ad valorem*, some 60 000 tonnes of manioc exported from Thailand without an export certificate, the Kingdom of the Netherlands had failed to fulfil its obligations under the EEC Treaty.

2 According to the form of order sought in its application, the Commission accuses the Kingdom of the Netherlands of having, in particular:

(a) admitted into free circulation in or around April 1983 some 60 000 tonnes of manioc:

— without applying the agricultural levy at the full rate laid down by Articles 2 and 4 of Council Regulation (EEC) No 2744/75 of 29 October 1975 on the import and export system for products processed from cereals and from rice (Official Journal L 281, p. 65);

— and without checking, in accordance with Article 5 of the Treaty and Article 7 of Commission Regulations (EEC) No 2029/82 of 22 July 1982 and No 3383/82 of 16 September 1982 laying down detailed rules for implementing the import arrangements applicable to products falling within

subheading 07.06 A of the Common Customs Tariff, originating the Thailand and exported from that country in 1982 and 1983 respectively (Official Journal L 218, p. 8, and L 356, p. 8), whether the manioc could be admitted at the reduced rate laid down by the EEC-Thailand Cooperation Agreement;

(b) refused to establish as the Communities' own resources and to make available to the Commission the amount of HFL 19 765 281.39, together with interest as from 29 June 1984, in accordance with Article 11 of Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal L 336, p. 1).

3 The Cooperation Agreement between the European Economic Community and the Kingdom of Thailand on manioc production, marketing and trade was approved, on behalf of the Community, by Council Decision 82/495/EEC of 19 July 1982 (Official Journal L 219, p. 52). By certain provisions of that agreement Thailand undertook to limit its exports to the Community of manioc falling within subheading 07.06 A of the Common Customs Tariff during the period of validity of the agreement (from January 1982 to December 1986) to the quotas fixed therein. For its part, the Community undertook, in particular, to limit to 6% the levy applicable to imports of manioc covered by the Agreement. To that end, Article 5 of the Agreement requires the Thai authorities to issue export certificates only within the limits of the quotas fixed and the Community authorities to issue import licences only on presentation of a Thai export certificate.

4 The application of the Cooperation Agreement within the Community was provided for by Council Regulation (EEC) No 2646/82 of 30 September 1982 on the import system applicable in 1982 to products falling within subheading 07.06 A of the Common Customs Tariff (Official Journal L 279, p. 81) and by Council Regulation (EEC) No 604/83 of 14 March 1983 on the import system applicable in 1983 to 1986 to products falling within subheading 07.06 A of the Common Customs Tariff and amending Regulation (EEC) No 950/68 on the Common Customs Tariff (Official Journal L 72, p. 3). Those regulations provide for the charging of an import levy of 6% *ad valorem* on manioc originating in Thailand, within the limits of the quantities fixed by the Cooperation Agreement, in derogation from Articles 2 and 4 of Regulation No 2744/75, which provide that the

rate of the levy for products falling within subheading 07.06 A of the Common Customs Tariff is to be calculated with reference to the levy fixed for barley.

5 The detailed rules for implementing the system laid down by the Cooperation Agreement were laid down for 1982 and for 1983 by Regulations Nos 2029/82 and 3383/82 respectively. Pursuant to certain provisions of those regulations, applications for import licences must be submitted to the competent authorities of the Member States, accompanied by the original of the export certificate, indicating in particular the name of the vessel transporting the manioc to the Community.

6 Under Article 7(1) of the said regulations, whose wording is identical:

'The import licence shall be issued on the fifth working day following the day on which the application was lodged, except where the Commission has informed the competent authorities of the Member State by telex that the conditions laid down in the Cooperation Agreement have not been fulfilled.

In the event of non-observance of the conditions governing the issue of the licence, the Commission may, where necessary, and following consultation with the Thai authorities, adopt appropriate measures.'

7 The Commission amended the provisions of Regulations Nos 2029/82 and 3383/82 by Commission Regulation (EEC) No 499/83 of 2 March 1983 (Official Journal L 56, p. 12). Under Article 2, this regulation is applicable to certificates the applications for which are lodged from 21 March 1983 onwards. It provides, first, that the import licence is also to indicate the name of the vessel given on the Thai export certificate submitted with the application. Secondly, it specifies that the import licence may not be accepted in support of the declaration of entry into free circulation unless it is clear, in particular from a copy of the bill of lading, that the products for which entry into free circulation is requested were transported to the Community in the vessel mentioned on the export certificate and that the date on which the products were loaded onto the vessel in Thailand precedes the date of the Thai export certificate.

8 It is apparent from the papers before the Court that this amendment was intended to deal with the difficulties which had arisen owing to the fact that, when the EEC-Thailand agreement entered into force, a certain number of import licences which had been issued previously were still valid and consequently allowed the importers holding them to carry out the corresponding imports after the entry into force of the Agreement without, however, having to submit the export certificates issued by the Thai authorities. Certain economic operators could thus be tempted to keep old export certificates and to re-use those of them which were still valid in order to seek new import licences under the system established by Regulation No 2029/82. The same export certificate could therefore be used to import into the EEC double the quantity of manioc indicated in the document. As the Court has already declared in its judgment of 15 January 1987 in Case 175/84 *Krohn & Co Import-Export (GmbH & Co KG)* v *Commission* [1987] ECR 97 such practices compromise the observance of the quotas fixed by the EEC-Thailand Cooperation Agreement.

9 By telex of 31 January 1983 the Commission informed the authorities of the Member States that the vessel *Equinox* had left Thailand with a cargo of manioc for which no export certificates had been issued and asked them to ensure that this manioc was not imported under an import licence issued in application of the Agreement.

10 On 16 June 1983 the Netherlands authorities informed the Commission that the vessel *Equinox* had, in April 1983, discharged 117 581 478 kilograms of manioc, of which 62 523 478 were covered by import licences which had been issued by the German intervention authority, the Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organisation of Agricultural Markets, hereinafter referred to as 'BALM'), before 21 March 1983 and which did not indicate the name of the vessel, while the remainder were covered by import licences issued after that date and indicating the name of the vessel *Equinox*.

11 Informal contacts took place between the Commission and the Netherlands authorities during 1984. On 25 July 1985 the Commission initiated the Article 169 procedure by a letter requesting the Dutch Government to submit its observations. On 29 January 1988 the Commission issued the reasoned opinion provided for by Article 169.

12 Taking the view that the Netherlands authorities should not have admitted into the Community the quantity of manioc in question amounting to some 60 000 tonnes at the reduced levy of 6% *ad valorem* and that they had thus failed to establish as Communities' own resources the amount of HFL 19 765 281, corresponding to the levy applicable to that cargo, and also to make that amount available to the Commission, together with the interest provided for in Article 11 of Regulation No 2891/77 calculated as from 29 June 1984, the Commission brought the present action.

13 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

14 The Netherlands Government considers, in the first place, that the application is inadmissible owing to the delays attributable to the Commission in these proceedings. While the first letter sent by the Commission to the Netherlands Government regarding the matters in question dates from 1 February 1984, the Commission did not bring its action until 21 March 1989, that is to say, more than five years later. The Commission's slowness has meant that the rights of defence of the Netherlands Government have been infringed and produced unacceptable financial consequences, in so far as the Netherlands Government risks having to pay the default interest provided for by Article 11 of Regulation No 2891/77 on the amount claimed by the Commission as uncollected levies.

15 In that regard, it is sufficient to point out that, as the Court ruled in its judgment of 10 April 1984 in Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, the rules of Article 169 of the Treaty, unlike those of Article 93 which derogate expressly therefrom, must be applied and the Commission is not obliged to act within a specific period. In the present case, the Commission has explained that it had decided to await the Court's judgment, cited above, in the *Krohn* case, as well as the reactions of the Netherlands Government to that judgment before bringing this action. In doing that the Commission has not exercised the discretion which it has under Article 169 in a way that is contrary to the Treaty.

16 It is true that in certain cases the excessive duration of the pre-litigation procedure laid down by Article 169 is capable of making it more difficult for the Member State concerned to refute the Commission's arguments and of thus infringing the rights of the defence. However, in the instant case, the Netherlands Government has not proved that the unusual length of the procedure had any effect on the way in which it conducted its defence.

17 Finally, it must be accepted, as the Commission has rightly pointed out, that the Netherlands Government could have avoided the adverse financial consequences to which it refers by making available to that institution the amount claimed while formulating reservations as to the validity of the Commission's arguments.

18 It follows that the arguments based on the inadmissibility of the present application must be dismissed and the substance of the case must be examined.

Substance

Failure to apply the levy laid down by Regulation No 2744/75

19 The Commission accuses the Dutch Government of not having applied to the contested quantity of manioc the levy at the full rate resulting from the application of Regulation No 2744/75. That quantity, exported from Thailand without export certificates being issued for that purpose by the authorities of that country, in application of the EEC-Thailand Cooperation Agreement, should not have benefited from the reduced levy fixed by that agreement and reproduced by Regulations Nos 2646/82 and 604/83.

20 The Netherlands Government has disputed that the quantity of manioc in question has been shown to have been exported from Thailand without being covered by export certificates. It has argued, in particular, that even if the Thai export certificates, submitted in order to obtain the import licences used for the customs clearance of that manioc, indicate the names of vessels other than the *Equinox*, it is possible that the manioc was finally loaded onto that vessel and not the one initially envisaged, or that it was transferred during the course of the voyage.

21 In regard to that argument it must be pointed out that it was the Thai authorities responsible for issuing the export certificates who themselves informed the Commission that the vessel *Equinox* was carrying manioc that was not covered by export certificates. Furthermore, the Thai export certificates submitted in order to obtain the import licences, which have been submitted at the Court's request, actually indicate the names of vessels other than the *Equinox*.

22 While it is true that the manioc could have been loaded on a different ship from the one initially envisaged, the fact remains that, according to certain documents among the papers before the Court which have not been disputed, the practice of the Thai authorities consists of not issuing an export certificate until after the ship has been loaded. Since the Netherlands Government has not shown the slightest evidence that the Thai authorities departed from this practice or that the manioc in question was transferred during the voyage, it must be taken as proved to the requisite legal standard that the contested quantity of manioc was exported from Thailand without the authorities of that country having issued export certificates.

23 It follows that, as the Commission contends, the manioc in question could not benefit from the reduced levy laid down by the Cooperation Agreement and by Regulations Nos 2646/82 and 604/83. Consequently, the Commission's case on this first point must be upheld.

Failure to ascertain whether the manioc could benefit from the reduced levy

24 The Commission contends that the Netherlands authorities failed to ascertain, in accordance with Article 5 of the Treaty and Article 7 of Regulations Nos 2029/82 and 3383/82, whether the manioc in question had been exported from Thailand under cover of the export certificates provided for by the Cooperation Agreement and were thus eligible for the application of the reduced levy. In particular, those authorities failed to act upon the request for verification which, contained in the

abovementioned telex of 31 January 1983, constituted an appropriate measure, adopted following consultation with the Thai authorities, within the meaning of Article 7 of the aforesaid regulations. In the alternative, the Commission accuses the Dutch authorities of not proceeding to the post-clearance recovery of the uncollected levies.

25 The Netherlands Government takes the view, first of all, that, before Regulation No 499/83 came into force, the Commission only had the power to oppose the issue of import licences and not the power to demand that the authorities of the Member States ascertain the identity of the quantities of manioc presented for entry into free circulation under import licences issued by the competent authority of a Member State. The national authorities did not have the means to ascertain that identity and could not redress the error committed by the Commission, which had not in any way opposed the issuing of import licences. Secondly, any refusal to clear quantities of manioc duly accompanied by import licences infringes the legitimate expectations of the operators concerned. Finally, the telex of 31 January 1983 does not constitute an appropriate measure within the meaning of Article 7 of Regulations Nos 2029/82 and 3383/82, was not sent following consultation with the Thai authorities, and was signed by an Deputy Director-General who was not competent to do so.

26 The submissions of the Dutch Government cannot be accepted. It must be pointed out, in the first place, that, according to the wording of the second subparagraph of Article 7(1) of the aforementioned regulations, the Commission is authorised to adopt measures in the event of the infringement of the conditions to which the issue of import licences is subject. It is therefore clear that the Commission's intervention must take place at a time subsequent to the issue of those licences.

27 It is important to emphasize, in the second place, that the first subparagraph of paragraph 1 of the same article confers on the Commission the power to oppose the issue of import licences. It follows that the power to adopt appropriate measures, which the Commission derives from the second subparagraph, serves no purpose unless it is exercised after the issue of those licences.

28 In the third place, the practical difficulties invoked by the Netherlands Government are not to be taken seriously. The national authorities responsible for clearing goods into free circulation could easily have contacted their counterparts in the other Member States which had issued import licences and which, having available the Thai export certificates submitted for that purpose, could have provided them with all the necessary information for ascertaining the identity of the imported manioc.

29 Fourthly, as regards the errors allegedly committed by the Commission, the very facts of this case show that the Commission could act only after the import licences had been issued. In fact, the information provided by the Thai authorities concerning the departure of the vessel *Equinox* could not have reached the Commission until after BALM had issued in the first days of January a number of import licences used when the manioc in question was placed in free circulation. The Commission cannot, therefore, have committed errors which the national authorities were required to correct.

30 Fifthly, as the Advocate General has rightly pointed out in paragraph 25 of his Opinion, the principle of the protection of legitimate expectations does not prevent the national authorities from refusing to clear into free circulation quantities of manioc exported from Thailand without an export certificate but none the less with an import licence fixing the levy at 6%. As the Court ruled in its judgment of 12 December 1985 in Case 67/84 *Sideradria SpA* v *Commission* [1985] ECR 3983, that principle may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force.

31 Finally, Article 7 of the aforementioned regulations do not make the Commission's intervention subject to any condition as to form, so that the telex of 31 January 1983 could constitute an appropriate measure within the meaning of those provisions. Moreover, it is apparent from the very words of that telex that the Thai authorities, by the information which they provided, did, in effect, prompt the Commission's intervention, so that formal consultation of them by the Commission was no longer needed.

32 In the alternative, the Netherlands Government has submitted an argument according to which it acted upon the Commission's telex by carrying out a check and thus learnt that the vessel *Equinox* had remained in dock in a Thai port awaiting the issue of the export certificates.

33 In that respect, it is sufficient to point out that, by the said telex, the Commission had expressly asked the competent authorities of the Member States to ensure that the cargo of the *Equinox*, which was not accompanied by Thai export certificates, was not released into free circulation under cover of import licences issued in application of the Cooperation Agreement, in accordance with Regulations Nos 2029/82 and 3383/82. The information obtained by the Netherlands Government was not inconsistent with the content of the Commission's telex and did not render superfluous checks aimed at preventing quantities of manioc exported from Thailand without export certificates from benefiting from the reduced levy.

34 It follows from the foregoing that the Commission's second complaint must be accepted on the sole basis of Article 7 of Regulations Nos 2029/82 and 3383/82, without it being necessary to rule on the arguments based on Article 5 of the Treaty or on the alternative submission concerning the failure to effect post-clearance recovery of the amounts not collected as levies.

Failure to establish as own resources and to make available to the Commission the amount of the uncollected levies

35 The Commission takes the view that the defendant State has infringed the provisions of Regulation No 2891/77 by refusing to establish as own resources and to make available to the Commission the amount of the levies pertaining to the contested manioc, namely HFL 19 765 281.39, together with interest calculated as from 29 June 1984.

35 The Dutch Government considers, first of all, that Article 2 of Regulation No 2891/77 attributes exclusively to the Member States the right to establish own resources and that they are not required to pay to the Commission amounts which it requires to be paid as a disputed claim. As regards default interest, this is payable, under Article 11 of the same regulation, only on amounts which have been established as own resources or which ought to have been so established by virtue of a mandatory time-limit. Finally, the amount of interest claimed is, *inter alia*, a result of the delays caused by the Commission in the present proceedings.

37 With regard to the first argument, it must be pointed out that, under Article 2 of Regulation No 2891/77, an entitlement shall be deemed to be established as soon as the corresponding claim has been duly determined by the appropriate department or agency of the Member State. However, it may not be inferred from that provision that the Member States may dispense with determining the claims, even where these are disputed. Otherwise, it would have to be accepted that the financial equilibrium of the Community may be disrupted, even temporarily, by the arbitrary conduct of a Member State.

38 As to the second argument, it must be pointed out that, according to the well-established case-law of the Court (see, in particular, the judgment of 21 September 1989 in Case 68/88 *Commission* v *Greece* [1989] ECR 2965), there is an inseparable link between the obligation to establish the Communities' own resources, the obligation to credit them to the Commission's account within the prescribed time-limit and the obligation to pay default interest; in addition, default interest is payable regardless of the reason for the delay in making the entry in the Commission's account. It follows that it is unnecessary to distinguish between a situation in which a Member State has established the Communities' own resources without paying them and one in which it has wrongfully omitted to establish them, even in the absence of a mandatory time-limit.

39 Finally, as regards the consequences of the alleged delays attributable to the Commission, the Court has already observed, in paragraph 17 of this judgment, that the Netherlands Government could easily have avoided them.

40 The last point of the Commission's claim must therefore be upheld.

41 It follows from all the foregoing considerations that it must be declared that the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty:

(a) by admitting into free circulation in or around April 1983 some 60 000 tonnes of manioc which had been exported from Thailand without an export certificate

— without applying the full rate of agricultural levy as provided for in Articles 2 and 4 of Council Regulation (EEC) No 2774/75 of 29 October 1975 on the import and export system for products processed from cereals and rice,

— and without checking, in accordance with Article 7 of Commission Regulation (EEC) No 2029/82 of 22 July 1982 and No 3383/82 of 16 December 1982 laying down detailed rules for implementing the import arrangements applicable to products falling within subheading 07.06 A of the Common Customs Tariff, originating in Thailand and exported from that country in 1982 and 1983 respectively, whether there existed, in respect of the manioc, entitlement to application of the lower levy provided for in the Cooperation Agreement between the EEC and Thailand; and

(b) by refusing to establish that the amount which was wrongly not levied on the manioc, namely HFL 19 765 281.39, is the Communities' own resources and to make it available to the Commission together with interest calculated as from 29 June 1984, in accordance with Article 11 of Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of the Netherlands has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that the Kingdom of the Netherlands has failed to fulfil its obligations under the EEC Treaty:

(a) by admitting into free circulation in or around April 1983 some 60 000 tonnes of manioc which had been exported from Thailand without an export certificate

— without applying the full rate of agricultural levy as provided for in Articles 2 and 4 of Council Regulation (EEC) No 2774/75 of 29 October 1975 on the import and export system for products processed from cereals and rice,

— and without checking, in accordance with Article 7 of Commission Regulation (EEC) No 2029/82 of 22 July 1982 and No 3383/82 of 16 December 1982 laying down detailed rules for implementing the import arrangements applicable to products falling within subheading 07.06 A of the Common Customs Tariff, originating in Thailand and exported from that country in 1982 and 1983 respectively, whether there existed, in respect of the manioc, entitlement to application of the lower levy provided for in the Cooperation Agreement between the EEC and Thailand; and

(b) by refusing to establish that the amount which was wrongly not levied on the manioc, namely HFL 19 765 281.39, is the Communities' own resources and to make it available to the Commission, together with interest calculated as from 29 June 1984, in accordance with Article 11 of Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources;

(2) Orders the Kingdom of the Netherlands to pay the costs.

Due Mancini O'Higgins Rodríguez Iglesias

Díez de Velasco Slynn Joliet Schockweiler Kapteyn

Delivered in open court in Luxembourg on 16 May 1991.

J.-G. Giraud
Registrar

O. Due
President

ORDER OF THE COURT
6 December 1990 *

In Case C-2/88 Imm.,

REQUEST for judicial cooperation submitted by the rechter-commissaris (examining judge) for criminal cases at the Arrondissementsrechtbank (District Court) Groningen, the Netherlands, in the preliminary investigation concerning

J. J. Zwartveld and Others,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs
Registrar: J.-G. Giraud

after hearing the views of the Advocate General

makes the following

Order

1 By a document lodged at the Court Registry on 8 August 1988 under No C-2/88 Imm., the rechter-commissaris at the Arrondissementsrechtbank Groningen submitted to the Court a 'request for judicial cooperation' in which he states as follows:

* Language of the case: Dutch.

(i) he is investigating a charge that in 1985 and 1986 the director and members of the management of the fish market in Lauwersoog (the Netherlands) were guilty of forgery, contrary to Article 225 of the Netherlands Penal Code;

(ii) it appeared from the investigation that the managers of the fish market had introduced a second market or black market, in addition to the official market, in breach of the national provisions adopted to implement the Community rules on fishing quotas;

(iii) it is clear from statements made by witnesses (officials in certain ministries and two members of the Netherlands Government) that those responsible for fisheries policy in the Netherlands were aware of the results of inspections carried out by EEC inspectors in the Netherlands between 1983 and 1986;

(iv) it is essential for purposes of the investigation for the rechter-commissaris to obtain the inspection reports in question and documents drawn up on the basis of those reports, and it might be necessary, after he has considered the documents, to take evidence from the inspectors concerned, of whose identity he is unaware;

(v) the request for the production of these reports was refused by the Commission on the ground that the documents formed part of a file on legal matters pending in the Commission.

2 The rechter-commissaris referred to Articles 1 and 12 of the Protocol on the Privileges and Immunities of the European Communities, annexed to the Treaty establishing a Single Council and Single Commission of the European Communities of 8 April 1965 (hereinafter referred to as 'the Protocol'), in conjunction with the European convention or conventions on mutual assistance, to which, he stated, the Community was not a party but which were incorporated in the Community legal order so that they were to be regarded as an integral part of Community law to which the national authorities were subject. On the basis of those provisions he requested the Court:

(a) to order the Commission, or at least the Directorate-General concerned, to provide him with the information which he has requested; and,

in the alternative, to grant the competent examining magistrate leave to search premises and to seize:

(i) (internal) reports and, if necessary, inspection reports drawn up since 1983 by EEC inspectors who have carried out inspections in the Netherlands with regard to sea fisheries,

(ii) any documents (which may have been drafted on the basis of the findings of the aforesaid officials) concerning compliance with the Community rules on sea fisheries.

(b) to order or at least allow the aforesaid EEC inspectors and senior officials in the Directorate-General for Fisheries, if necessary by lifting their immunity, to be examined as witnesses either by the rechter-commissaris or at least in his presence by an examining magistrate within the European Community, concerning both the inspections carried out by them between 1983 and 1987 in the Netherlands and the discussions which they had with Netherlands officials on Netherlands fisheries policy.

3 By a document lodged at the Court Registry on 13 October 1988, the Commission contended that the rechter-commissaris's request was inadmissible.

4 By an order of 13 July 1990 in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, the Court decided as follows:

(1) the request by the rechter-commissaris, Groningen, is declared admissible;

(2) the Commission is ordered to forward to the Court a list of the reports drawn up between 1983 and 1987 by Commission officials who carried out inspections in the Netherlands with regard to sea fisheries and to submit to the Court in respect of the reports which the Commission refuses to produce to the rechter-commissaris, Groningen, a statement of the imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities which justify that refusal;

(3) the reports in respect of which the Commission does not rely on the said imperative reasons are to be transmitted forthwith to the rechter-commissaris, Groningen;

(4) the Court will rule at a later date on the request for production of the reports in respect of which the Commission relies on the said imperative reasons;

(5) the Commission is ordered to authorize its officials to be examined as witnesses before the rechter-commissaris, Groningen, with regard to their findings during the inspections carried out in the Netherlands between 1983 and 1987 in the sea fisheries sector, and to submit to the Court in respect of the officials for whom such authorization is refused a statement of the imperative reasons relating to the need to safeguard the interests of the Communities which justify refusal of authorization;

(6) the Court will rule at a later date on the request concerning the officials whom the Commission refuses to authorize to be examined as witnesses in reliance on the said imperative reasons;

(7) costs are reserved.

5 By a document lodged at the Court Registry on 21 September 1990, the Commission transmitted to the Court the reports of inspections carried out in the Netherlands by the Commission's fishery inspectors between 1983 and 1987. The Commission considers, however, that imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities preclude the individual facts contained in those reports from being communicated to the rechter-commissaris and its officials from giving evidence on those facts.

6 The first reason put forward by the Commission is based on the need to respect the division of powers between the Commission, which is entrusted with the task of monitoring the actions of the national authorities, and those authorities, which are responsible for investigations and prosecutions of fishermen and other persons subject to supervision or of national officials responsible for supervision. The second reason put forward by the Commission is that it must not, by the

communication of private information, jeopardize the rights of third parties who might be liable to disciplinary or legal proceedings under national law.

7 Before considering the validity of the imperative reasons relating to the need to avoid interference with the functioning and the independence of the Communities which the Commission pleads in order to justify its refusal to communicate all the documents to the rechter-commissaris and to permit its officials to give evidence, it is necessary to determine the reports which could be produced to the national court.

8 It is clear from the rechter-commissaris's request that it is conducting a preliminary investigation of a charge that the managers of the fish market at Lauwersoog were guilty of forgery. A reading of the reports of inspections carried out in the Netherlands by the Commission's fishery inspectors between 1983 and 1987 which have been produced to the Court reveals that only four of those reports concern inspections carried out in the Port of Lauwersoog.

9 In these circumstances the only reports which may be produced to the rechter-commissaris and the only facts on which the Commission's officials may give evidence are those concerning the inspections in the port in which the fish market managed by the persons against whom the national court is conducting its investigation is situated.

10 As regards the imperative reason put forward by the Commission relating to the need to avoid any interference with the functioning and independence of the Communities, namely the need to respect the division of powers between the Community authorities and the national authorities, it must be stated that the risk of such interference has not been established. The national court's request is intended solely to obtain the communication of certain information in the Commission's possession which it requires in order to exercise the powers conferred upon it by national law and does not involve any risk that the Commission will encroach upon the powers of the national authorities. As the Court stressed in its order of 13 July 1990 *Zwartveld and Others*, cited above, the Community institutions are under a duty of sincere cooperation with the judicial

authorities of the Member States, which are responsible for ensuring that Community law is applied and respected in the national legal system.

11 Although the Commission may justify a refusal to produce documents to a national judicial authority on legitimate grounds connected with the protection of the rights of third parties or where the disclosure of this information would be capable of interfering with the functioning and independence of the Community, in particular by jeopardizing the accomplishment of the tasks entrusted to it, it must be stated that the Commission has not adduced any evidence to show that the production to the rechter-commissaris of the individual particulars, more specifically those concerning boats, contained in reports on the inspections carried out in the Port of Lauwersoog and the granting of permission to Commission officials to give evidence thereon would be likely adversely to affect all those interests.

12 Consequently, it must be stated that the Commission has failed to establish the imperative reasons which would justify the refusal to produce to the rechter-commissaris the reports or parts of the reports on inspections carried out by the Commission's fishery inspectors in the Port of Lauwersoog in the Netherlands between 1983 and 1987 and the refusal to permit its officials to be examined as witnesses on the information contained in those reports.

13 It follows from the foregoing that the Commission must be ordered to produce to the rechter-commissaris in Groningen the reports or parts of the reports drawn up by Commission officials who carried out inspections with regard to sea fisheries in the Port of Lauwersoog in the Netherlands and to permit its officials to be examined as witnesses before the rechter-commissaris in Groningen exclusively on the information contained in those reports.

14 Since none of the parties has asked for costs, the Commission, the Council, the European Parliament and the Member States which have submitted observations must be ordered to pay their own costs.

On those grounds,

THE COURT

hereby orders as follows:

(1) The Commission shall produce to the rechter-commissaris in Groningen the reports or parts of the reports drawn up between 1983 and 1987 by Commission officials who carried out inspections in the Netherlands with regard to sea fisheries concerning the port of Lauwersoog.

(2) The Commission shall authorize its officials to be examined as witnesses before the rechter-commissaris in Groningen exclusively with regard to the information contained in the reports on the inspections carried out in the port of Lauwersoog.

(3) The Commission shall inform the Court within a period of one month of the action taken pursuant to this order.

(4) The Commission, the Council, the European Parliament and the Member States which have submitted observations to the Court shall bear any costs which they have incurred.

Luxembourg, 6 December 1990.

J.-G. Giraud
Registrar

O. Due
President

JUDGMENT OF THE COURT (Second Chamber)
13 December 1989 *

In Case C-322/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal du travail (Labour Tribunal), Brussels, for a preliminary ruling in the proceedings pending before that court between

Salvatore Grimaldi, residing in Brussels,

and

Fonds des maladies professionnelles (Occupational Diseases Fund), **Brussels**,

on the interpretation, in the light of the fifth paragraph of Article 189 of the EEC Treaty, of the Commission Recommendation to the Member States of 23 July 1962 concerning the adoption of a European schedule of occupational diseases (*Journal officiel* 1962, 80, p. 2188) and of Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases (*Journal officiel* 1966, 147, p. 2696),

THE COURT (Second Chamber)

composed of: F. A. Schockweiler, President of Chamber, G. F. Mancini and T. F. O'Higgins, Judges,

Advocate General: J. Mischo
Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of the Commission of the European Communities, represented by its Legal Adviser Jean-Claude Seché, acting as Agent,

* Language of the case: French.

having regard to the Report for the Hearing and further to the hearing on 10 October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 10 October 1989,

gives the following

Judgment

1 By judgment of 28 October 1988, which was received at the Court on 7 November 1988, the tribunal du travail, Brussels, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the fifth paragraph of Article 189 of the EEC Treaty and of the Commission Recommendation to the Member States of 23 July 1962 concerning the adoption of a European schedule of occupational diseases (*Journal officiel* 1962, 80, p. 2188).

2 The question was raised in proceedings between Salvatore Grimaldi, a migrant worker of Italian nationality, and the Fonds des maladies professionnelles (Occupational Diseases Fund), Brussels (hereinafter referred to as 'the Fund'), following the latter's refusal to recognize that Dupuytren's contracture, from which Mr Grimaldi suffers, was an occupational disease.

3 Mr Grimaldi worked in Belgium from 1953 to 1980. On 17 May 1983 he requested the Fund to recognize that the abovementioned disease, which is an osteo-articular or angio-neurotic disease of the hands caused by mechanical vibrations from the use of a pneumatic drill, was an occupational disease. The Fund took the contested decision on the ground that the disease in question did not appear in the Belgian schedule of occupational diseases.

4 In the action brought by Mr Grimaldi contesting that decision the tribunal du travail, Brussels, ordered an expert opinion which concluded that the plaintiff was suffering from Dupuytren's contracture, which was not contained in the Belgian

schedule of occupational diseases but could be deemed to be a 'disease caused by the over-straining . . . of peritendinous tissue'. This disease appears in point F. 6(b) of the European schedule of occupational diseases which the Recommendation of 23 July 1962 recommended should be introduced into national law. In addition, the question arose whether Mr Grimaldi could be permitted to prove that a disease not included in the national list was occupational in origin in order to receive compensation under the 'mixed' system of compensation provided for by Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases (*Journal officiel* 1966, 147, p. 2696).

5 The tribunal du travail, Brussels, therefore decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does a measure such as the "European schedule" of occupational diseases not have direct effect in a Member State on the basis of an interpretation of the fifth paragraph of Article 189 in the light of the spirit of the first paragraph thereof and the teleological approach of the Court's case-law, in so far as the schedule is clear, unconditional, sufficiently certain and unequivocal and does not confer any discretion as to the result to be achieved and in so far as it is annexed to a Commission recommendation which has not been formally implemented in a national legal system *after more than 25 years*?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the Community provisions at issue, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 In so far as the preliminary question concerns the interpretation of recommendations, which, according to the fifth paragraph of Article 189 of the EEC Treaty, have no binding force, it is necessary to consider whether, under Article 177 of the Treaty, the Court has jurisdiction to give a ruling.

8 It is sufficient to state in that respect that, unlike Article 173 of the EEC Treaty, which excludes review by the Court of acts in the nature of recommendations, Article 177 confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception.

9 Moreover, in proceedings under Article 177 the Court has already ruled on several occasions on the interpretation of recommendations adopted on the basis of the EEC Treaty (see judgments of 15 June 1976 in Case 113/75 *Frecassetti* v *Amministrazione delle finanze dello Stato* [1976] ECR 983, and of 9 June 1977 in Case 90/76 *Van Ameyde* v *UCI* [1977] ECR 1091). It is therefore necessary to consider the question submitted to the Court.

10 It appears from the documents before the Court that although the question refers only to the recommendation of 23 July 1962, it also seeks to ascertain the effects under national law of Recommendation 66/462 of 20 July 1966. The question must therefore be understood as asking whether, in the absence of any national measure to implement them, those recommendations confer on individuals rights upon which they may rely before national courts.

11 In the first place, the Court has consistently decided that whilst under Article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects (see, in particular, judgment of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53).

12 In order to establish whether the two recommendations may confer rights on individuals, however, it is necessary first to ascertain whether they can produce binding effects.

13 Recommendations, which according to the fifth paragraph of Article 189 of the Treaty are not binding, are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules.

14 Since it follows from the settled case-law of the Court (see, in particular, judgment of 29 January 1985 in Case 147/83 *Binderer* v *Commission* [1985] ECR 257) that the choice of form cannot alter the nature of a measure, it must nevertheless be ascertained whether the content of a measure is wholly consistent with the form attributed to it.

15 As regards the two recommendations at issue in these proceedings, it must be stated that in the statement of the reasons on which they are based reference is made to Article 155 of the EEC Treaty, which confers on the Commission a general power to formulate recommendations, and to Articles 117 and 118 of the Treaty. As the Court held in its judgment of 9 July 1987 in Joined Cases 281, 283, 284, 285 and 287/85 *Federal Republic of Germany, France, the Netherlands, Denmark and the United Kingdom* v *Commission* [1987] ECR 3203, Article 118 does not encroach upon the Member States' powers in the social field in so far as the latter is not covered by other provisions of the Treaty and provided that those powers are exercised in the framework of cooperation between Member States, which is to be organized by the Commission.

16 In these circumstances there is no reason to doubt that the measures in question are true recommendations, that is to say measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects. Consequently, they cannot create rights upon which individuals may rely before a national court.

17 In this regard, the fact that more than 25 years have elapsed since the first of the recommendations in question was adopted, without its having been implemented by all the Member States, cannot alter its legal effect.

18 However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.

19 The reply to the question asked by the tribunal du travail, Brussels, must therefore be that in the light of the fifth paragraph of Article 189 of the EEC Treaty, the Commission Recommendation of 23 July 1962 concerning the adoption of a European schedule of occupational diseases and Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases cannot in themselves confer rights on individuals upon which the latter may rely before national courts. However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.

Costs

20 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question referred to it by the tribunal du travail, Brussels, by judgment of 28 October 1988, hereby rules:

In the light of the fifth paragraph of Article 189 of the EEC Treaty, the Commission Recommendation of 23 July 1962 concerning the adoption of the

European schedule of industrial diseases and Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases cannot in themselves confer rights on individuals upon which the latter may rely before national courts. However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.

Schockweiler Mancini O'Higgins

Delivered in open court in Luxembourg on 13 December 1989.

J.-G. Giraud
Registrar

F. A. Schockweiler
President of the Second Chamber

JUDGMENT OF THE COURT
22 October 1987 *

In Case 314/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Hamburg for a preliminary ruling in the proceedings pending before that court between

Foto-Frost, Ammersbek,

and

Hauptzollamt Lübeck-Ost,

on the interpretation of Article 177 of the EEC Treaty, Article 5 (2) of Council Regulation No 1697/79 (EEC) of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (Official Journal 1979, L 197, p. 1), on the interpretation of the Protocol of 25 March 1957 on German internal trade and connected problems, and on the validity of a Commission decision addressed on 6 May 1983 to the Federal Republic of Germany finding that the post-clearance recovery of import duties must be effected in a particular case,

THE COURT,

composed of: Lord Mackenzie Stuart, President, G. Bosco, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: G. F. Mancini
Registrar: J. A. Pompe, Deputy Registrar

* Language of the Case: German.

after considering the observations submitted on behalf of

Foto-Frost, the plaintiff in the main proceedings, by H. Heemann, Rechtsanwalt, Hamburg, assisted by H. Frost, expert,

the Government of the Federal Republic of Germany, by M. Seidel, acting as Agent,

the Commission of the European Communities, by J. Sack, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing as supplemented further to the hearing on 16 December 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 19 May 1987,

gives the following

Judgment

1 By an order of 29 August 1985, which was received at the Court on 18 October 1985, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions concerning the interpretation of Article 177 of the EEC Treaty, Article 5 (2) of Council Regulation No 1697/79 on 24 July 1979 on the post-clearance recovery of import duties or export duties (Official Journal 1979, L 197, p. 1) and the Protocol of 25 March 1957 on German internal trade and connected problems, and the validity of a Commission decision addressed on 6 May 1983 to the Federal Republic of Germany finding that the post-clearance recovery of import duties must be effected in a particular case.

2 Those questions were raised in proceedings brought by Firma Foto-Frost, Ammersbek (Federal Republic of Germany), an importer, exporter and wholesaler of photographic goods, for the annulment of a notice issued by the Hauptzollamt (Principal Customs Office) Lübeck-Ost for the post-clearance recovery of import

duties following a Commission decision addressed to the Federal Republic of Germany on 6 May 1983 in which it was held that it was not permissible to waive the recovery of import duties in the case in question.

3 The operation to which the recovery of duties related were Foto-Frost's importation into the Federal Republic of Germany and release for free circulation there of prismatic binoculars originating in the German Democratic Republic. Foto-Frost purchased the binoculars from traders in Denmark and the United Kingdom, which dispatched them to it under the Community external transit procedure from customs warehouses in Denmark and the Netherlands.

4 The competent customs offices initially allowed the goods to enter free of duty on the ground that they originated in the German Democratic Republic. Following a check, Hauptzollamt Lübeck-Ost, the principal customs office, considered that customs duty was due under the German customs legislation. However, it took the view that it was not appropriate to effect the post-clearance recovery of the duty on the ground that Foto-Frost fulfilled the requirements set out in Article 5 (2) of Council Regulation No 1697/79, which provides that 'The competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned'. According to the order requesting a preliminary ruling the Hauptzollamt took the view that Foto-Frost had completed the customs declaration correctly and could not have been expected to detect the error in so far as other customs offices had considered that previous similar operations did not give rise to the payment of duty.

5 Since the amount of the duty involved was greater than 2 000 ECU, under Commission Regulation No 1573/80 of 20 June 1980 laying down provisions for the implementation of Article 5 (2) of the aforementioned Council Regulation No 1697/79 (Official Journal 1980, L 161, p. 1) the Hauptzollamt itself was not empowered to take the decision not to effect post-clearance recovery. Consequently, at the Hauptzollamt's request, the Federal Minister for Finance requested the Commission to decide under Article 6 of the aforesaid Regulation No 1573/80 whether the post-clearance recovery of the duty in quesion could be waived.

6 On 6 May 1983 the Commission addressed to the Federal Republic of Germany a decision to the effect that it could not. The grounds given for the decision were that 'the customs offices concerned did not themselves make an error in the application of the provisions governing inter-German trade but merely accepted as correct, without immediate question, the information given on the declarations presented by the importer; ... this practice in no way prevents those authorities from subsequently making a correction in respect of charges, this possibility being expressly provided for in Article 10 of Council Directive 79/695/EEC of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation' (Official Journal 1979, L 205, p. 19). It further considered that 'the importer was in a position to consider the circumstances of the import operations in question in the light of the provisions governing inter- German trade, the application of which he was claiming; ... he could thus detect any error in implementing these provisions; ... it has been established that he did not comply with all the provisions laid down by the rules in force as regards the customs declarations'.

7 Following that decision the Hauptzollamt issued the notice for the post-clearance recovery of duty which Foto-Frost is contesting in the main proceedings.

8 Foto-Frost applied to the Finanzgericht Hamburg for an order suspending the operation of that notice. The Finanzgericht allowed the application on the ground that the operations in question appeared to fall within the ambit of German internal trade and were therefore exempt from customs duty under the Protocol on German internal trade

9 Foto-Frost then applied to the Finanzgericht Hamburg for the annulment of the notice for the post-clearance recovery of duty. The Finanzgericht took the view that the validity of the Commission's decision of 6 May 1983 was doubtful on the ground that all the requirements set out in Article 5 (2) of Council Regulation No 1697/79 for refraining from taking action for the post-clearance recovery of duty were fulfilled. Since the contested notice was based on the Commission's decision, the Finanzgericht considered that it could not annul it unless the Community decision was itself invalid. The Finanzgericht therefore referred the following four questions to the Court for a preliminary ruling:

'(1) Can the national court review the validity of a decision adopted by the Commission pursuant to Article 6 of Commision Regulation (EEC) No 1573/80 of 20 June 1980 (Official Journal L 161, p. 1) on whether the post-clearance recovery of import duties should be waived pursuant to Article 5 (2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 (Official Journal L 197, p. 1), which decision held that there was no justification for waiving the recovery of the import duties, and can it, if appropriate, hold in proceedings challenging such a decision that recovery of the duties should be waived?

(2) If the national court cannot review the validity of the Commission's decision, is the Commission's decision of 6 May 1983 (ECR 3/83) valid?

(3) If the national court can review the validity of the Commission's decision, is Article 5 (2) of Regulation No 1697/79 to be interpreted as conferring a power to adopt a discretionary decision, which may be reviewed by the court only as regards abuses of that discretion (and if so, which abuses?) without any possibility of substituting its own discretion, or does it confer the power to adopt a measure of equitable relief, which is fully subject to review by the court?

(4) If the assessment to customs duties cannot be waived pursuant to Article 5 (2) of Regulation No 1697/79, do goods originating in the German Democratic Republic which have been introduced into the Federal Republic of Germany via a Member State other than Germany by way of the external Community transit procedure fall within the ambit of German internal trade within the meaning of the Protocol on German internal trade and connected problems of 25 March 1957, with the consequence that when they are imported into the Federal Republic of Germany they are liable neither to customs duties nor to import turnover tax, or are such charges to be levied as in the case of imports from non-member countries, so that Community customs duties, in accordance with the relevant customs legislation, and import turnover tax, in accordance with Article 2 (2) of the Sixth Council Directive on the harmonization of turnover taxes in the European Communities, are to be levied?'

10 Reference is made to the Report for the Hearing for a fuller description of the facts and of the applicable provisions of Community law and for an account of the

observations submitted by Foto-Frost, Hauptzollamt Lübeck-Ost, the Government of the Federal Republic of Germany and the Commission.

The first question

11 In its first question the Finanzgericht asks whether it itself is competent to declare invalid a Commission decision such as the decision of 6 May 1983. It casts doubt on the validity of that decision on the ground that all the requirements laid down by Article 5 (2) of Regulation No 1697/79 for taking no action for the post-clearance recovery of duty seem to be fulfilled in this case. However, it considers that in view of the division of jurisdiction between the Court of Justice and the national courts set out in Article 177 of the EEC Treaty only the Court of Justice is competent to declare invalid acts of the Community institutions.

12 Article 177 confers on the Court jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the Community institutions and on the validity of such acts. The second paragraph of that article provides that national courts may refer such questions to the Court and the third paragraph of that article puts them under an obligation to do so where there is no judicial remedy under national law against their decisions.

13 In enabling national courts, against those decisions where there is a judicial remedy under national law, to refer to the Court for a preliminary ruling questions on interpretation or validity, Article 177 did not settle the question whether those courts themselves may declare that acts of Community institutions are invalid.

14 Those courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the Community measure.

15 On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 *International Chemical Corporation* v *Amministrazione delle Finanze* [1981] ECR 1191, the main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.

16 The same conclusion is dictated by consideration of the necessary coherence of the system of judicial protection established by the Treaty. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. As the Court pointed out in its judgment of 23 April 1986 in Case 294/83 *Parti écologiste 'les Verts'* v *European Parliament* [1986] ECR 1339), 'in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.

17 Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.

18 It must also be emphasized that the Court of Justice is in the best position to decide on the validity of Community acts. Under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, Community institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question. Furthermore, under the second paragraph of Article 21 of that Protocol the Court may require the Member States and institutions which are not participating in the proceedings to supply all information which it considers necessary for the purposes of the case before it.

19 It should be added that the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures; however, that case is not referred to in the national court's question.

20 The answer to the first question must therefore be that the national courts have no jurisdiction themselves to declare that acts of Community institutions are invalid.

The second question

21 The second and third questions assume that the operations in question are in fact liable to customs duties. In its second question the Finanzgericht is seeking to ascertain, in the event that the Court alone has jurisdiction to review the validity of the Commission decision, whether that decision is valid.

22 It must be observed that Article 5 (2) of Regulation No 1697/79 lays down three specific requirements which must be fulfilled before the competent authorities may waive the post-clearance recovery of duties. That provision must be interpreted as meaning that if all those requirements are fulfilled the person liable is entitled to the waiver of the recovery of the duty in question.

23 It now falls to be considered whether the three requirements set out in Article 5 (2) of Regulation No 1697/79 are fulfilled in this case. The Court has the power to verify the existence of the facts on which a Community act is based and the legal inferences which the Community institution has drawn therefrom where, in the context of a request for a preliminary ruling, they are alleged to be incorrect.

24 The first requirement contained in Article 5 (2) is that the failure to collect the duty must have been the result of an error made by the competent authorities themselves. In that regard, the Commission's argument to the effect that the customs authorities did not make an error themselves but merely made the initial assumption that the particulars given in Foto-Frost's declaration were correct, as

they were entitled to do under Article 10 of Council Directive 79/695/EEC, must be rejected. According to the latter provision, where duty has been calculated on the basis of non-verified particulars given in the customs declaration, the declaration may be subjected to subsequent verification and the amount of duty calculated rectified. In this case, as the Commission itself acknowledged in its observations and in answering a question put to it by the Court, Foto-Frost's declaration contained all the factual particulars needed in order to apply the relevant rules, and those particulars were correct. In those circumstances, the post-clearance check carried out by the German customs authorities failed to disclose any new fact. Therefore, it was in fact as a result of an error made by the customs authorities themselves in initially applying the relevant rules that duty was not charged when the goods were imported.

25 The second requirement is that the person liable must have acted in good faith or, in other words, that he could not have detected the error made by the competent authorities. In that connection, it is observed that the specialist judges of the Finanzgericht Hamburg expressed the view in their order of 22 September 1983 suspending the operation of the amendment notice that it was very doubtful whether duty was payable on operations of the type at issue. The Finanzgericht considered that such operations appeared to fall within the ambit of German internal trade and were therefore exempt from customs duty under the Protocol on such trade. However, it observed that the situation was uncertain as regards the case-law of both the Court of Justice and the national courts. In those circumstances, it cannot reasonably be considered that Foto-Frost, a commercial undertaking, could have detected the error made by the customs authorities. Moreover, it had even less reason to suspect that an error had been made, since previous similar operations has been granted exemption from duty.

26 The third requirement is that the person liable must have observed all the provisions laid down by the rules in force as far as his customs declaration is concerned. As to that point, it must be observed that, in answering a question put to it by the Court, the Commission itself admitted, contrary to what is stated in its decision of 6 May 1983, that Foto-Frost had completed its customs declaration correctly. Moreover, there is nothing in the documents before the Court to suggest that that was not the case.

27 It follows from the foregoing that all the requirements laid down in Article 5 (2) of Regulation No 1697/79 were fulfilled in this case and therefore Foto-Frost was entitled to the waiver of the post-clearance recovery of the duty in question.

28 Accordingly, the decision addressed to the Federal Republic of Germany on 6 May 1983 in which the Commission stated that post-clearance recovery of import duties must be carried out in a particular case is invalid.

The third question

29 The Finanzgericht asks whether, in the event that it itself is competent to declare the Commission's decision invalid, the application of Article 5 (2) of Regulation No 1697/79 depends on a discretionary decision which the national court may review only as regards abuses of that discretion ('Ermessensfehler') or on a measure of equitable relief, which is fully subject to review by that court?

30 In view of the answers given to the first and second questions, the third question does not call for a reply.

The fourth question

31 The fourth question is put to the Court in the event that it does not emerge from the answers to the first questions that Foto-Frost is entitled to the waiver of post-clearance recovery. The Finanzgericht asks whether in that case the operations in question fall within the ambit of German internal trade within the meaning of the Protocol on German internal trade, which would mean, in its view, that they are exempt from customs duty.

32 In view of the answer given to the second question, the fourth question does not call for a reply.

Costs

33 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to questions submitted to it by the Finanzgericht, Hamburg, by order of 29 August 1985, hereby rules:

(1) The national courts have no jurisdiction themseves to declare that measures taken by Community institutions are invalid.

(2) The decision addressed to the Federal Republic of Germany on 6 May 1983 in which the Commission stated that post-clearance recovery of import duties must be carried out in a particular case is invalid.

Mackenzie Stuart Bosco Moitinho de Almeida Rodríguez Iglesias

Koopmans Everling Bahlmann Galmot Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 22 October 1987.

For the President A. J. Mackenzie Stuart

P. Heim
Registrar

G. Bosco
acting as President

Costs

56 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. The applicant has not asked that the defendant be ordered to pay the costs. Consequently, although the defendant has failed in its submissions, each party must be ordered to bear its own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that the decision of the Bureau of the European Parliament dated 12 October 1982 concerning the allocation of the appropriations entered under Item 3708 of the General Budget of the European Communities and the rules adopted by the enlarged Bureau on 29 October 1983 governing the use of the appropriations for reimbursement of expenditure incurred by the political groupings having taken part in the 1984 elections are void;

(2) Orders each party to bear its own costs.

Koopmans Everling Bahlmann Joliet

Bosco Due Galmot Kakouris O'Higgins

Delivered in open court in Luxembourg on 23 April 1986.

P. Heim
Registrar

T. Koopmans
President of Chamber
acting as President

JUDGMENT OF THE COURT
23 April 1986 *

In Case 294/83

Parti écologiste 'Les Verts', a non-profit-making association, whose headquarters are in Paris, represented by Étienne Tête, special delegate, and Christian Lallement, of the Lyon Bar, with an address for service in Luxembourg at the Chambers of E. Wirion, 1 place du Théâtre,

applicant,

v

European Parliament, represented by Mr Pasetti-Bombardella, Jurisconsult, Roland Bieber, Legal Adviser, Johannes Schoo, Principal Administrator, Jean-Paul Jacqué, Professor at the Faculty of Law and Political Science of the University of Strasbourg, and Jürgen Schwarz, Professor at the University of Hamburg, acting as Agents, and by Mr Lyon-Caen, avocat, with an address for service in Luxembourg at its seat, plateau du Kirchberg, BP 1601,

defendant,

APPLICATION for a declaration that two decisions of the Bureau of the European Parliament, the first dated 12 and 13 October 1982 and the second dated 29 October 1983, concerning the allocation of Item 3708 of the budget are void,

THE COURT,

composed of: T. Koopmans, President of Chamber, acting as President, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 4 December 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 28 December 1983, 'Les Verts — Parti écologiste', a non-profit-making association whose headquarters are in Paris and whose formation was declared to the préfecture de police on 3 March 1980, brought an action under the second paragraph of Article 173 of the EEC Treaty requesting the Court to declare void the decision of the Bureau of the European Parliament dated 12 October 1982 concerning the allocation of the appropriations entered under Item 3708 of the General Budget of the European Communities and the decision of the enlarged Bureau of the European Parliament dated 29 October 1983 adopting rules governing the use of the appropriations for reimbursement of expenditure incurred by the political groupings having taken part in the 1984 European elections.

2 Item 3708 was entered in the general budget of the European Communities for the 1982, 1983 and 1984 financial years, in the section dealing with the European Parliament, under Title 3, concerning expenditure resulting from special functions carried out by the institution (Official Journal 1982, L 31, p. 114, Official Journal 1983, L 19, p. 112, and Official Journal 1984, L 12, p. 132). That item provides for a contribution to the costs of preparations for the next European elections. The remarks concerning the item in the budgets for 1982 and 1983 are identical. It is stated that 'this appropriation is to cover a contribution to the cost of preparations for the information campaign leading up to the second direct elections in 1984' and that 'the Bureau of the European Parliament will lay down the conditions governing this expenditure'. The remark contained in the 1984 budget states that the contribution will be made 'pursuant to the Bureau decision of 12 October 1982'. In total 43 million ECU was allocated to this item.

3 On 12 October 1982, the Bureau, which is composed of the President and the 12 Vice-Presidents of the Parliament, adopted, upon a proposal from the chairmen of the political groups, a decision concerning the allocation of the appropriations entered under Item 3708 (hereinafter referred to as 'the 1982 Decision'). The Bureau sat on that occasion in the presence of the chairmen of the political groups and delegates of the non-attached members. One of the political groups, the Technical Coordination Group, objected to the principle of granting funds to the political groups for the election campaign.

4 That decision, which was not published, provided that the appropriations entered under Item 3708 of the budget of the European Parliament were to be divided each year between the political groups, the non-attached members and a reserve fund for 1984. The division was to be carried out in the following manner: (a) each of the seven groups was to receive a flat-rate allocation of 1% of the total appropriations; (b) apart from this, each group was also to receive for each of its members 1/434 of the total appropriations remaining after deduction of the flat-rate allocations; (c) each of the non-attached members was also to receive 1/434 of the total appropriations remaining after deduction of the flat-rate allocations; (d) the total of the allocations to the political groups and the non-attached members under the rules set out in (b) and (c) was not to exceed 62% of the total appropriations entered under Item 3708; and (e) each year, an amount equivalent to 31% of the total appropriations entered under Item 3708 was to be allocated to a reserve fund. It was provided that this reserve fund would be divided, in proportion to the number of votes obtained, among all political groupings obtaining, in the 1984 elections, more than 5% of the valid votes cast in the Member State in which the grouping put up candidates or more than 1% of the valid votes cast in three or more Member States in which the grouping put up candidates (hereinafter referred to as 'the 1% clause'). Finally, it was stated that precise details of the allocation of the reserve fund would be decided on at a later stage.

5 On 12 October 1982, the Bureau of the European Parliament, sitting in the same circumstances, also adopted rules governing the utilization by the political groups of the appropriations earmarked for the information campaign preceding the 1984 European elections (hereinafter referred to as 'the 1982 Rules on Utilization of Funds'). Those rules, which have not yet been published, follow the recommendations made by a working party composed of the chairmen of the political groups and chaired by the President of the European Parliament.

6 As regards the utilization of the funds, the rules were as follows. The funds allocated to the political groups were to be used solely to finance activities directly

connected with the preparation and implementation of the information campaign for the 1984 elections. The total administrative expenditure (in particular, salaries for temporary staff, rental of office accommodation and major items of office equipment, and telecommunications costs and expenditure) was not to exceed 25% of the funds allocated. The funds were not to be utilized to purchase immovable property or office furniture. The political groups were to deposit the funds allocated to them in separate bank accounts specifically opened for that purpose.

7 The chairmen of the political groups were to be responsible for ensuring that the funds were used for purposes compatible with the rules adopted. An account of the utilization of the funds was ultimately to be given to the other control bodies responsible for auditing the funds of the European Parliament.

8 As regards accounting records, the rules required that completely separate accounts be kept from those recording income and expenditure pertaining to the political groups' other activities. The political groups were to institute accounting systems meeting certain specified requirements. The systems had to make a distinction between three types of expenditure (administrative expenditure, expenditure on meetings and expenditure on publications and publicity), subdivided by project. Each year, starting from the date of the first transfer of funds to the political groups, the groups were to publish a report on the utilization of the funds (payments, commitments, reserves) during that period. That report was to be forwarded to the President of the European Parliament and to the chairman of the Committee on Budgetary Control.

9 Under the heading 'Repayment of funds not utilized', it was stated that the funds allocated could be utilized until at the latest 40 days before the date of the elections to cover any payment commitments, provided that payment was actually made not later than 40 days after the date of the elections. Any monies disbursed contrary to those two conditions were to be repaid to the European Parliament within three months of the date of the elections. Where appropriate, the European Parliament could recover any monies owing to it by deducting that amount from the appropriations set aside for the political groups under Item 3706 (other political activities).

10 On 29 October 1983, the enlarged Bureau, which is composed of the Bureau and the chairmen of the political groups, adopted 'Rules governing the use of the appropriations for reimbursement of expenditure incurred by the political groupings having taken part in the 1984 European elections' (Official Journal C 293, p. 1) (hereinafter referred to as 'the 1983 Rules').

11 As had been announced in the 1982 Decision, those rules specified the basis on which the reserve fund of 31% was to be allocated. The conditions concerning the minimum number of votes which political groupings had to obtain in order to obtain a share of the funds are the same as those set out in the 1982 Decision. The 1983 Rules added that political groupings wishing to benefit from the 1% clause had to submit a declaration of affiliation to the Secretary General of the European Parliament no later than 40 days before the elections. The rules also contained various provisions concerning the allocation of the funds. For parties, lists or alliances represented in the European Parliament, the funds were to be allocated to the political groups and non-attached members with effect from the first sitting following the elections. For parties, lists or alliances not represented in the European Parliament, it was provided that:

Requests for reimbursement were to be submitted to the Secretary General of the European Parliament within 90 days of the publication of the results of the election in the Member States in question, together with all appropriate documents;

The period during which expenditure was to be considered as expenditure on the 1984 elections was to begin on 1 January 1983 and finish 40 days after the date of the 1984 elections;

Requests were to be accompanied by statements of accounts proving that the amounts were disbursed for the elections to the European Parliament;

The aforesaid criteria applicable to expenditure incurred by the political groups were also to apply to expenditure incurred by political groupings not represented in the European Parliament.

12 The applicant association puts forward seven submissions in support of its action:

(1) lack of competence;

(2) infringement of the Treaties, in particular, Article 138 of the EEC Treaty and Articles 7 (2) and 13 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage;

(3) breach of the general principle of the equality of all citizens before the law governing elections;

(4) infringement of Article 85 *et seq.* of the EEC Treaty;

(5) breach of the French Constitution, inasmuch as the principle of the equality of citizens before the law has not been respected;

(6) an objection of illegality and inapplicability, inasmuch as the vote cast by the French Minister in the Council of the European Communities during the deliberation on the budgets was unlawful, thus rendering unlawful the deliberation of the Council and the subsequent steps in the budgetary procedure; and

(7) misuse of powers, inasmuch as the Bureau of the European Parliament used the appropriations entered under Item 3708 in order to ensure the re-election of the members of the European Parliament elected in 1979.

Admissibility of the action

1. *Capacity of 'Les Verts — Confédération écologiste — Parti écologiste' to pursue the proceedings*

13 After the written procedure had been completed, it emerged that by an agreement of 29 March 1984 the applicant association, 'Les Verts — Parti écologiste', and another association called 'Les Verts — Confédération écologiste' decided to dissolve themselves and to merge in order to form a new association called 'Les Verts — Confédération écologiste — Parti écologiste'. That association was registered at the préfecture de police in Paris on 20 June 1984 (JORF of 8.11. 1984, NC, p. 10241, notice replacing and cancelling those contained in the JORF of 25.7.1984, NC 172, pp. 6604 and 6608). It was that new association which put up a list for 'Les Verts — Europe écologie' at the European elections of June 1984, having submitted on 28 April 1984 the declaration of affiliation referred to in Rule 4 of the 1983 Rules. It was also that association which, in a letter of 23 July 1984, submitted a request for reimbursement under those rules to the Secretary General of the European Parliament. As a result of that request it received a sum of 82 958 ECU, calculated by applying to the 680 080 votes obtained a funding factor per vote of 0.1206596.

14 In view of those new factors, the European Parliament contended first of all that the applicant association 'Les Verts — Parti écologiste' had, by virtue of its being dissolved, lost the capacity to pursue these proceedings and that the rule that it continued to have legal personality for the purposes of its winding-up could not

apply to this action since the action had been transferred to the new association. While not denying that the new association, 'Les Verts — Confédération écologiste — Parti écologiste', could continue the proceedings instituted by the applicant association, the European Parliament argued that the proceedings had to be continued within a period laid down by the Court and that this had to be done clearly by the organs of the new association empowered to do so under the association's rules. Since it considered that the latter condition had not been fulfilled, the European Parliament contended that the Court should dismiss the application.

15 It should first be pointed out that it can be seen from the agreement of 29 March 1984 that the dissolution of the two associations, including the applicant association, took place subject to their being merged to form a new association. The dissolution and merger of the original associations and the formation of the new association were thus brought about by means of a single act; consequently there is both legal and temporal continuity between the applicant association and the new association and the latter has acquired the rights and obligations of the former.

16 Secondly, the merger agreement expressly states that legal proceedings which have been instituted, and in particular those instituted before the Court of Justice, 'are to continue on the same terms' and 'under the same arrangements'.

17 Thirdly, the European Parliament itself referred during the oral procedure to a decision adopted by the national interregional committee of the new association on 16 and 17 February 1985. According to that decision, which was read out at the hearing by counsel for the new association, the committee, which is the body empowered under the rules of the association to bring legal proceedings, expressly decided, in view of the dilatory attitude of the European Parliament, to continue the proceedings instituted by the association 'Les Verts — Parti écologiste'.

18 In those circumstances, there can be no doubt as to the intention of the new association to maintain and continue the action that was brought by one of the associations from which it was formed and that was expressly assigned to it, and the European Parliament's submissions to the contrary must be rejected.

19 Although the European Parliament has not put forward any plea of inadmissibility based on the conditions laid down in Article 173 of the Treaty, the Court must verify of its own motion whether those conditions have been fulfilled. In this case, it appears to be necessary to rule expressly on the following points: does the Court have jurisdiction to hear and determine an action for annulment brought under Article 173 of the Treaty against a measure adopted by the European Parliament? Are the 1982 Decisions and the 1983 Rules measures intended to produce legal effects *vis-à-vis* third parties? Are those measures of direct and individual concern to the applicant association within the meaning of the second paragraph of Article 173 of the Treaty?

2. *The Court's jurisdiction to hear and determine an action for annulment brought under Article 173 of the Treaty against a measure adopted by the European Parliament*

20 It must first be observed that the 1982 Decision and the 1983 Rules were adopted by organs of the European Parliament and must therefore be regarded as measures adopted by the European Parliament itself.

21 The applicant association considers that, in view of the provisions of Article 164 of the Treaty, the Court's power to review the legality of measures adopted by the institutions under Article 173 of the Treaty cannot be limited to measures adopted by the Council and the Commission without giving rise to a denial of justice.

22 The European Parliament also considers that, in accordance with its general function as custodian of the law, as laid down in Article 164 of the Treaty, the Court can review the legality of measures other than those adopted by the Council and the Commission. In its opinion, the list of potential defendants in Article 173 of the Treaty is not exhaustive. The European Parliament does not dispute that in areas such as the budget and questions relating to the organization of direct elections, where increased powers have been conferred upon it by amendment of the Treaties and where it may itself adopt legal measures, it is subject to judicial review by the Court. In the case of appropriations granted by way of a contribution to the information campaign for the second direct election, the European Parliament directly exercises its rights. It does not therefore wish to remove the measures which it adopts in this area from judicial review. However, it considers that, if Article 173 of the Treaty is to be interpreted broadly so as to render the

measures adopted by it challengeable by way of an action for annulment, it should in turn have the capacity to bring such an action against measures adopted by the Council and the Commission.

23 It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.

24 It is true that, unlike Article 177 of the Treaty, which refers to acts of the institutions without further qualification, Article 173 refers only to acts of the Council and the Commission. However, the general scheme of the Treaty is to make a direct action available against 'all measures adopted by the institutions . . . which are intended to have legal effects', as the Court has already had occasion to emphasize in its judgment of 31 March 1971 (Case 22/70 *Commission* v *Council* [1971] ECR 263). The European Parliament is not expressly mentioned among the institutions whose measures may be contested because, in its original version, the EEC Treaty merely granted it powers of consultation and political control rather than the power to adopt measures intended to have legal effects *vis-à-vis* third parties. Article 38 of the ECSC Treaty shows that where the

Parliament was given *ab initio* the power to adopt binding measures, as was the case under the last sentence of the fourth paragraph of Article 95 of that Treaty, measures adopted by it were not in principle immune from actions for annulment.

25 Whereas under the ECSC Treaty actions for annulment against measures adopted by the institutions are the subject of two separate provisions, they are governed under the EEC Treaty by Article 173 alone, which is therefore a provision of general application. An interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its system. Measures adopted by the European Parliament in the context of the EEC Treaty could encroach on the powers of the Member States or of the other institutions, or exceed the limits which have been set to the Parliament's powers, without its being possible to refer them for review by the Court. It must therefore be concluded that an action for annulment may lie against measures adopted by the European Parliament intended to have legal effects *vis-à-vis* third parties.

26 It is now necessary to consider whether the 1982 Decision and the 1983 Rules are measures intended to have legal effects *vis-à-vis* third parties.

3. *The question whether the 1982 Decision and the 1983 Rules are measures intended to produce legal effects* vis-à-vis *third parties*

27 The two contested measures both concern the allocation of the appropriations entered in the budget of the European Parliament to cover the cost of preparations for the 1984 European elections. They deal with the allocation of those appropriations to third parties for expenses relating to activities to take place outside the European Parliament. In that regard they govern the rights and obligations both of political groupings which were already represented in the European Parliament in 1979 and of those which were to take part in the 1984 elections. They determine the proportion of the appropriations to be received by each of the groupings, either on the basis of the number of seats obtained in 1979 or on the basis of the number of votes obtained in 1984. For that reason, the measures in question were designed to produce legal effects *vis-à-vis* third parties and may therefore be the subject of an action under Article 173 of the Treaty.

28 The argument that the Court of Auditors' power of review under Article 206a of the Treaty precludes any review by the Court of Justice must be rejected. The Court of Auditors only has power to examine the legality of expenditure with reference to the budget and the secondary provision on which the expenditure is based (commonly called 'the basic measure'). Its review is thus in any event distinct from that exercised by the Court of Justice, which concerns the legality of the basic measure. The measures contested in this case are in reality the equivalent of a basic measure, inasmuch as they provide in principle for the expenditure and lay down the detailed rules according to which the expenditure is to be effected.

4. *The question whether the contested measures are of direct and individual concern to the applicant association within the meaning of the second paragraph of Article 173 of the Treaty*

29 The applicant association emphasizes that it has legal personality and that the contested decisions, entailing as they do a grant of aid to rival political groupings, is certainly of direct and individual concern to it.

30 The European Parliament considers that, as the Court's case-law concerning that condition stands at present, the applicant association's action is inadmissible. However, it raises the question whether a wide interpretation of the first paragraph of Article 173 of the Treaty would not affect the interpretation to be given to the second paragraph of that article. It emphasizes in that regard that the applicant association is not an ordinary third party but, as a political party, occupies an intermediate position between the privileged applicants and private individuals. In its view, the special function of political parties must be taken into consideration at Community level. It considers that their special status justifies their being accorded a right of action under the second paragraph of Article 173 of the Treaty against measures which determine under what conditions and in what amount they are to receive, on the occasion of the direct elections, funds from the European Parliament for the purpose of making the latter more widely known. In its defence, the European Parliament concludes from that line of reasoning that political parties are directly and individually concerned by the 1983 Rules.

31 It must first be pointed out that the contested measures are of direct concern to the applicant association. They constitute a complete set of rules which are sufficient in themselves and which require no implementing provisions, since the calculation of the share of the appropriations to be granted to each of the political groupings concerned is automatic and leaves no room for any discretion.

32 It remains to be examined whether the applicant association is individually concerned by the contested measures.

33 That examination must be centred on the 1982 Decision. That decision approved the principle of granting the appropriations entered under Item 3708 to the political groupings; it then determined the share of those appropriations to be paid to the political groups in the Assembly elected in 1979 and to the non-attached members of that Assembly (69%) and the share of the appropriations to be distributed among all the political groupings, whether or not represented in the Assembly elected in 1979, which took part in the 1984 elections (31%); finally, it divided the 69% between the political groups and the non-attached members. The 1983 Rules merely confirmed the 1982 Decision and completed it by setting out the formula for the division of the 31% reserve fund. They must therefore be regarded as an integral part of the original decision.

34 The 1982 Decision concerns all the political groupings, even though the treatment they receive differs according to whether or not they were represented in the Assembly elected in 1979.

35 This action concerns a situation which has never before come before the Court. Because they had representatives in the institution, certain political groupings took part in the adoption of a decision which deals both with their own treatment and with that accorded to rival groupings which were not represented. In view of this, and in view of the fact that the contested measure concerns the allocation of public funds for the purpose of preparing for elections and it is alleged that those funds were allocated unequally, it cannot be considered that only groupings which were represented and which were therefore identifiable at the date of the adoption of the contested measure are individually concerned by it.

36 Such an interpretation would give rise to inequality in the protection afforded by the Court to the various groupings competing in the same elections. Groupings not represented could not prevent the allocation of the appropriations at issue before the beginning of the election campaign because they would be unable to plead the illegality of the basic decision except in support of an action against the individual

decisions refusing to reimburse sums greater than those provided for. It would therefore be impossible for them to bring an action for annulment before the Court prior to the elections or to obtain an order from the Court under Article 185 of the Treaty suspending application of the contested basic decision.

37 Consequently, it must be concluded that the applicant association, which was in existence at the time when the 1982 Decision was adopted and which was able to present candidates at the 1984 elections, is individually concerned by the contested measures.

38 In the light of all those considerations, it must be concluded that the application is admissible.

Substance of the case

39 In its first three submissions, the applicant association describes the scheme established by the European Parliament as a scheme for reimbursement of election campaign expenses.

40 In its first submission, the applicant association claims that the Treaty provides no legal basis for the adoption of such a scheme. In its second submission it asks the Court to declare that, in any event, such a matter is covered by the concept of a uniform electoral procedure referred to in Article 138 (3) of the Treaty and that it therefore remains within the powers of the national legislatures by virtue of the provisions of Article 7 (2) of the Act concerning the election of the representatives of the Assembly by direct universal suffrage.

41 Finally, the applicant association's third submission criticizes the unequal opportunity afforded to the various political groupings inasmuch as those already represented in the Parliament elected in 1979 shared twice in the division of the appropriations entered under Item 3708. They shared first in the division of the 69% which was reserved for the political groups and non-attached members of the Assembly elected in 1979 and shared again in the division of the 31% reserve fund. They were thus placed at a considerable advantage compared to groupings which did not already have representatives in the Assembly elected in 1979.

42 The European Parliament replies to the first two submissions together. It considers that there is a contradiction between the two submissions: the matter either falls or does not fall within the powers of the Community but the applicant association cannot advance both of those propositions at the same time. The European

Parliament emphasizes above all that the scheme was not set up to reimburse election campaign expenses but to make a contribution to an information campaign designed to make the Parliament more widely known among the electorate at the time of the elections, as can be clearly seen both from the remarks on Item 3708 and from the implementing rules. The participation of the European Parliament in such an information campaign follows from its power, acknowledged by the Court in its judgment of 10 February 1983 (Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, at p. 287), to determine its own internal organization and to adopt 'appropriate measures to ensure the due functioning and conduct of its proceedings'. Since the scheme was not concerned with reimbursement of election campaign expenses, the first and second submissions are without foundation.

43 The European Parliament also contends that the third submission should be rejected because the equality of opportunity between the various political groupings has not been affected. The purpose of the rules is to permit an effective dissemination of information concerning the Parliament. The political parties represented in the Assembly elected in 1979 have already demonstrated that they have engaged in activities to promote European integration. Being larger groupings, they are more representative and are therefore in a position to disseminate a greater quantity of information. The Parliament maintains that it is therefore justifiable to make larger sums available to them for their information campaign. It considers that the division of the appropriations into 69% for the prior financing of the information campaign and 31% for the subsequent financing of all the political groupings which took part in the elections constitutes a decision which comes within its political discretion. The Parliament emphasized once again at the hearing that the Bureau and the enlarged Bureau decided on an allocation of the appropriations according to a formula which naturally took account of the size of the contribution which could be made by the various groupings in promoting the concept of political integration in public opinion in the Member States.

44 It should first of all be repeated that the European Parliament is entitled to adopt, by virtue of its power to determine its own internal organization given to it by the Treaties, appropriate measures to ensure the proper functioning and conduct of its proceedings, as was made clear in the aforesaid judgment of 10 February 1983. However, it must be pointed out that the financing scheme set up would not come within that power of internal organization if it were to be found that it cannot be distinguished from a scheme providing for flat-rate reimbursement of election campaign expenses.

45 In order to consider whether or not the first three submissions are well-founded, it is therefore necessary to determine first of all the true nature of the financing scheme set up by the contested measures.

46 It should first be noted that the contested measures are, to say the least, ambiguous. The 1982 Decision merely states that it deals with the allocation of the appropriations entered under Item 3708, whereas the internal memorandum summarizing it speaks quite openly of financing the election campaign. With regard to the 1983 Rules, they do not state whether the expenses which they propose to reimburse must have been incurred in connection with the dissemination of information concerning the European Parliament itself or information concerning the positions which the political groupings have adopted or which they intend to adopt in the future.

47 It is true that the 1982 Rules on the utilization of funds provided that the funds allocated could only be used for activities connected with the information campaign for the 1984 elections. To ensure that that condition was met, they specified the kind of expenditure which could be covered, designated the persons responsible for ensuring that the funds were correctly utilized, required the keeping of separate accounts itemizing the different types of expenditure and required the submission of reports on the utilization of the funds. In this way, the European Parliament sought to guarantee that the funds made available to the political groups would be used mainly to cover expenditure on meetings and publications (brochures, advertisements in the press and posters).

48 It must be emphasized, however, that those rules are not sufficient to remove the ambiguity as to the nature of the information provided. In fact, the 1982 Rules did not, any more than the contested measures, lay down any condition linking the allocation of the funds to the nature of the information disseminated. The European Parliament considers that, by giving an account of their activities, candidates contributed to the information available on the way in which the parliamentary institution had carried out its task. It is clear that in an information campaign of that type, which the European Parliament describes as allowing the presentation of different views, information on the role of the European Parliament and party propaganda are inseparable. Moreover, the European Parliament admitted at the hearing that it was not possible for its members to separate strictly electoral statements from information.

49 Finally, it must be pointed out that the funds made available to the political groupings could be spent during the election campaign. That is clear first of all as regards the amounts paid out of the 31% reserve fund, which was divided among the groupings which took part in the 1984 elections. The expenditure which could be reimbursed was that incurred in connection with the 1984 European elections during the period from 1 January 1983 to 40 days after the elections. It is,

however, equally true of the 69% of the appropriations divided each year between the political groups and the non-attached members of the Assembly elected in 1979. It can be seen from the 1982 Rules that one-third of the total amount allocated (minus the flat-rate portion) was not to be paid until after the 1984 elections had been held. Furthermore, the funds allocated from the 69% of the total appropriations could be used to constitute reserve funds and to cover payment commitments until at the latest 40 days before the date of the elections, provided that payment was actually made not later than 40 days after the date of the elections.

50 Under those circumstances, it must be concluded that the financing scheme set up cannot be distinguished from a scheme providing for flat-rate reimbursement of election campaign expenses.

51 Secondly, it must be considered whether the adoption of the contested measures infringes Article 7 (2) of the Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage.

52 According to that provision, 'pending the entry into force of a uniform electoral procedure and subject to the other provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions'.

53 The concept of electoral procedure within the meaning of that provision includes *inter alia* the rules designed to ensure that the electoral procedure is properly conducted and that the various candidates are afforded equal opportunities during the election campaign. Rules setting up a scheme for the reimbursement of election campaign expenses belong to that category.

54 The reimbursement of election campaign expenses is not one of the matters covered by the Act of 1976. Consequently, as Community law stands at present, the setting up of a scheme for the reimbursement of election campaign expenses and the introduction of detailed arrangements for its implementation remain within the competence of the Member States.

55 The applicant association's submission alleging an infringement of Article 7 (2) of the Act of 1976 must therefore be upheld. For that reason, there is no need to rule on the other submissions.